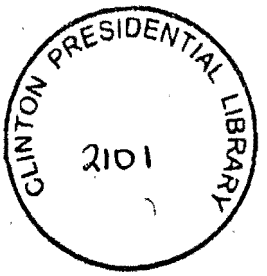


THE WHITE HOUSE
WASHINGTON
February 10, 2000

MEMORANDUM FOR JOHN D. PODESTA

FROM: **BETH NOLAN**
GENE SPERLING
BILL MARSHALL
PETER RUNDLET
JOHN DUNCAN

SUBJECT: **Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in *Loewen* NAFTA Arbitration**

We seek your guidance in resolving an interagency dispute that raises important policy considerations over the appropriate jurisdictional defense to advance on behalf of the United States in a NAFTA arbitration, Loewen Group, Inc. v. United States. As outlined below, there are strong equities favoring each position, and the approach we take will not only have significant implications on the nature and extent of investor protections afforded by the NAFTA, but may also affect the long-term viability of the NAFTA itself. Because the Department of Justice must submit is brief to get printed by this Wednesday, February 16, in order to file it by February 18, we must resolve this issue immediately.

Background

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Chapter 11 was designed to encourage trilateral investment by establishing rules of fair treatment of foreign investment and investors, and by establishing a means for resolving disputes between investors and their host governments. Among other things, Chapter 11 authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11. The claim is arbitrated by the Additional Facility of the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C.

Loewen contends that the United States is liable under the NAFTA for $725 million in damages. Loewen alleges the damages resulted from Mississippi state court judgments rendered against it as a result of a $16 million suit brought against Loewen over a failed business deal. After a controversial trial, during which Loewen contends the court improperly permitted the plaintiff's lawyer to inflame the jurors with anti-Canadian, racial, and class rhetoric, the jury returned a verdict of $500 million against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims that it was unable to post a supersedeas bond

in the amount of 125% of the judgment, as required under Mississippi law to stay the judgment pending appeal. After the Mississippi Supreme Court upheld the bond requirement, Loewen settled the case for structured payments of $175 million (which at the time had a net present value of $85 million), arguing that the bond requirement effectively denied it the opportunity to appeal. Thereafter, Loewen submitted its claim for arbitration, contending that the large jury verdict and the Mississippi courts' refusal to waive or reduce the bond requirement were unjust and discriminatory, in violation of several standards set forth in NAFTA Chapter 11.

The Issue

The Department of Justice is defending the United States in this matter, coordinating with its client agencies, the Department of State and the Office of the United States Trade Representative ("USTR"). Although all of these agencies agree that the United States should make some jurisdictional challenge to the tribunal's competence to hear this case, the gravamen of the current dispute is how broad our jurisdictional argument should be. Justice believes our strongest defense lies in advancing the broadest jurisdictional argument -- that the arbitral tribunal lacks jurisdiction in this case because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the judgments of domestic courts are not "measures" as that term is used in NAFTA. As discussed below, Justice is also prepared to advance a narrower version of this argument. State and USTR oppose advancing either of the broader jurisdictional arguments (outlined below), because they believe neither jurisdictional argument is likely to prevail and, in any case, would undermine the ability of U.S. investors to challenge unfair and discriminatory court judgments abroad. State and USTR prefer the narrower jurisdictional argument that court judgments can be measures only when they have been appealed to the highest available court. Although both sides point to the NAFTA's drafting history in support of their views, what remains of the negotiating history is unfortunately sparse and inconclusive.

In evaluating these arguments, it is of course necessary to consider the strength of our position with respect to the underlying merits of the case, and assess the anticipated damages in the event we lose. None of the agencies thinks that we are in a strong position with respect to the merits of the case. Justice, in particular, believes that we face a serious possibility of losing if the case is heard on the merits. Although State and USTR assert that we have credible answers to each of Loewen's charges, they concede that only Justice has comprehensively analyzed the merits. Justice points out that the Mississippi judgments were widely viewed in both Canada and the U.S. (including Mississippi) as a miscarriage of justice. Professors Laurence Tribe and Charles Fried of Harvard Law School, and Sir Robert Jennings, former President of the International Court of Justice, all submitted testimony that the judgments were a "travesty." Justice does not deny that we have some credible defenses, but it is very concerned that the magnitude of the punitive damages awarded and Loewen's alleged inability to appeal from the jury award could lead an international tribunal to conclude that even our highly regarded, constitutionally based judicial system failed in this case to satisfy the NAFTA's "minimum standard of treatment." With respect to the question of damages, all of the agencies agree that the tribunal is unlikely to assess all of the damages claimed by Loewen, but it is not unreasonable to expect an award of at least $50 million plus millions more in attorneys' fees and costs.

Resolving the jurisdictional argument question requires a careful balancing of policy and political concerns on the one hand, against the probability of success of different legal arguments, on the other. With the exception that everyone agrees that "we want to win this case," Justice and State/USTR -- despite months of discussions -- have been unable to reach agreement on the substance and relative importance of the legal and policy arguments. Most recently, we chaired a meeting with senior officials from Treasury, State, USTR, Justice, and Commerce that resulted in no appreciable movement toward resolving these issues. Because of the complexity of the issues and the importance of resolving them appropriately and immediately, we felt your guidance was necessary.

Policy Considerations

It is important to outline the primary policy concerns and disputes that are the backdrop to the alternative jurisdictional arguments. Everyone agrees that winning this case is important. In addition to the cost of a high damage award, Justice believes that a loss on the merits would establish a dangerous precedent whereby the U.S. could effectively become a guarantor with respect to any judgment rendered against a foreign investor in the state or federal courts of the United States. Further, Justice argues, given that the U.S. is alone in its recognition of large punitive damage awards, the cost of allowing challenges to our court judgments far outweighs the benefits that U.S. investors may gain from being able to challenge foreign court judgments. Finally, Justice believes a loss is likely to generate a great deal of political hostility toward the NAFTA, particularly if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors. Justice has noted that the case already has received significant media attention and fears that the possible headline "NAFTA Panel Overturns Mississippi State Court Ruling, U.S. to Pay Millions" may threaten the continued existence of the NAFTA. Because Justice believes that our best, and possibly only, chance to win this case is to win a jurisdictional argument, they would prefer to make the broadest possible argument -- that court judgments are not "measures" under NAFTA Chapter 11.

State and USTR[1], on the other hand, believe that making this argument would severely undermine our policy of protecting U.S. investors abroad by limiting their flexibility to challenge arbitrary, expropriatory, or otherwise unfair court judgments in other countries (particularly Mexico, where the U.S. Government and World Bank reports have confirmed the continued existence of judicial corruption). State and USTR point out that, because our pleadings will likely become public, the loss of investor protection will occur irrespective of whether the U.S. prevails on this point, and further, that our arguments might eventually undermine protections we have under other trade agreements, such as our Bilateral Investment Treaties ("BITs"). While State and USTR recognize the danger to the NAFTA of losing this case, they argue that we will face certain criticism from the investment community if we argue that court judgments are not covered by Chapter 11.

[1] Although this memorandum refers only to the positions of Justice and State/USTR (which are the client agencies in this matter), Commerce and Treasury appear to concur with the State/USTR position, based on our senior-level meeting, which included these agencies.

Possible Jurisdictional Arguments

1. Court judgments are not "measures" for purposes of NAFTA Chapter 11.

The broadest possible jurisdictional argument is that domestic court decisions can never be "measures" as defined by NAFTA Chapter 11. Because Justice believes that our best hope for success is through a jurisdictional defense, its preferred argument is the broadest jurisdictional bar. Although Justice recognizes that the broadest jurisdictional argument is not unassailable, it believes that it is strong for the following reasons: (1) Chapter 11 applies only to "measures *adopted or maintained*" by a government, (emphasis added), and although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice," the definition makes no mention of court judgments and, on its face, appears to contemplate only legislative and executive acts as opposed to verdicts rendered by the judiciary, which are not "adopted or maintained"; (2) because Chapter 11 is, at most, ambiguous as to whether the drafters intended to include court judgments within the definition of "measures," and because it is a canon of treaty interpretation that ambiguities in international agreements are to be resolved in favor of sovereignty (*"in dubio mitius"* or "restrictive interpretation"), court judgments should not be included within the definition of "measures"; (3) State and USTR cannot identify a single occasion in which an international tribunal used the term "measures" to refer conclusively to domestic court judgments; and (4) Professor David Bederman, an international law expert whom Justice consulted upon the recommendation of the State Department, "fully endorsed" Justice's approach and agreed that this argument is legally viable.

State and USTR have strong reservations about Justice's approach, even from a strictly legal point of view. They argue that this jurisdictional argument is unlikely to prevail in an international tribunal because this definition of "measures" requires a radical departure from customary international law (and the BITs) and there was no indication by the parties to the NAFTA that they clearly intended this result. They point out that the definition of "measures" is illustrative, not exhaustive, and that the term is commonly understood to include all actions by a state. State and USTR also question Justice's reliance on the "ambiguity favoring sovereignty" doctrine, arguing that the principle is not a particularly strong or credible guide to treaty interpretation. Furthermore, because the Justice interpretation conflicts with the use of the word "measures" elsewhere in NAFTA, where it clearly includes court judgments, it could have negative consequences for other parts of the Agreement, such as Chapter 17, covering intellectual property.

Our review of the legal arguments suggests that while Justice's position has strengths, it is not certain to prevail. Accordingly, while Justice's approach may be the best argument to win this case, this possibility needs to be weighed against the probable costs of making it.

2. Court judgments in cases not initiated by the government are not "measures" for purposes of NAFTA Chapter 11.

Even though Justice prefers the broadest jurisdictional argument (since arguments distinguishing between types of court judgments are unmoored from the text of the NAFTA), Justice is comfortable making the more narrow jurisdictional argument that only those court

judgments that result from the actions of executive or administrative officials or entities, including the initiation of an enforcement action, would be "measures" subject to NAFTA Chapter 11. Justice argues that this compromise strikes the appropriate balance between winning this case and protecting U.S. investors abroad because, under this theory, the only situation in which an investor would be precluded from proceeding would be a lawsuit between private parties.

State and USTR argue that most of the failings of the first argument apply here, as well. First, they believe that this argument will be unlikely to prevail and that we will diminish the protections for U.S. investors (not only under the NAFTA, but potentially in the BITs, and in future investment negotiations, as well) just by making the argument. Second, even if we win, State and USTR believe this approach provides inadequate protection to U.S. investors because the dangers of unfair or corrupt court judgments in private disputes abroad are real and far-reaching, and will ultimately harm our efforts to promote fair and transparent legal systems worldwide. In response to these concerns, Justice disputes the magnitude of this danger, noting that State and USTR did not identify any examples of harm to a U.S. investor from a court decision that did not involve improper influence by executive or administration officials.

3. *Court judgments can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision:*

This is the jurisdictional argument that State and USTR would like to make. State and USTR argue that requiring investors to appeal court judgments to the highest available court before they can be "measures" under the NAFTA has more support in customary international law than the jurisdictional arguments Justice wants to assert. Moreover, they point out that their argument is distinguishable from the typical exhaustion of remedies situation waived in the NAFTA. Exhaustion normally covers situations in which the executive takes an action and courts are asked to remedy that action. Here, the injury first arose through the action of the court, hence it is only reasonable to provide the highest court an opportunity to review and correct that action if appropriate. Although State and USTR concede that it is not clear that their jurisdictional argument would prevail for some of the reasons that Justice points to below, it does attack one of the most troubling aspects of Loewen's claim -- that it chose to settle instead of giving the higher courts an opportunity to correct any errors below. More importantly, this argument strikes a better balance between minimizing the impact on U.S. investors abroad, while advancing the rule of law through judicial accountability.

Although Justice is willing to make this argument as a subsidiary argument to a broader jurisdictional argument, Justice contends that the argument has several weaknesses standing alone. First, it is difficult to argue that a final trial court judgment -- which is a fully executable action -- is less "final" for purposes of state responsibility than a statute or regulation that has not been challenged in court. Second, since the NAFTA explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to arbitration, it would be difficult to persuade the tribunal that exhaustion of the judicial process is required before a court judgment becomes a measure under the NAFTA. Third -- and probably most damaging, the argument, even if accepted, may not work in this particular case. Loewen will have a strong argument that they were effectively barred from achieving highest court

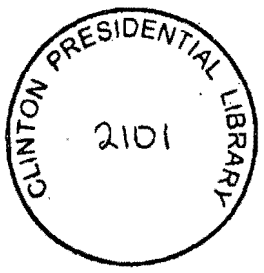
review because of Mississippi's bond requirement. Loewen can argue that they were left with two equally unacceptable alternatives: (1) petition the U.S. Supreme court for an emergency stay of enforcement of the underlying judgment and for a writ of certiorari on the question of the Mississippi Supreme Court's refusal to waive the bond requirement -- both of which are rarely granted, or (2) file for bankruptcy protection, which provides for an automatic stay, but which the tribunal would likely find to be an unreasonable requirement in order to have exhausted the judicial process.

Conclusion

As stated at the outset, the equities favoring different jurisdictional arguments are strong, and the consequences of different approaches are significant. While weighing the options, it may be helpful to keep the following foundational question in mind: *If we were negotiating the NAFTA today, would we seek to include court judgments within the definition of "measures," thereby gaining greater protection for U.S. investors while risking the consequences of a loss in a case like Loewen, or would we prefer a narrower definition of "measures" that excluded some or all court judgments?*

Given that there are competing equities presented by this question, it is our recommendation that the United States assert the second jurisdictional argument presented here. First, we begin with the premise, shared by all of the agencies, that we want to win this case and a broader jurisdictional argument (together with the subsidiary exhaustion argument) is more likely to succeed than the narrow argument standing alone. Second, by arguing that court judgments in cases not initiated by a governmental entity are not "measures" under Chapter 11, we would strike the best balance between presenting a strong jurisdictional argument in this case and preserving Chapter 11 protection for U.S. investors abroad from unfair or discriminatory court judgments. In our view, the likelihood of a loss on the merits and the magnitude and immediacy of such a loss outweighs the more speculative damages that might accrue to the U.S. investor over time if we argue that court judgments in purely private actions are precluded from the protections of Chapter 11.

At your request, we are willing to meet with you to discuss this at your earliest convenience, to coordinate a principal's meeting to more fully air all views, or redraft this memorandum for the President's decision. We have limited time, however, because of the need to craft and submit briefs to the printer by the February 16 deadline.



Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. report	[Re: the Loewen Group, Inc.] (88 pages)	02/02/2000	P5 2102

COLLECTION:
Clinton Presidential Records
Counsel's Office
Peter Rundlet
OA/Box Number: 23666

FOLDER TITLE:
[Draft of the Jurisdictional Brief in Loewen] [loose]

2010-0021-F
ry1523

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

PRIVILEGED MATERIAL
ATTORNEY WORK PRODUCT

DRAFT

February 2, 2000

INTRODUCTION

On October 31, 1998, The Loewen Group, Inc. ("TLGI") and Raymond L. Loewen ("Ray Loewen") (collectively "Claimants" or "Loewen") submitted this claim to arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"), the parties to which are the governments of the United States, Canada and Mexico. Chapter 11 of the NAFTA sets forth certain rules for the treatment of foreign investment and provides a means for resolving disputes between investors and their host governments. Loewen's claim arises from a purely private lawsuit that was partially adjudicated in the courts of the State of Mississippi and was ultimately settled by a private agreement, in which no government was involved.

The underlying lawsuit arose, in part, from Loewen's own reckless business practices in the acquisition of funeral homes, for which the company is now well-known. In that lawsuit, a Mississippi jury found that Loewen had willfully breached certain contracts as part of a scheme to destroy competition and raise prices in local funeral home markets. Although Loewen initially appealed the jury's verdict, it chose instead to settle the dispute out of court rather than continue with the appellate process.

From this chain of events, claimants have constructed a claim against the United States under the NAFTA, an international trade agreement that has no application to the purely private dispute and settlement agreement that underlie claimants' complaint. According to claimants, the United States is liable under the NAFTA because, they contend, the Mississippi trial court wrongly permitted the lawyers for the opposing party to make inflammatory statements to the

jury, resulting in a judgment that claimants contend was unjust. Although that judgment was undeniably subject to appeal in higher courts, claimants allege they were effectively denied their right to appeal when the Mississippi Supreme Court decided not to depart from a statutory requirement of a supersedeas bond in order to stay execution of the judgment pending appeal.

This NAFTA claim is remarkable in a number of respects, not the least of which are the startling liberties that the claimants take with the underlying facts of the case. Indeed, claimants' account of the case often bears so little relation to the reality of the events that it is difficult to know where to begin to respond to the merits of the claim. Fortunately, a detailed exploration of the merits is unnecessary at this time because the entirety of this claim is outside the scope of the United States' consent to arbitration under the NAFTA and, therefore, is not within the competence of the Tribunal.

NAFTA Chapter 11 is expressly limited in its scope. By its terms, the Chapter applies only to "measures adopted or maintained" by a NAFTA Party. See NAFTA Chapter 1101(1). The only injuries that claimants allege to have suffered, however, flow exclusively from Loewen's private agreement to settle the Mississippi litigation. Because private agreements to settle private litigation are plainly not governmental "measures," Loewen's entire claim is outside the scope of the NAFTA Parties' consent to arbitration.

Even if claimants could attribute their injuries to the Mississippi court judgments rather than their own private decision to settle the Mississippi litigation, their claim nevertheless falls outside the scope of NAFTA Chapter 11. As a review of the text of the NAFTA makes clear, the NAFTA Parties did not intend to include domestic court judgments in purely private litigation within the meaning of "measures adopted or maintained" by a NAFTA Party for purposes of

NAFTA Chapter 11. To the extent that the text remains ambiguous on this subject, settled canons of treaty interpretation require that NAFTA Chapter 11 be construed to have excluded such court judgments from its scope, in deference to the sovereignty of the NAFTA Parties.

Moreover, even if domestic court judgments in private disputes could somehow be viewed as "measures adopted or maintained" under NAFTA Chapter 11, such judgments could only be NAFTA "measures" when rendered by the highest available court from which no further appeal is possible. It is well-settled in customary international law that only the highest available court can implicate the international responsibility of a State. Because the Mississippi judgments of which claimants complain were still subject to further appeals at the time Loewen chose to settle, those judgments cannot be "measures adopted or maintained" for purposes of NAFTA Chapter 11 and, therefore, do not give rise to an arbitrable claim under the NAFTA.

Loewen's claim that it was prevented from further appeals of the Mississippi judgments and thus "coerced" into settling the litigation is fully undermined by the advice that the company received from its counsel at the time, and is otherwise meritless. As explained in detail in the attached declaration of Drew S. Days III, Professor of Law at the Yale Law School and former Solicitor General of the United States, "the contention of Loewen that no federal court review (either by the United States Supreme Court or federal district court) was available to it -- assuming the truth of Loewen's factual allegations -- is without proper basis in United States law." As Professor Days explains, "Loewen could have sought and obtained United States Supreme Court review of the Mississippi bonding requirement or . . . Loewen could have obtained review and relief from federal district court." In either case, Loewen "would have obtained an order staying execution of the state trial court's judgment pending review of the

merits of Loewen's allegations." Loewen's own documents reveal that the company held this same view at the time, notwithstanding the position it advances in this proceeding.

In addition, it is beyond serious dispute that Loewen could have continued with its appeal of the trial court judgment under the protections of Chapter 11 of the U.S. Bankruptcy Code (business reorganization), as countless U.S. companies have done in similar circumstances. To the extent that Loewen contends otherwise, the United States submits the attached declarations of several prominent U.S. bankruptcy law experts -- Professor Elizabeth Warren of the Harvard Law School, and practitioners J. Ronald Trost, Esq., Harvey R. Miller, Esq., and Alan M. Miller, Esq. -- which conclusively demonstrate not only that Chapter 11 reorganization was a reasonable and viable means by which Loewen could have pursued its appeals, but that Loewen was so advised by its counsel at the time. These declarations also strongly suggest that Loewen's professed reasons for rejecting its counsel's advice and foregoing the protections of Chapter 11 are mere pretext and that the company's decisions were, more likely, based on the illegitimate personal interests of Mr. Loewen rather than sound business judgment.

Given the existence of these and other reasonable alternatives by which Loewen could have continued with its appeal, the court judgments of which claimants complain are plainly not those of the highest available courts in the judicial system. Because those judgments were thus still subject to reversal on appeal (indeed, Loewen itself argues that they would "almost certainly" have been reversed on appeal), these court judgments lack the finality required of "measures adopted or maintained" by the United States for purposes of NAFTA Chapter 11. As a result, claimants' entire claim of injury as a result of those judgments is not within this Tribunal's competence to hear.

Dismissal of this claim is all the more appropriate given the fact that Loewen is merely seeking, in this forum, to vindicate rights that are fully protected under U.S. law and could have been asserted in U.S. courts. Just as NAFTA Chapter 11 protects aliens against discrimination (Article 1102), ensures a minimum standard of "fair and equitable" treatment (Article 1105), and proscribes uncompensated expropriations, (Article 1110), the United States Constitution ensures aliens "equal protection under the law" (U.S. Const. Amend. XIV), guarantees "due process under the law" (id.), and prohibits states from taking property without just compensation. (Id.). Indeed, Loewen itself argues that the Mississippi judgments are objectionable, in part, because they allegedly violated these U.S. constitutional standards. Having chosen not to appeal and thereby give the United States, through its courts, any notice and opportunity to cure the alleged violations, Loewen cannot assert an arbitrable claim under NAFTA Chapter 11.

Loewen also fails to establish how the Mississippi courts' alleged failure to prevent the opposing party's attorneys from making inflammatory remarks can constitute a government "measure." Although Loewen now contends that the trial was "infected by appeals to the jury's alleged anti-Canadian, racial and class biases," Loewen's lawyers never objected on such grounds at any point before the jury rendered its verdict, nor did they argue to the court until after the verdict -- as Loewen does now -- that a jury instruction was needed "to address the heightened risk of improper nationality-based, racial, and class bias." Because Loewen thus never asked the court to protect against the alleged misstatements until after the verdict, the court's alleged failure to do so cannot be viewed as a "measure" that gives rise to an arbitrable claim under the NAFTA.

Even if The Loewen Group's claim could somehow survive these fatal jurisdictional flaws, the claims asserted by Ray Loewen individually are plainly outside this Tribunal's

competence.

[RAY LOEWEN DEFENSES FROM STATE DEP'T]

Finally, the United States renews its request that these proceedings be bifurcated and that the foregoing substantial objections to competence be treated as a preliminary question. Not only would bifurcation be most consistent with well-settled and prudent practice in international arbitration, but it would spare the parties and the Tribunal from an unnecessary -- and extraordinarily costly -- exploration of the merits of Loewen's allegations, which will require no less than the virtual re-creation of the entire underlying proceedings.

BACKGROUND

I. The Death-Care Industry

A. Origins

Death and the care of the deceased have always been deeply personal matters. Practices of caring for the dead have changed over time and vary across religious, ethnic and cultural lines.

For many years in the United States, funerals were generally a simple affair in which families and neighbors would prepare their own dead for burial in a plain wooden box. See J. Mitford, The American Way of Death 17 (1963); [An American Approach to Funerals, The Gazette 6/27/99 A6]. By the mid-nineteenth century, however, care of the deceased was increasingly handled by non-family members, as embalming, a common practice during the U.S. Civil War to preserve soldiers' bodies for their journey home, gained wider use.

Over time, funerals became more elaborate and embalmers became more involved in the provision of death-care services, eventually directing the entire funeral process -- from preparing the body to arranging the services to helping the grieving families cope with their loss. Id., J.

Harr, The Burial, The New Yorker (Nov. 1, 1999) at 79. From these developments the funeral home business was born.

"Funeral directors," as the providers of these services would become known, were generally respected members of their communities and were, in many cases, seen as an extension of the clergy. [The High Cost of Dying, NYC Comm'n Rep.]. Although the mourners no longer handled funeral services themselves, they still preferred that the services be provided by a familiar and trusted member of the community. The trust relationship between funeral directors and their neighbors also inured to the benefit of the funeral business: once a funeral home became established as part of the community, it could realize a steady and highly-predictable demand for its services.

B. The "Big Three" Consolidators

For most of the twentieth century, funeral homes were operated as family businesses in which sons routinely followed their fathers, carrying on the traditional, community-based role of the funeral home. By the 1960s, however, an increasing number of family-owned funeral homes came up for sale as children of the owners elected, for a variety of reasons, not to stay in the family business. Given the steady demand for funeral services, as well as the attractive profits on those services, some saw this development as a potentially lucrative business opportunity.

In the United States and Canada, a handful of companies quickly began forming large death-care conglomerates by purchasing small, family-owned funeral homes as they came up for sale. By "consolidating" several homes into a single chain, these companies were able to capitalize on certain economies of scale (such as centralized embalming facilities, sharing of resources like hearses and personnel, and group-purchases from suppliers) and thereby increase

profits. The companies eventually broadened their acquisition efforts to include other death-care properties, such as cemeteries and crematoria, to achieve similar economies of scale. Consolidation of death-care properties increased briskly to the point where, by the mid-1990s, three large, publicly-traded companies -- Service Corporation, Inc. ("SCI"), The Loewen Group, Inc., and Stewart Enterprises, Inc. ("Stewart") -- dominated death-care markets throughout North America. See D. Roberts, Profits of Death (1997) pp. 139-40.

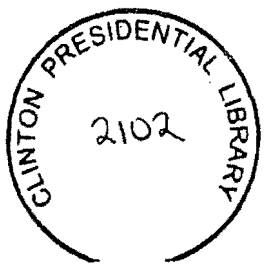
Even though these "Big Three" consolidators (as they are known in the industry) were able to reduce certain operating costs, they did not pass those cost savings on to consumers in the form of lower prices. To the contrary, the death-care consolidators, faced with capital costs of acquisitions and steady pressure from shareholders to increase profits, made a practice of raising prices immediately upon the acquisition of funeral homes, in many cases dramatically. See C. Loose, Adieu to Family-Owned Mortuaries, Wash. Post (Aug. 29, 1997) A1. The consolidators were able to sustain these price hikes because consumers of funeral services, overcome by the grief of their personal loss, were unlikely to comparison-shop for lower prices. [The Burial at 80]. Indeed, The Loewen Group informed its investors that this lack of price-sensitivity was one of the more "attractive industry fundamentals" of the funeral business. [Fight to the Death at 66].

Although the growth of the Big Three consolidators was dramatic, consumers were generally unaware (until recently) of the consolidators' existence or the changes that consolidation brought about in the industry. This was by design, as the consolidators deliberately concealed their ownership of funeral homes "to create the illusion that local funeral homes are still run exactly as they always have been, by native sons and daughters with a vested interest in the community." E. Larson, Fight to the Death, Time (Dec. 9, 1996) p. 63. This

illusion was achieved by maintaining the name of the funeral home and retaining the original owners, who had built their reputations in their communities over generations, as salaried employees of the larger company. Consumers were thus left with the erroneous impression that they were dealing with the same family-owned business that had always existed in their community. See M. Horn, The Deathcare Business, U.S. News & World Rep. (March 23, 1998) (cover story).

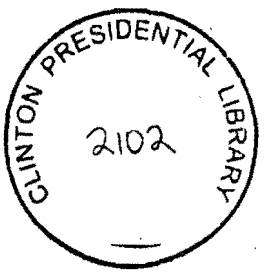
For much of the 1990s, investors rewarded the Big Three consolidators by bidding up their stock prices in the expectation of increased profits as the companies continued to consolidate the largely-fragmented funeral industry, and in anticipation of an increase in deaths from an aging population. Recently, however, the stocks of all of the Big Three consolidators have suffered significant devaluations as a result of several factors.

First, it became clear that the consolidators' practice of raising prices immediately after acquiring a funeral home "wasn't only embarrassing" for the local funeral home operators, but "it also could be bad for business." D. Morse & M. Heinzl, Funeral-Home Owners Discover the Downside of Sale to Consolidator, Wall St. J. (Sept. 17, 1999) at A1. As consumer awareness of such practices grew, so did a backlash against the consolidators in favor of local, independently-owned and discount funeral homes. See R. Fields, Grim Time for Funeral Firms, L.A. Times (Oct. 24, 1999) C1. Consumers were put off by the high-pressure sales tactics that consolidators were using to market pre-paid -- or "pre-need" -- funeral services as a means of "squeez[ing] out more revenue" in order "to recoup acquisition costs and to keep investors salivating at their profit margins . . . ." Id. Numerous organizations began to call for greater regulation of the industry to protect consumers against what were viewed as the consolidators' deceptive practices,



unreasonable price increases, and monopolization of local death-care markets. See [NYC Dep't of Consumer Affairs Report]; R. Fields & M. Lipka, Death Inc., Sun-Sentinel (March. 21, 1999) 1A. The consolidators were thus reaping the whirlwind of "a dramatic increase in funeral service prices, declining morale among long-standing employees and fraying bonds with the communities that had made the homes successful in the first place." B. Milner, The Dying Game, Globe & Mail (June 5, 1999) at B3.

Second, in their zeal to outbid each other on acquisition prospects and thereby gain greater market share, the Big Three consolidators had engaged in an undisciplined "feeding frenzy" that bid up the prices of death-care properties to unreasonable levels, with the result that the companies substantially overpaid for many of their acquisitions. Market analysts observed that this unbridled acquisition spree, fueled largely by a bitter and personal rivalry between the leaders of SCI and The Loewen Group, see J. Schreiner, A Mutually Destructive Rivalry, Nat'l Post (Apr. 3, 1999) D3, was based "more on gaining market share and ego than on sound business decisions." J. Baer, Death Care in the Doldrums, Globe & Mail (Oct. 4, 1999) B4. According to one survey, the companies had bid prices up so high that they were paying 70% more for death-care properties in 1998 than they did in 1993. Service Corp. Warns Investors, Houston Chronicle (Oct. 2, 1999) (citing Credit Suisse estimates). In the end, the Big Three consolidators had saddled themselves with enormous debt to acquire properties whose valuations eventually plummeted when investors realized their intrinsic worth. By October 1999, the stock index of publicly-traded death-care companies had fallen more than 73% for the year, a decline that continues to this day. See T. Hirschmann, Death's No Sure Thing, Nat'l Post (Oct. 9, 1999)



C1.[1]

II. Ray Loewen and The Loewen Group

While all of the Big Three consolidators introduced an "unprecedented aggression" into the death-care industry, R. Fields, Grim Time for Funeral Firms, L.A. Times (Oct. 24, 1999) C1, The Loewen Group quickly earned a reputation as the most aggressive. This aggression was sparked by The Loewen Group's founder, Ray Loewen, who was known in the industry as a forceful, highly-competitive and often brash figure.[2]

Ray Loewen began purchasing funeral homes in Canada in the late 1960s, soon after assuming control of his own family's funeral home. Sensing in Canada the same opportunity for consolidation that was beginning in the United States, Mr. Loewen founded a death-care consolidation company in 1984 -- The Loewen Group -- and steadily acquired additional funeral homes throughout Canada, owning a total of 68 homes by 1987.

The Loewen Group's pace of acquisitions increased dramatically in 1987 when the company decided to expand into the United States' funeral home market, which is significantly

---

[1]Other factors have also been cited as causing the decline of the Big Three, including slowing death rates, plummeting funeral home valuations, and "a failure to keep pace with consumers' changing tastes" in funerals. J. Baer, Death Care in the Doldrums, Globe & Mail (Oct. 4, 1999) B4; J. Schreiner, Loewen Group Stock Dives 27%, Nat'l Post (March 11, 1999) C1.

[2]Indeed, Ray Loewen used to boast to investors that "his first management decision was to fire his brothers from their parents' small Mennonite funeral home in Manitoba . . . ." [N. Bernstein, Brash Funeral Chain Meets its Match in Old South, 1/27/96 A6]. See also [Family at Root of Loewen's Fall 6/2/99 ("[Mr. Loewen's] self-confidence led to a certain arrogance and an inability to listen to advice from his managers.")] [check before using]; B. Mohl, Growth of Chains Has Led to Rise in Funeral Prices, Boston Globe 8/28/95 (The Loewen Group was "very, very ruthless" and "[h]aving a monopoly was not wrong from their viewpoint.") (quoting Massachusetts Assistant Attorney General).

larger than Canada's and was, at the time, almost entirely unconsolidated. To finance this expansion, The Loewen Group underwent an initial public offering, thus becoming a publicly-traded company with Ray Loewen as its Chief Executive Officer and Chairman of the Board of Directors. [A2002].

With this new source of financing in hand, and driven by a personal desire to overtake the world's largest death-care company, SCI of Texas, Ray Loewen launched an aggressive buying spree for family-run funeral homes as they came up for sale all over the United States.[3] The company acquired funeral homes at a voracious pace, becoming the world's second-largest death-care company in just a few years and deriving 90% of its revenue from the United States.

But with this aggressive expansion came significant problems. As the company grew, so did the need for greater administrative control to ensure that new acquisitions were efficiently integrated into the company's overall operations. With such unbridled expansion, however, the company became increasingly unable to manage its own growth in this regard. [Stam Can. Aff. p.4; id. at 23 ("reporting and information systems were not able to keep pace with the growth of the Company . . . .")].

Moreover, Loewen had been raising a substantial portion of its financing for acquisitions through regular offerings of new debt and equity in The Loewen Group, touting to investors the company's significant increases in annual revenue and earnings. Most of these increases, however, came not from boosting sales in the company's existing funeral homes, but through the

---

[3]In the Palm of Ray's Hand, Nat'l Post (June 2, 1999) C4 (former Loewen executive acknowledging that Ray Loewen "was just in a big hurry" to keep pace with SCI" and that the company's eventual downfall resulted from Ray Loewen's "impatience to acquire, acquire, acquire.")

"fiscal illusion" that was created by "buying more funeral homes at an increasingly fast pace." [Fight to the Death at 66]. At the same time, Loewen's aggressive bidding for funeral homes had steadily raised the prices of new acquisitions, thereby eroding profits and causing the company to incur greater debt (and interest expense on that debt) to finance new acquisitions. Loewen thus needed either to slow the pace of its acquisitions or, if the company was to continue with its aggressive expansion, to somehow increase revenues to offset the increasing costs of acquisitions and to service the company's burgeoning debt load.

Loewen, however, refused to slow down. Although it was now overpaying for new funeral home acquisitions and facing greater difficulties integrating new properties, the company increased its pace of acquisitions still further, "lest it disappoint shareholders, whom Ray Loewen has promised annual earnings growth of 25% or more." [Fight to the Death 66]. Moreover, in 1994, the company significantly expanded its acquisition program to emphasize cemeteries in addition to funeral homes.

Loewen's increased emphasis on cemetery acquisitions provided a quick, but illusory, fix for the company's growing debt problems. Under applicable accounting rules, cemetery owners are permitted to treat 100% of all "pre-need" cemetery sales as revenue at the time a customer contract is signed. In contrast, proceeds from pre-need sales of funeral services must be placed in trust and cannot be recognized as revenue until those services are actually performed. [Stam 5/31/99 Can. Aff. at 6]. By acquiring cemeteries, therefore, Loewen could increase its short-term reported revenue much faster than it could by acquiring funeral homes alone, thus appearing to outsiders to be meeting the earnings growth targets that Ray Loewen had led investors to expect.

As The Loewen Group's management would concede years later, however, this approach

to acquisitions only exacerbated the company's debt problems in the long run. To sell pre-need cemetery products and services, Loewen had to incur significant up-front "cash costs of establishing and supporting a growing pre-need sales program, including payment of certain sales commissions." [Stam 5/31/99 Can. Aff. 6]. At the same time, Loewen's pre-need cemetery customers were buying with "low initial cash payments" that did not offset the company's up-front costs. Id. Thus, even though Loewen was treating the entire purchase amount as "revenue" for accounting purposes, it would not actually receive the vast bulk of the sale proceeds until some future date, well after the company had already paid its up-front expenses. Therefore, while the aggressive acquisition of cemeteries enabled the company (in the short run) to show the increased revenue growth that Ray Loewen had promised to investors, the company was in fact "burning" cash at a rate that would eventually erode its credit-worthiness and profitability. See, e.g., R. Fields, Grim Time for Funeral Firms, L.A. Times, 10/24/99 C1 ("Their numbers looked good, but their debt was going up as fast as their income. It had to collapse.").

With this high-risk and fundamentally flawed approach to acquisitions, The Loewen Group began 1995.[4] In that year alone, the company acquired an additional 177 funeral homes and 64 cemeteries for a cost of $487.9 million, nearly twice the amount it spent on acquisitions in the previous year. [A1928]. Loewen was thus well on its way to earning its reputation as a "volatile and irrational bidder for death care properties . . . ." J. Schreiner, A Mutually Destructive Rivalry Nat'l Post (Apr. 3, 1999) D3.

---

[4] Cf. [Story of a Funeral-Home Stock Has Somber Investment Moral, Wall St. J. (1/30/96) C1 (consolidation "certainly presents additional risk when compared with larger, more stable companies in more traditional industries. You not only have specific event risks, but also execution risks.") (quoting stock analyst)]

At the same time, Loewen was proceeding toward trials in two large lawsuits, one in Mississippi state court and another in U.S. federal court in Pennsylvania.[9] Both lawsuits charged The Loewen Group with a variety of unfair and deceptive business practices, and each sought millions of dollars in damages. Although Loewen would eventually settle the Pennsylvania litigation for $30 million before trial, it elected to take the Mississippi case to trial. That litigation would ultimately become the basis of this NAFTA claim.

III. The Mississippi Litigation

A. The Dispute

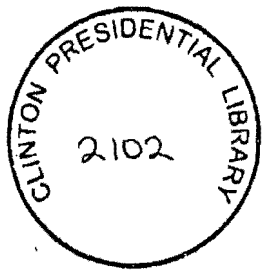
In 1990, with its aggressive buying spree well under way, The Loewen Group purchased Reimann Holdings, Inc., a small family-run company that owned funeral homes and a funeral insurance company in the Gulf Coast region of Mississippi. The purchase not only provided The Loewen Group with additional funeral properties, but it also provided a convenient vehicle for acquiring and consolidating additional funeral homes throughout the state.

Loewen promptly put this holding-company vehicle to work, acquiring the Wright & Ferguson Funeral Home in Jackson, Mississippi. Wright & Ferguson was the largest funeral home in Jackson and had a long-standing business relationship with the O'Keefes, a family that owned a number of funeral homes and funeral insurance companies in nearby Biloxi, Mississippi. Under a series of contracts dating back to 1974, the O'Keefes had the exclusive right to sell their companies' brand of funeral insurance through the Wright & Ferguson funeral home.

The Loewen Group itself owned several funeral insurance companies and, as part of its

---

[9][other suits as well; see TLGI1994].



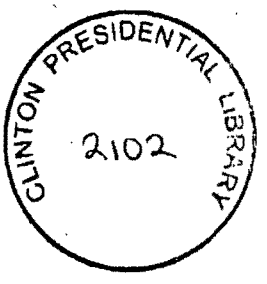
consolidation efforts, often sought to sell its own brand of insurance through the funeral homes it acquired. Despite the pre-existing contractual relationship between Wright & Ferguson and the O'Keefe companies, Loewen began selling its own funeral insurance through the Wright & Ferguson home.

In April 1991, following failed negotiations with Loewen, the O'Keefes filed suit in Mississippi state court alleging that The Loewen Group had breached the exclusive contracts between the O'Keefe companies and Wright & Ferguson. Loewen promptly contacted Jeremiah O'Keefe, the head of the O'Keefe family business, to discuss the possibility of settling the lawsuit.

O'Keefe and Loewen reached a settlement agreement in August 1991. Under its terms, Loewen agreed to sell certain insurance-related properties to O'Keefe and to provide O'Keefe with the exclusive right to provide certain insurance policies sold through Loewen funeral homes. In exchange, O'Keefe agreed to dismiss the lawsuit against Loewen, to sell Loewen two O'Keefe funeral homes, and to assign Loewen an option to purchase a Jackson, Mississippi cemetery tract.

Prompt implementation of the agreement was important to O'Keefe, as he needed to supplement his companies' cash reserves with Loewen's insurance properties in order to meet certain state insurance regulatory requirements. Aware of O'Keefe's constraints and vulnerability in this regard, Loewen delayed implementation of the agreement. Loewen argued that the agreement left open too many terms to be binding and attempted to impose additional conditions, eventually preventing the deal from ever closing. After the deal collapsed, O'Keefe was forced to sell four of his funeral homes to another consolidator in order to raise sufficient cash to meet the state regulators' requirements.

O'Keefe then renewed his lawsuit against Loewen, adding claims that Loewen



fraudulently induced O'Keefe into a settlement agreement that it had no intention of honoring. O'Keefe alleged that Loewen willfully breached the August 1991 settlement agreement in an attempt to drive O'Keefe into insolvency and thereby acquire O'Keefe's funeral properties at distressed prices. O'Keefe also alleged that Loewen's actions were part of the company's broader scheme to acquire monopoly power in funeral home markets by destroying competitors, like O'Keefe, through ruthless, fraudulent and predatory business practices, in violation of Mississippi's antitrust laws.

B. The Trial

Trial in the case of O'Keefe v. The Loewen Group began on September 13, 1995, in the Circuit Court for the First Judicial District of Hinds County, Mississippi, and lasted for nearly two months. Over the course of those two months, the jury heard evidence and testimony from several witnesses, including former Loewen Group employees, demonstrating that Loewen was often deceptive and ruthless in its acquisition of funeral homes, expressly sought to acquire clusters of funeral homes in order to dominate regional markets, and routinely raised prices immediately upon the acquisition of funeral homes (and annually thereafter) with the expectation that bereaved consumers would not notice the price hikes.

After the close of evidence, the court proposed a set of jury instructions. When asked by the judge if he had any objection to the instructions, Loewen's lawyer replied: "Do not." Tr. at 5390-91. Although Loewen requested that other instructions be given (several of which the court agreed to deliver), it never argued to the court -- as it does now -- that any further instruction was

needed "to address the heightened risk of improper nationality-based, racial, and class bias."[6] Similarly, although Loewen now contends that the trial was "infected by appeals to the jury's alleged anti-Canadian, racial and class biases," Loewen's lawyers never raised an objection on such grounds at any point -- whether in voir dire or the trial itself -- before the jury rendered its verdict.[7] [Loewen Mem. at 39 ¶93].

C. The Verdict

On November 1, 1995, the jury returned a verdict in favor of O'Keefe in the amount of $260 million. After the verdict was announced, the jury foreman[8] wrote the judge a note explaining that the $260 million verdict was intended to award $100 million in compensatory damages and $160 million in punitive damages. Because Mississippi law provides that juries are to consider punitive damages separately from compensatory damages, Miss. Code Ann. § 11-1-65(b)-(c), the judge proposed to accept only the jury's compensatory award of $100 million and conduct a separate proceeding on the issue of punitive damages. Neither O'Keefe nor Loewen

---

[6]Even after the verdict, Loewen's objection was not that the court's instructions to the jury were somehow defective, but only that the jury failed to follow those instructions. [A1201]. Indeed, it was not until nearly two weeks after the jury rendered its verdict -- and more than a week after the court entered judgment on that verdict -- that Loewen first alleged the jury had been influenced by "issues and matters of race, national origins, class and economic status . . . ." [A729]. Even then, Loewen did not contend that the court's instructions were responsible for such an outcome. [A718-723].

[7]Like all jurisdictions in the United States, Mississippi follows the "contemporaneous objection rule," which provides that an objection "must be made contemporaneously with the allegedly improper utterance" or else it is waived. Ivy v. General Motors Acceptance Corp., 612 So.2d 1108, 1114 (Miss. 1992).

[8]The jury foreman, one of four whites on the jury, was born and raised in Canada, is married to a Canadian national, and regularly visits his hometown in Ontario, Canada. If the merits of this case are ever reached, Loewen's claim that the jury was motivated by "anti-Canadian bias" will be shown, for this and other reasons, to be patently absurd.

objected to this proposal. See Tr. 5741-5749.[9]

The trial court then held a separate hearing on the issue of punitive damages, after which the jury, on November 2, 1996, returned a punitive damages award of $400 million in favor of O'Keefe. The total verdict of $500 million was reduced to judgment and entered by the trial court on November 6, 1995.

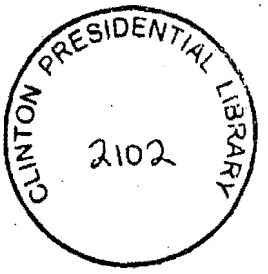
D. The Appeal

On November 27, 1995, after a series of unsuccessful post-trial motions, Loewen filed an appeal of the trial court judgment with the Mississippi Supreme Court, as was its right under Mississippi law. See Miss. Code Ann. § 11-51-3. Under Mississippi law, a party can stay execution of a money judgment for the pendency of the appeal by posting a supersedeas bond in the amount of 125% of the judgment from which the appeal is taken. See Miss. R. App. P. 8(a). If it had posted a bond in the amount of $625 million, therefore, Loewen could have prevented O'Keefe from executing on the judgment while the appeal was pending.

Loewen argued, however, that posting a bond in the full amount required by the Mississippi statute would have been difficult and costly for the company. Therefore, on November 28, 1995, Loewen asked the trial court to reduce the bond requirement to $125 million -- 125% of the compensatory damages portion of the judgment -- pursuant to the court's authority to reduce a bond "for good cause shown." Miss. R. App. P. 8(b). On November 29, 1995, after the submission of briefs and a full hearing on the matter, the trial court denied Loewen's request.

---

[9] [explain how motion for mistrial wasn't the same as objecting to proposal]



[A1072-78][19].

Loewen appealed the trial court's bond decision to the Mississippi Supreme Court, which the court agreed to hear on an expedited basis. On November 30, 1995, the court granted Loewen an interim stay of execution of the judgment while it was considering the bond issue. [A1082]. As a condition of the interim stay, however, the court required Loewen to post a $125 million bond, which Loewen had earlier represented it could afford to do. Although Loewen argued that the court should permanently reduce the bond requirement to $125 million, its counsel privately acknowledged that such a departure from the bond requirement would be "unprecedented . . . ." [TLGI3770]

While the bond issue was pending before the Mississippi Supreme Court, Loewen raised $155 million to fund acquisitions by issuing new stock in the company in the Canadian equity markets, and was preparing to raise an additional $____ million in the U.S. markets. Loewen's Mississippi counsel strongly advised against such equity issuances while the bond question was still pending, as it would suggest to the Mississippi Supreme Court that the company had greater financial capacity to post a full bond than it had earlier represented. [H. Miller memo 12/7/95; TLGI2784; TLGI3335; TLGI3888]. On January 24, 1996, the Mississippi Supreme Court denied Loewen's request for a reduction in the bond and ordered that the interim stay of execution of the trial court judgment, which had been in effect for nearly three months, would expire on January 31, 1996, unless Loewen posted a bond in the full amount of $625 million. [A1176].

---

[19]Contrary to Loewen's claim, the court did not "summarily deny" the request, but rather offered an extensive explanation of its reasons for requiring the full bond, including the observation that the very purpose of the bond "is to effect absolute security to the party affected by the appeal." [A1074].

E. Loewen's Decision To Settle Rather Than Continue With The Appeal

After the Mississippi Supreme Court's decision on January 24, 1996, Loewen had several options by which it could have continued with its appeal of the jury verdict, including: (1) posting the full bond and thereby staying execution of the judgment pending appeal, (2) proceeding with the appeal without posting a supersedeas bond, (3) seeking review of the Mississippi Supreme Court's bond decision in the U.S. Supreme Court, (4) seeking relief from the bond requirement in a U.S. federal district court, or (5) filing for protection under Chapter 11 of the U.S. Bankruptcy Code and proceeding with the appeal under such protection.

Loewen and its counsel were extremely confident of their chances of success on appeal. According to its counsel, Loewen faced "a high probability -- approaching 90 percent -- that we will secure a reversal of a substantial portion" of the judgment. [TLGI2789]. See also TLGI2430 ("I think the chances are excellent that we will secure substantial, if not complete, relief" from the jury verdict); [TLGI2859].

Despite this extraordinary confidence in the likelihood of success on appeal -- and, as explained in greater detail below, the advice of its counsel that viable means existed for pursuing an appeal -- Loewen elected to settle the Mississippi litigation with O'Keefe. On January 29, 1996, Loewen settled the litigation on the following terms: O'Keefe would receive $50 million in cash on January 31, 1996, 1.5 million shares of The Loewen Group on February 15, 1996, and annual payments of $4 million for the next twenty years. The total value of the settlement, according to Loewen, was approximately $85 million.[11]

---

[11]Although Loewen values the settlement at $175 million for present purposes, that amount does not reflect the deferral of payment and tax benefits that Loewen received from the settlement. In

ARGUMENT

The jurisdiction of international tribunals rests solely upon the consent of States. Because of the primacy of consent, the Tribunal must be satisfied that the State has consented to the adjudication in the express terms of the agreement on which the claim is based, and may proceed only upon an "unequivocal indication" of a "voluntary and indisputable" acceptance by the State of the tribunal's jurisdiction. Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), 1995 I.C.J. 6, 63-64. Here, the NAFTA conveys precisely the limits of the three contracting governments' consent and clearly excludes the present claim from the Tribunal's jurisdiction.

I. THE CLAIM IS NOT ARBITRABLE BECAUSE A PRIVATE AGREEMENT TO SETTLE A PRIVATE LITIGATION MATTER OUT OF COURT IS NOT A GOVERNMENT "MEASURE" WITHIN THE SCOPE OF NAFTA CHAPTER 11

Chapter 11 of the NAFTA is expressly limited in its scope. By its clear terms, the Chapter applies only to "measures adopted or maintained" by a NAFTA Party that are alleged to be in breach of the NAFTA's substantive obligations. NAFTA Article 1101(1); see also NAFTA Articles 1116, 1117. Although Claimants assert that their claim is based on acts or omissions of the courts of Mississippi, the only injuries alleged in this case flow directly from The Loewen Group's payment of money pursuant to a binding agreement, in which no governmental entity was involved, to settle a purely private dispute. The company's decision to assume such an obligation, therefore, cannot be viewed as a government "measure" for purposes of NAFTA Chapter 11.

The international law of state responsibility has long recognized the tautology that "[s]tate

---

statements to federal regulators and in its press releases at the time, Loewen estimated the after-tax present value of the settlement to be approximately $85 million.

responsibility is only engaged when an act or omission is attributed to a state." D. Bederman, Contributory Fault and State Responsibility, 30 Va. J. Int'l L. 335, 342, 346 (1990)) (citing treatises); see also Restatement (Third) of Foreign Relations Law § 207, comment c ("the state is not responsible for injuries caused by private persons that result despite [reasonable] police protection."). Contrary to the allegations set forth in their Notice of Claim, and as explained in greater detail below, The Loewen Group was free to continue with its appeal rather than settle the O'Keefe judgment. For its own private business reasons, the company chose not to do so and, instead, bound itself to the settlement that claimants now contend led to their eventual downfall. Because the assumption of the obligation to pay the O'Keefe plaintiffs pursuant to the terms of the settlement agreement was thus entirely The Loewen Group's own choice, Claimants cannot attribute their alleged injuries to any government "measure" and, therefore, have not asserted an arbitrable claim against the United States under the NAFTA.

II. THE CLAIM IS NOT ARBITRABLE BECAUSE THE JUDGMENTS OF DOMESTIC COURTS ARE NOT "MEASURES ADOPTED OR MAINTAINED BY A PARTY" WITHIN THE SCOPE OF NAFTA CHAPTER 11

Although they appear to acknowledge that their binding settlement of the O'Keefe litigation was not a government "measure" for purposes of NAFTA Chapter 11, claimants contend that the settlement was not voluntarily made, but was instead "coerced" by the judgments of the Mississippi courts. According to claimants, the decision of the Mississippi courts not to depart from the full supersedeas bond requirement left Loewen with no alternative but to enter into the settlement agreement. As a result, claimants argue, the Mississippi court judgments are the "measures" to which their alleged injuries are attributable.

Even if claimants truly were coerced by the Mississippi court judgments to enter into the

settlement agreement -- and, as explained below, they most assuredly were not -- claimants nevertheless fail to attribute their alleged injury to a "measure adopted or maintained" by the United States. Contrary to claimants' contention, domestic court judgments in litigation involving only private parties are not "measures adopted or maintained" for purposes of the NAFTA.

It is a familiar and well-settled principle of international law that international agreements are to be "interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Article 31; I. Brownlie, Principles of Public International Law, p. 627 (4th ed., 1990). In substance, these principles require that the NAFTA be interpreted to effectuate the express agreement of the parties; here, the governments of Canada, Mexico and the United States. See R. Jennings & A. Watts, eds., Oppenheim's International Law, 9th ed. at 1267 (1996). Thus viewed, it is readily apparent from the text of the NAFTA that Chapter 11 does not apply to the judgments of domestic courts in private disputes, but is instead concerned only with legislative and regulatory actions that affect trade and investment. Other evidence and principles of construction further reinforce the fact, made clear by the express terms of the NAFTA, that the parties never intended Chapter 11 to apply to judgments of domestic courts in private litigation. Claimants' challenges to the judgments of the Mississippi courts, therefore, are not arbitrable under the NAFTA.

A. The Ordinary Meaning Of The Phrase "Measures Adopted or Maintained" Does Not Include Domestic Court Judgments In Purely Private Disputes

Article 1101 of the NAFTA limits the application of Chapter 11 only to "measures adopted or maintained by a Party . . . ." See NAFTA Article 1101(1). Article 201, which sets

forth the general definitions of the terms in the NAFTA, defines "measure" to include "any law, regulation, procedure, requirement or practice." On its face, this definition does not include jury verdicts or court judgments and, instead, includes only legislative or administrative rules and requirements. The Mexican and French-Canadian versions of the NAFTA similarly do not include court judgments in their definitions of "measure." See Tratado de Libre Comercio de América del Norte, Artículo 201 ("medida incluye cualquier ley, reglamento, procedimiento, requisito o práctica"); Accord de libre-échange nord-américain, Article 201 ("mesure s'entend de toute législation, réglementation, procédure, prescription ou pratique").

This understanding of "measure" is consistent with the ordinary usage of the term, which does not refer to court judgments, but instead contemplates only legislative or regulatory actions. Indeed, every major dictionary of the English language makes clear that, in the context of government action, the word "measure" has the specific meaning of "[a] legislative bill or enactment." Webster's II, New Riverside University Dictionary (1994); see also Webster's Third New International Dictionary (1986) ("Step; *specif.* a proposed legislative act: Bill"); The New Shorter Oxford English Dictionary, (3d ed. 1993) ("A plan or course of action intended to attain some object, a suitable action; *spec.* a legislative enactment proposed or adopted."); The Random House Dictionary of the English Language, 2d ed. (1987) ("a legislative bill or enactment: *The senate passed the new measure.*") (emphasis in original). Significantly, none of these dictionaries includes anything even approximating jury verdicts or court judgments within the definition of a "measure."

The term "measure" is also routinely used in international agreements to refer exclusively to legislative or regulatory actions rather than court judgments. For example, Canada regularly

includes references in its international agreements to "measures of nationalization, expropriation, taking under administration or *any other similar legislative or administrative measures*." Agreement Between the Government of Canada and the Government of the Czechoslovak Socialist Republic Relating to the Settlement of Financial Matters (April 18, 1973) (emphasis added). See also, e.g., Agreement Between the Government of Canada and the Government of the Polish People's Republic Relating to the Settlement of Financial Matters (Oct. 15, 1971) (requiring payment on claims concerning "property, rights or other interests nationalized or otherwise taken by the application of Polish *legislation or administrative decisions*") (emphasis added); Agreement Between the Government of Canada and the Government of the Socialist Republic of Romania Concerning the Settlement of Outstanding Financial Problems (July 13, 1971) (requiring payment on claims concerning "Canadian property, rights and interests affected by Romanian measures of nationalization, expropriation, taking under administration, and *any other similar legislative or administrative measures* . . . .") (emphasis added).[12]

Similarly, the standard-form contract of the Multilateral Investment Guarantee Agency ("MIGA"), an organization within the World Bank Group that insures investors against certain

---

[12]The General Agreement on Trade and Services ("GATS"), which appears as an annex to the General Agreement on Tarriffs and Trade ("GATT"), defines the term "measure" more broadly to include "any measure . . . whether in the form of a law, regulation, rule, procedure, *decision*, administrative action, or any other form." GATS Article XXVIII(a) (emphasis added). Of course, the drafters of NAFTA chose not to include such a definition, even though it was in existence at the time. Moreover, even this broad definition does not include court judgments on its face, as the term "decision" in this context is typically used to refer to administrative, rather than judicial, decisions. See, e.g., Agreement Between the Government of Canada and the Government of the Polish People's Republic Relating to the Settlement of Financial Matters (Oct. 15, 1971) (requiring payment on claims concerning "property, rights or other interests nationalized or otherwise taken by the application of Polish *legislation or administrative decisions*") (emphasis added).

risks (including expropriations) around the world, makes clear that "measures" does not include court judgments. In its "expropriation" section, the MIGA contract states that it provides coverage for expropriations resulting from:

> any *measure* taken, directed, authorized, ratified or approved by the Host Government, which is expropriatory . . . and which constitutes: (a) an *administrative action*; or (b) a *legislative action* which requires no further legislation, regulation or administrative action for its implementation.

Article 8, MIGA Contract of Guarantee (Third Revision, Aug. 1, 1995) (emphasis added).

Although Claimants correctly observe that court judgments have, in a few extreme and unusual cases, risen to the level of a "denial of justice" that implicate the responsibility of nations under international law, see Notice of Claim ¶ 146, that observation is irrelevant, as it confuses the concept of "denial of justice" with the entirely separate concept of "measures." It has long been recognized in international law that actions of the judiciary, by which a "denial of justice" may be effected, are entirely distinct from actions of all other organs of government. As one leading treatise explains, "the *popular* meaning of denial of justice . . . seems to be that relating to court action. . . . Although one cannot be too certain that this is the term's 'natural' meaning, it is undoubtedly the one which is usually favored by textwriters on international law." A. Freeman, The International Responsibility of States for Denial of Justice, 31 (1938) (emphasis in original). It is well-established that this "popular" understanding of denials of justice "omits wrongs by any organs of the State other than courts or bodies acting in purely judicial capacity." Id. at 146.

Given this settled conceptual distinction between denials of justice (i.e., wrongs committed by courts) and wrongs committed by all other organs of government, it would be unreasonable to construe the single term "measures" to include court judgments in addition to

legislative and regulatory actions. This is particularly so in this case, given that the definition of "measure" in NAFTA Article 201, on its face, does not include court judgments or any reference to a "denial of justice." Indeed, the term "denial of justice" does not appear anywhere in the NAFTA.

The distinction between "measures" and court judgments is also supported by international decisional law, even in cases where the broadest possible definition of "measures" is urged. In the recent Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998), for example, Canada argued that the International Court of Justice ("ICJ") lacked jurisdiction to hear a dispute concerning a particular Canadian statute because Canada had reserved from the ICJ's jurisdiction any "disputes arising out of or concerning *conservation and management measures* taken by Canada" with respect to fishing vessels in certain regions. Because a broad interpretation of the term "measures" was more protective of Canada's sovereignty, Canada "stress[ed] the very wide meaning of the word 'measure'" in arguing that the statute in question was reserved from the ICJ's jurisdiction. Id. at ¶ 65. The Court agreed that the statute was a "measure," noting that the broadest meaning of the term "is used in international conventions to encompass statutes, regulations and administrative action." Id. (emphasis added). Although the question of whether court judgments are "measures" was not at issue in the case, the ICJ's explanation of even the "very wide meaning" of the term significantly did not include court judgments, but was instead limited to "statutes, regulations and administrative action." See also Fisheries Case, Counter-Memorial of Canada on Jurisdiction, Feb. 29, 1996 ("Canada's Brief") at ¶ 96 (The term's "most common usage is in relation to *legislative* measures.") (emphasis in

original).[13] The Court's understanding reflects the ordinary meaning of the term "measures," which does not include court judgments.

That "measures" do not include court judgments is further underscored by the fact that the scope of Chapter 11 is limited only to "measures *adopted or maintained*" by a NAFTA country. See NAFTA Article 1101(1). As a matter of common usage, legislative proposals are "adopted," and pre-existing rules or practices are "maintained." See, e.g., Webster's Third New International Dictionary of the English Language at 29 (1986) ("adopt" refers to "a bill or measure passed or accepted formally"); id. at 1362 ("maintain" means to "keep up" or "continue"). Court judgments, in contrast, are neither "adopted" nor "maintained," but instead are "issued," "rendered," "entered" or "made." See, e.g., id. at 585 (a "decision" is "arrived at after consideration"); id. at 1223 (a "judgment" is "pronounced" or "given in a cause by a court of law or other tribunal . . . .; a legal judgment entered for one party . . . ."). [14] The plain text of Article 1101(1), therefore, does not

---

[13]It is also worth noting that Canada urged the broadest possible construction of the term "measures" because the law requires an "unequivocal indication" of a "voluntary and indisputable" acceptance of an international tribunal's jurisdiction. Canada's Brief at ¶¶52-53 (citing ICJ cases). Had the issue been presented where a *narrow* reading was necessary to protect sovereignty — as it is in this case, see infra at [ ] — the ICJ likely would have construed the term narrowly. See, e.g., Fisheries Case at ¶ 71 (noting that narrower interpretation "would deprive the reservation of its intended effect.").

[14]The Mexican and French-Canadian versions of the NAFTA support this same distinction. Compare, e.g., The Oxford-Hachette French Dictionary at 13 (2d ed. 1997) (illustrating meaning of "adopter" with "adopter une loi -- to pass a law"); id. at 486 ("maintenir" means "to keep") with id. at 219 (one can "make or take" a "décision;" "prendre une décision"); id. at 452 (to "give one's verdict" or "to pass judgment;" "prononcer un jugement"); id. at 1156 ("se décider" means "to reach or come to a decision"); id. at 1387 ("prononcer/rendre un jugement" means "to pass/give a judgment"); id. at 1652 ("rendre une décision" means "to give a ruling"). Compare also, e.g., The Oxford Spanish Dictionary at 18 (1994) ("adoptar" means "to take," as in "drastic measures will have to be taken"); id. at 479-80 ("mantener" means "to keep," as in "keep up the old traditions") with id. at 227 (one can "make" a "decisión"); id. at 441 (one can "express" or "form" a "juicio"); id. at 1524 (one can "give" or "make" a judicial ruling, or "fallo").

bring court judgments within the reach of Chapter 11.

B. The Meaning Of "Measures Adopted or Maintained" In The Context Of The NAFTA

As noted above, NAFTA Article 201 defines "measure" to include "any law, regulation, procedure, requirement or practice." Although the drafters of NAFTA surely were capable of identifying court judgments with specificity when they wanted to do so, Article 201 does not include court judgments in its definition of a "measure." For example, NAFTA Article 1109(4)(e) permits each NAFTA government to apply its laws to "ensur[e] the satisfaction of judgments in adjudicatory proceedings." By the principle of *expressio unius est exclusio alterius*, which is well-recognized in the law of treaty interpretation, see Oppenheim's at 1279-80, one can fairly infer that the drafters of NAFTA did not intend to include "judgments in adjudicatory proceedings" within the definition of "measures" in Article 201.

Indeed, the term "measures" appears frequently throughout NAFTA Chapter 11 and, without exception, is not used to refer to the judgments of domestic courts. To the contrary, the provisions of NAFTA Chapter 11 appear clearly to exclude domestic court judgments from the Chapter's scope.

Most notable in this regard is NAFTA Article 1121, which sets forth the conditions that an aggrieved investor must satisfy before it may challenge a government measure through international arbitration. Principal among these "conditions precedent" is the requirement that investors "waive their right to initiate or continue before any administrative tribunal or court . . . any proceedings with respect to the measure of the disputing Party that is alleged to be a breach" of Chapter 11. NAFTA Article 1121(1)(b). In other words, to make a claim in arbitration

challenging a "measure," the investor must, inter alia, elect to abandon any further domestic court challenge to that measure. Because this provision plainly distinguishes between judicial proceedings and the measure challenged in those proceedings (i.e., "proceedings with respect to the measure"), the language of Article 1121 makes clear that a court proceeding itself was not understood by the parties to be a "measure" subject to challenge in international arbitration.

In fact, the parties to the NAFTA appear to have included this requirement in Article 1121 precisely because it "forces investors to choose between local remedies and international arbitration so that international panels cannot act as a court of appeals" over domestic judicial decisions. U.S. White Paper of Talking Points for Carla Hills in Negotiations with Mexico and Canada. As the United States argued in the course of the NAFTA's negotiations, it was necessary to eliminate the requirement that an investor exhaust all local remedies before proceeding to international arbitration because such a requirement, "far from helping to minimize the political problems associated with investment disputes, could actually heighten them, as most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." Id.

If "measures" were construed to include domestic court judgments, the purpose of Article 1121's election-of-remedies provisions would be undermined, as it would allow an international tribunal to sit, in effect, as a "court of appeals" over domestic court judgments. See, e.g., A. Freeman, The International Responsibility of States for Denial of Justice, 170 (1938) (in denial of justice cases, "what would actually happen is that an international tribunal would operate by way of a court of appeals."). Such a result would be inconsistent not only with the plain language of the NAFTA, but with the clear intent of the parties, as well as common-sense principles of

international law. See, e.g., Barcelona Traction, Light and Power Co., Ltd., 1970 I.C.J. 3, 157-58 ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.") (separate opinion of Judge Tanaka). Because the parties to the NAFTA drafted the agreement expressly to avoid such a scenario, it would be unreasonable to conclude that they intended the term "measure" to include domestic court judgments.

Other uses of the term "measure" in Chapter 11 underscore that the term was intended to refer only to trade-related legislative or regulatory actions. Article 1106(2), for example, refers to "measure[s] that require[] an investment to use a technology to meet generally applicable health, safety or environmental requirements," a reference that plainly does not include court judgments. Similarly, Article 1108 refers to the "continuation," "prompt renewal" or "amendment" of any non-conforming measures, while Article 1111 speaks of measures prescribing special formalities in connection with the establishment of foreign investments, "such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party . . . ." Such uses of the term "measures" are consistent only with legislation or regulation and do not refer to court judgments. See also, e.g., NAFTA Article 1114(2) ("[I]t is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.").

The term "measure" also appears several hundred times in other parts of the NAFTA, each time making clear that the agreement as a whole is concerned only with trade- and investment-

related legislative and regulatory actions, and not court judgments. Article 2103, for example, speaks of regulatory measures aimed at the imposition and collection of taxes, setting forth the extent to which such measures are subject to Chapter 11's arbitration provisions. See NAFTA Article 2103(6). The entirety of Chapter 7 of the NAFTA is devoted to "Agriculture and Sanitary and Phytosanitary Measures," while all of Chapter 9 is devoted to "Standards-Related Measures," which are defined as "standard[s], technical regulation[s] or conformity assessment procedure[s]." NAFTA Article 915. "Measures" is used in Article 302 to refer to rules for allocating in-quota imports, and in Articles 309-315 to refer to non-tariff export restrictions "such as licenses, fees, taxation and minimum price requirements." See also NAFTA Article 605. The term appears countless times in similar fashion throughout the NAFTA, reinforcing a definition of "measures" that includes only legislative or regulatory actions that concern trade and investment.[15]

Indeed, in the more than one thousand pages that constitute the NAFTA, including nearly 300 separate Articles as well as numerous annexes and supplemental agreements, the sole use of the term "measures" in the context of judicial action is a reference in only four Articles to

---

[15] See, e.g., NAFTA Articles 315 & 605 (using "export measures" as synonymous with export restrictions, such as higher prices on certain goods); NAFTA Article 512 (administrative customs "determinations, measures and rulings"); NAFTA Articles 602(1), 606 (energy regulatory measures); NAFTA Article 607 (national security measures); NAFTA Article 904(1) (measures relating to safety, the protection of human, animal or plant life or health, the environment or consumers, including prohibitions on importation of goods and services); NAFTA Article 1201 (measures relating to cross-border trade in services); NAFTA Article 1210 (preventing measures relating to licensing and certification from becoming barriers to trade); NAFTA Article 1304 (discussing measures "adopted or maintained" to prevent interference with public telecommunications networks); NAFTA Article 1305 (requiring NAFTA parties to adopt antitrust measures, "such as accounting requirements, requirements for structural separation" and other "rules" to prevent anticompetitive conduct); NAFTA Article 1406 (equating "measures" with "regulation, oversight, implementation of regulation and . . . procedures . . . "); NAFTA Article 1502(3) (requiring action through "regulatory control, administrative supervision or the application of other measures . . . .").

"provisional" or "interim" measures issued by international tribunals, see Article 1134, and by domestic courts in the specific context of intellectual property proceedings. See Articles 1715, 1716, 1718. These scant references to "provisional" or "interim measures," however, do not expand the scope of Chapter 11 to include jury verdicts or other domestic court judgments.

"Provisional" or "interim measures" are well-recognized as having a specialized meaning in the field of international arbitration that bears no relation to the "measures" that are covered by NAFTA Chapter 11. The terms generally refer to preliminary actions taken "to preserve the respective rights of the parties" pending a decision by a court or tribunal where necessary to prevent a party from suffering "irreparable prejudice." Paraguay v. United States, 37 I.L.M. 810, 818 (I.C.J. 1998); see also, e.g., D.A. Redfern, Arbitration and the Courts: Interim Measures of Protection -- Is the Tide About to Turn?, 30 Tex. Int'l L. J. 71, 78 (1995); C. Brower & W.M. Tupman, Court-Ordered Provisional Measures Under the New York Convention, 80 Am. J. Int'l L. 24 (1986) ("[T]he rules of most international arbitral regimes authorize a tribunal to order interim or provisional measures . . . .").

This is precisely the manner in which the terms "provisional" or "interim measures" are used in the NAFTA. Article 1134 authorizes international arbitral tribunals to "order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction." Similarly, Article 1716, which applies only to intellectual property disputes, requires each NAFTA party to "provide that its judicial authorities . . . have the authority to order prompt and effective provisional measures" to enjoin an alleged infringement of intellectual property rights and "to preserve relevant evidence

in regard to the alleged infringement." NAFTA Article 1716(1). See also NAFTA Article 1715(2)(f) (judicial authorities must have power to order a party who improperly requested provisional measures in an intellectual property dispute to compensate the party "wrongfully enjoined or restrained . . . .").

Clearly, the recognition of an international arbitral tribunal's authority to issue interim measures of relief does not imply that the judgments of domestic courts are "measures" subject to arbitration under Chapter 11. Nor do the references to court-ordered provisional measures in intellectual property disputes suggest that court judgments are subject to arbitration under Chapter 11. Indeed, under the terms of Chapter 17 ("Intellectual Property"), even provisional measures issued in intellectual property cases are not subject to arbitration under Chapter 11. Article 1716 makes clear that arbitration was not intended as the proper course for challenging a provisional measure, as it requires NAFTA parties to allow defendants to "have those measures reviewed by [the relevant NAFTA party's] judicial authorities . . . ." NAFTA Article 1716(5)(b).

Moreover, in drafting Chapter 17, the parties to the NAFTA were careful to avoid imposing obligations that would subject a court judgment (as opposed to other forms of government action or inaction) to challenge under the agreement. In each of Chapter 17's references to court-ordered provisional or interim measures, the only obligations imposed are those that require the parties to ensure that their courts are *empowered* to take particular action. See, e.g., NAFTA Article 1715(2), (5); Article 1716(1) ("Each Party shall provide that its judicial authorities shall have the authority" to issue certain orders). While a government could be challenged under the NAFTA for failing to empower its judicial authorities as required in Chapter 17, in no case does the Chapter impose requirements that would subject a court judgment itself to

challenge as a "measure."

In any event, even if court-ordered provisional measures in intellectual property cases could somehow be challenged in an arbitration under NAFTA Chapter 11, such provisional measures are entirely distinct from the sort of court judgments that Loewen challenges here. Article 1716(6), for example, provides that the judicial authorities of the NAFTA parties must "revoke or otherwise cease to apply the provisional measures . . . if proceedings leading to a decision on the merits are not initiated" within a certain period of time. In the event that proceedings leading to a decision on the merits of the case are initiated, NAFTA Article 1718(7) requires the NAFTA parties to provide for a "review" to determine whether the provisional measures should be modified, revoked or confirmed. Both of these provisions show that the issuance of provisional measures is entirely independent of court proceedings on the merits and, indeed, that a proceeding on the merits need not even exist for provisional measures to be issued in the first instance. Thus, even if Chapter 17 could be construed to include court-ordered "provisional measures" within the scope of the term "measures" in Chapter 11, it makes clear that court judgments on the merits of a given case — such as the court judgments challenged here — are not arbitrable "measures" for purposes of Chapter 11. Cf., e.g., C. Higgins, Interim Measures in Transnational Maritime Arbitration, 65 Tul. L. Rev. 1519, 1523-24 (1991) ("Provisional or interim measures of relief are distinguishable from interim awards. Generally interim awards involve rulings on the merits or substance of the dispute," whereas interim measures of relief are merely "orders given by the arbitrator/s for the preservation of rights and property" pending the proceedings on the substance of the case) (quoting ICC Arb. Comm'n, Report on the Problems of Interim/Partial Awards § 1.1 (1985)); P. Essoff, Finland v. Denmark: A Call to Clarify the

International Court of Justice's Standards for Provisional Measures, 15 Fordham Int'l L. J. 839, 841 (1992) (the ICJ's "power to hear a case on the merits is distinct from its power to indicate provisional measures.").

It is also significant that the term "measures" in NAFTA Article 1101(1) is modified by the phrase "adopted or maintained." As noted above, this additional limitation is inconsistent with court judgments, as court judgments are not "adopted or maintained," but instead are "rendered," "issued" or "made." See supra at ___. Although the phrase "adopted or maintained" is used throughout the NAFTA, it refers in each instance only to legislative or regulatory rules or actions that concern trade and investment, and never to court judgments. See, e.g., Supplemental Agreement on Environmental Cooperation, Annex 36A, ¶ 4 (Sept. 13, 1993) ("procedures adopted or maintained" by Canada); NAFTA Article 2104(3) (requiring certain "measure[s] adopted or maintained" to be "temporary and be phased out progressively"); NAFTA Article 314 (conditions under which a Party "may adopt or maintain any duty, tax or other charge on the export" of goods); NAFTA Article 906(4) ("technical regulation adopted or maintained"); NAFTA Article 910(3)(a) ("any standard or conformity assessment procedure proposed, adopted or maintained"); NAFTA Annex 301.3, § B(2)(b) ("tariff rate quotas adopted or maintained"); NAFTA Article 1210 ("any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party"); NAFTA Article 1302(7)(d) ("a licensing, permit, registration or notification procedure which, if adopted or maintained, . . ."); NAFTA Article 2005(4)(a) ("a measure adopted or maintained by a Party to protect its human, animal or plant life or health . . . ."); NAFTA Article 719 ("any control or inspection procedure or approval procedure, proposed, adopted or maintained . . . ."); NAFTA Article 702(3) ("measures adopted or maintained pursuant

to an intergovernmental coffee agreement."). Such usage throughout the NAFTA merely underscores that Chapter 11 was not intended to apply to domestic court judgments.

In short, whether in the context of the NAFTA or in international practice generally, the limiting phrase "measures adopted or maintained" in NAFTA Article 1101 applies only to legislative or regulatory actions and excludes domestic court judgments from its scope. It is not surprising, therefore, that the President of the United States, when he transmitted the NAFTA to the U.S. Congress for approval, explained that "the NAFTA's rules generally cover state and local laws and regulations, as well as those at the federal level." NAFTA Implementation Act, Statement of Administrative Action, p.8 (Nov. 3, 1993) (emphasis added). Because Chapter 11 applies only to such "laws and regulations," this Tribunal lacks competence to address Loewen's challenges to the judgments of the Mississippi courts.

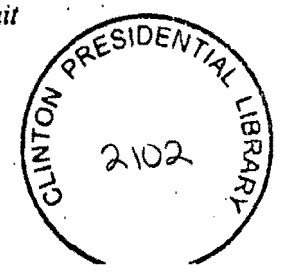
C. The Object And Purpose Of The NAFTA

The purpose of the NAFTA is clear: to enhance trade and investment among Canada, Mexico and the United States. See NAFTA Chapter 102 ("Objectives"). The agreement's principal goals are to "eliminate barriers to trade" among the three countries, to "promote conditions of fair competition in the free trade area," to increase "investment opportunities" and to "provide adequate and effective protection and enforcement of intellectual property rights" in each of the three countries. Id. To these ends, the NAFTA includes a mechanism for the resolution of disputes concerning government "measures" that pertain to trade and investment. Id.; see also NAFTA Chapter 11. Nowhere in these stated goals is there any suggestion that the NAFTA was intended to apply to court judgments, particularly where the judgment is a jury's award of damages in a purely private contract dispute, unrelated to any government measures, that was

eventually settled out of court.

In fact, the inclusion of such proceedings within the scope of Chapter 11's dispute resolution mechanism would be inconsistent with the stated goals of the NAFTA. As noted above, Chapter 11 seeks to facilitate the orderly resolution of trade and investment disputes by requiring aggrieved investors to waive their right to challenge a government measure in a domestic court. See NAFTA Article 1121(1)(b). In the view of the NAFTA's drafters, this requirement was appropriate because the more traditional requirement that an investor exhaust all local remedies before proceeding to international arbitration,"far from helping to minimize the political problems associated with investment disputes, could actually heighten them, as most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." U.S. White Paper of Talking Points for Carla Hills, supra. The NAFTA's drafters thus made clear that the inclusion of domestic court judgments within the scope of "measures" that could be challenged in arbitration would frustrate the very purpose of the dispute resolution mechanisms that are vital to the NAFTA's success. Cf., e.g., D. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Law. 727 (1993) (Chapter 11 "was an essential element of an agreement that was to provide the basis for hemispheric free trade.").

Because Loewen's challenge is so contrary to the expressed intent of the NAFTA parties, representatives of the NAFTA governments have spoken out against the filing of such claims. For example, Canadian trade officials have complained that Chapter 11 was never intended to permit claims like Loewen's and are seeking an interpretive agreement among the three NAFTA nations to confirm this point. See I. Jack, *Ottawa Pushes for Reform of NAFTA Lawsuit*



Provisions: $1-Billion in Claims, Fin. Post (Apr. 20, 1999) at C03; P. Morton, *Washington Cool to Rewriting Key NAFTA Clause: Canada Urged Review: Aim is to Limit Firms' Ability to Sue Governments*, Financial Post (Jan. 23, 1999) at D09; Editorial, *A New Role for a Trade Deal: NAFTA's Creators Never Expected it Would be Used Like This*, Globe and Mail (June 18, 1999) at A12; see also W. Glaberson, *NAFTA Invoked to Challenge Court Award in U.S.*, N.Y. Times (Jan. 28, 1999) ("[T]hose who were most involved in the debate over the trade agreement five years ago say they did not anticipate claims based on court verdicts."). Such an effort only underscores that the inclusion of court judgments within the meaning "measures" would be inconsistent with the object and purpose of the NAFTA.

D. Even If The Meaning And Scope of The Term "Measures" Were Ambiguous, Canons Of Treaty Interpretation Require That The Term Be Interpreted To Exclude Domestic Court Judgments

It has long been a principle of customary international law that treaties are to be interpreted in deference to the sovereignty of states. See, e.g., EC Measures Concerning Meat and Meat Products (Hormones), 1998 WL 25520, Report of the Appellate Body at *71 n.154 (WTO Jan. 16, 1998); Nuclear Tests Case (Australia v. France), 1974 I.C.J. 267 (1974). International tribunals repeatedly insist on an "unequivocal indication" of a "voluntary and indisputable" acceptance by a sovereign of the tribunal's jurisdiction. Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), 1995 I.C.J. 6, 63-64; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. 325, 341-42. Given this strong deference to sovereignty, "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a

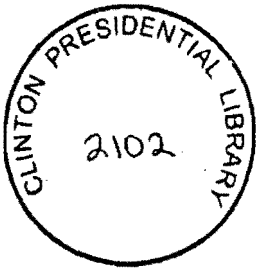
party, or involves less general restrictions upon the parties." R. Jennings and A. Watts (eds.), Oppenheim's International Law, 9th ed., Vol. I, p. 1278 (Longman 1992).

Clearly, an unwelcome review of a country's domestic court judgments through international arbitration would significantly interfere with that country's territorial supremacy. As one noted scholar has observed, "[a] concept of denial of justice which exposes to investigation the substance of the judgment rendered is an evisceration of the very *corpus* of the sovereignty doctrine and its precious tenet of freedom from interference on the part of other States. In cases of this kind, what would actually happen is that an international tribunal would operate by way of a court of appeals." A. Freeman, The International Responsibility of States for Denial of Justice, 146 (1938). The parties to the NAFTA recognized as much in the course of the negotiations of the agreement, and included provisions in Chapter 11 expressly to avoid such interference. See U.S. White Paper, supra. See also, e.g., Barcelona Traction, 1970 I.C.J. at 157-58 ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.") (separate opinion of Judge Tanaka).

Because the parties to the NAFTA expressly sought to prevent international review of domestic court judgments, it would be unreasonable to construe the phrase "measures adopted or maintained" in Chapter 11 to refer to domestic court judgments. Even if the term could plausibly be so construed, settled principles of international law require that such an ambiguity must be resolved to exclude domestic court judgments from Chapter 11's scope. See, e.g., Regina v. Pierre

Bouchereau, 2 C.M.L.R. 800, 810 (ECJ 1977) ("The word 'measure' is not one of precise import. Its interpretation requires a consideration of the context in which it is found."). To infer the parties' consent to have their court judgments challenged in international proceedings on the basis of such language would ignore the "fundamental principle of international judicial settlement" that a tribunal "not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt." Qatar v. Bahrain, 1995 I.C.J. at 64.

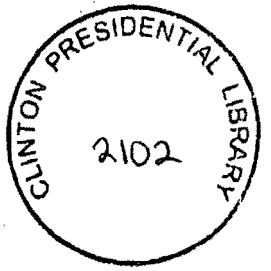
Indeed, the endorsement of Loewen's position here would lead to absurd consequences that the NAFTA Parties plainly could not have intended. Under Loewen's reading of the NAFTA, an investor that finds itself in adverse litigation need not worry about the ultimate outcome of the litigation because its host government would, in effect, serve as a guarantor of that outcome through the NAFTA process. If an investor found itself to be losing a given case, the investor could, under Loewen's view, simply settle the litigation and seek indemnification from the host government under the NAFTA. The possibility for collusion between the investor and the opposing party in the litigation is obvious: the investor and the opposing party could agree to virtually any amount in settlement with the mutual expectation that the settlement would be fully reimbursed by the host government. The NAFTA Parties clearly could not have intended such a result, and the language of the NAFTA does not permit it. See, e.g., Vienna Convention on the Law of Treaties, Art. 32 (treaty language should not be interpreted to "lead[] to a result which is manifestly absurd or unreasonable."); U.S. White Paper (evidencing drafters' intent to prevent opportunity for investor to go "to arbitration because it was losing in domestic courts.").



E. None Of Loewen's Citations Establish That The Term "Measures Adopted Or Maintained" In NAFTA Chapter 11 Includes Court Judgments In Purely Private Disputes

Recognizing the limited scope of NAFTA Chapter 11's application, Loewen devotes a substantial portion of its memorial to its claim that the Mississippi judgments fall within the meaning of the term "measures adopted or maintained" under NAFTA Chapter 1101(1). In particular, Loewen argues that the definition of the term "measure" in the NAFTA is not limited, but is instead defined non-exhaustively to include "any law, regulation, procedure, requirement or practice." NAFTA Article 201(1). Loewen draws two conclusions from this point, both of which are erroneous.

First, Loewen argues that the NAFTA's use of the word "includes" rather than "means" renders the definition of "measure" sufficiently open-ended to include any form of government action, including court judgments in private disputes. See TLGI Mem. at 139-40. This argument, however, ignores the settled interpretive rule of *noscitur a sociis* -- "a word is known by the company it keeps." See, e.g., Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 575 (1995); Australian Broadcasting Tribunal v. Bond, (Austl. 1990) 170 C.L.R. 321, ¶21 (Toohey and Gaudron, J.J.). Courts regularly use this principle "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth'" to the language. Gustafson, 513 U.S. at 575. Here, the illustrations given in the definition of "measure" are all clearly of a type: they refer to actions of legislative and administrative bodies and do not describe those of courts. As explained above, if the NAFTA's drafters had intended to include "denial of justice" claims arising from private litigation within the scope of "measures" challengeable under the NAFTA, they easily could have done so.



Second, Loewen argues that, even if court judgments are not "measures" in the ordinary sense of the term, court judgments fall within the subsidiary definitions of "measure" provided in NAFTA 201(1) -- in particular, the term "requirement." According to Loewen, "civil damages judgments constitute a state-imposed 'requirement'" under United States law. TLGI Mem. at ___. This is not so.

Loewen relies on a single case, Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992), as support for its claim. Contrary to Loewen's claim, however, Cipollone did not hold that "civil damages judgments" constitute a state-imposed requirement. Rather, a plurality of justices in that case found only that a common-law *right of action* for damages -- as opposed to court judgments in such cases -- fell within the definition of a "requirement" under the statute in question. See 505 U.S. at 521-23. Indeed, even on this point, three justices concluded that the plain meaning of the word "requirement" did not extend to common-law damages actions. See id. at 534-40 (concurrence in part, dissent in part).[16]

Loewen fails to identify a single case in which the term "measures adopted or maintained" has been construed to include court judgments in private litigation. For example, the European Court of Justice in Regina v. Pierre Bouchereau, 2 C.M.L.R. 800 (ECJ 1977) did not hold that court judgments in civil disputes fall within the ordinary meaning of the term "measures." To the

---

[16]Significantly, these justices observed that the meaning of the word "requirement" was illuminated by a legislative statement of intent to include "not only action by State statute but by all other administrative actions or local ordinances or regulations by any political subdivisions of any State . . . ." Id. at 540 (quoting Senate Report). The justices found that this illustrative list was "remarkable for the absence of any reference to common-law damages actions." Id. As in Cipollone, the list of government actions within the definition of "measure" in the NAFTA is remarkable for the absence of any reference to court judgments, decisions, or "denials of justice."

contrary, the court held only that the term "measure," as used in the agreement in question, applied to court action where the court performed an administrative (rather than traditionally judicial) function; namely, recommending deportation pursuant to statute. Id. Significantly, the United Kingdom argued in that case that the ordinary meaning of the term "only refers to provisions laid down by law, regulation or administrative action, to the exclusion of actions of the judiciary." Id. at 821. The ECJ did not reject that position as a general matter, but held only that "the concept 'measure' includes the action of a court which is required by the law to recommend in certain cases the deportation of a national of another member state." Id. at ___. Because the Mississippi courts in the O'Keefe litigation did not perform the peculiarly administrative -- and inherently non-judicial -- advisory function of the court in Regina, see id. at __ (recommendation by U.K. court was statutorily-mandated and a prerequisite to "justifying a subsequent decision by the executive authority . . . ."), the ECJ's conclusion has no bearing on the proper application of the NAFTA in this case. See, e.g., id. at 810 ("The word 'measure' is not one of precise import. Its interpretation requires a consideration of the context in which it is found.") (opinion of Advocate General).[17]

The remainder of Loewen's citations stand only for the uncontroversial proposition that states can be held responsible for the actions of their courts in certain circumstances. See TLGI

---

[17]The decision of the Iran-U.S. Claims Tribunal in Oil Fields of Texas, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986), is similarly inapposite. See TLGI Mem. at 144. Unlike NAFTA tribunals, the jurisdiction of the Iran-U.S. claims tribunal extends to "expropriations and other measures affecting property rights." Although it concluded that it had jurisdiction to hear a claim arising from a judicial decision, the Oil Fields panel did not base its finding of jurisdiction on the term "measures," but rather on the term "expropriations." See id. at __. Under that tribunal's own jurisprudence, "expropriation" is a broader term, "encompassing not only formal measures, but also indirect and 'creeping' takings." Grimm v. Iran, 2 Iran-U.S. Cl. Trib. Rep. 78 (Holtzmann, J., dissenting).

Mem. at 142-44. These citations miss the point, however. The question presented here is not whether international law recognizes state responsibility for court action in general, but whether the NAFTA in particular affords investors a private right of action against the NAFTA Parties for court judgments in private disputes. Indeed, if this claim were to survive this jurisdictional bar, it would be the first claim in history brought by a private party to challenge a domestic court judgment under international law. Given the intent of the NAFTA Parties as reflected in the text of the agreement, and construed with the appropriate deference to the sovereignty of the NAFTA parties, NAFTA Chapter 11 cannot be seen to have conferred such an extraordinary right of action on private parties.

III. EVEN ASSUMING THAT A COURT JUDGMENT COULD BE A "MEASURE" WITHIN THE SCOPE OF CHAPTER 11, THE COURT JUDGMENTS COMPLAINED OF HERE ARE NOT "MEASURES ADOPTED OR MAINTAINED" BY THE UNITED STATES BECAUSE THEY WERE NOT RENDERED BY THE HIGHEST AVAILABLE COURT

As noted above, international tribunals constituted under NAFTA Chapter 11 have jurisdiction only over disputes alleging injuries from "measures adopted or maintained" by a NAFTA Party. NAFTA Article 1101(1). Even assuming that a domestic court judgment could ever be such a "measure," the law is clear that a lower court judgment that is still capable of appeal cannot qualify as a "measure adopted or maintained" by a NAFTA Party. Because all of the judgments challenged here were still subject to appeal in higher courts, the judgments cannot be "measures" and, therefore, the entirety of the claim is beyond the competence of the Tribunal.

It is well-settled in international law that "[j]udicial action is a single action from beginning to end and it cannot be said that the State has spoken finally until all appeals have been exhausted." E. Borchard, "'Responsibility of States' at the Hague Codification Conference," 24

Am. J. Int'l L. 517, 532 (1930) (citing Belgian delegate). "It cannot be determined whether there is any international responsibility until it is known what the final state action will be, a fact which cannot be known until available appeals and local opportunities for correction of the error or wrongful act, if any, have been exhausted." Id. at 533. Because an international obligation can only be breached when it becomes "definitively impossible for the State" to comply with that obligation, see Yearbook of the Int'l L. Comm'n of 1978 at 95, a judicial action cannot be a "measure" for purposes of NAFTA Chapter 11 unless it is the final act of the judicial system from which no further appeal is possible. See, e.g., E. Borchard, The Diplomatic Protection of Citizens Abroad 198 (1915) ("It is a fundamental principle that . . . only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state."); Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 45-46 ("Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated."); Freeman at 634 ("It is not disputed that courts are able to involve the State in responsibility, but the judicial decision with which it is confronted must be final and without appeal.") (quoting League of Nations Publications, Basis of Discussion, Vol. III Responsibility of States pp. 41-51 (1929)).

The requirement that a claimant exhaust all appeals is jurisdictional. Where, as here, a claim is based on court judgments that could have been appealed, the claim must be dismissed at the outset: "no claim based upon a denial of justice may be predicated upon the decision of a lower court. The alien must have unsuccessfully pursued all available modes of appellate revision and have been brought face to face with a definitive pronouncement of the highest judicial body

before such a complaint will be receivable." A. Freeman, International Responsibility of States for Denial of Justice, 415 (1938). "[A]s long as there remains a possibility of revising the sentence by appeal, resort to the higher tribunals is a *sine qua non* of presenting a claim." Id. at 422.

Moreover, the requirement of a final, non-appealable judgment is a strict one under customary international law. It is not enough to argue -- as Loewen does here -- that further appeals would have been difficult, costly or unlikely to succeed. Rather, for a State to be held internationally liable, "the test is obvious futility or manifest ineffectiveness, not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests." C.F. Amerasinghe, Local Remedies in International Law 195 (1990). See also, e.g., 1934 Finland v. GB, 3 UNRIAA at 1504 (rule excusing failure to appeal where reversal was "hopeless" is "most strictly construed, and if substantial right of appeal existed, failure to prosecute an appeal operated as a bar to relief."); E. Borchard, The Diplomatic Protection of Citizens Abroad 824 (1915) ("A claimant is not . . . relieved from exhausting his local remedies by alleging his inability, through poverty, to meet the expenses involved, his ignorance of his right of appeal, the fact that he acted on the advice of counsel, or a pretended impossibility or uselessness of action before the local courts.").

Claimants do not appear to dispute -- nor could they -- that the court judgments of which they complain were not rendered by the highest court in the judicial system and that each of those judgments was, at least theoretically, subject to reversal on appeal. Similarly, claimants do not contend -- nor could they -- that the payment of the full supersedeas bond was a condition of its right to appeal from the trial court judgment. To the contrary, Loewen possessed and exercised

(briefly) its right to appeal pursuant to Mississippi law, with or without a supersedeas bond; the posting of a supersedeas bond was not a condition of the appeal, but merely a condition for the court to stay execution of the judgment pending the appeal. Claimants argue, instead, that the supersedeas bond requirement had the practical effect of denying their right of appeal because, according to claimants, the posting of the bond would have had "devastating financial consequences" for the company, whereas an appeal without a bond would have "quite literally destroyed the company."

Contrary to Loewen's account, several avenues of appeal were available to Loewen that the company, for its own private business reasons, elected not to pursue. Although it alleges that it "had no reasonable legal alternative" to settling the O'Keefe case, and that it settled the case only under "duress," TLGI Mem. at 135, ¶ 308, Loewen misapprehends the applicable standard under customary international law. It is true that the requirement of a final, non-appealable judgment may be overcome where a claimant can demonstrate that pursuing an appeal would be "obvious[ly] futil[e]" or "manifest[ly] ineffective." C.F. Amerasinghe, Local Remedies in International law 195 (1990). But Loewen does not even try to meet this test in its Memorial. Instead, Loewen argues only that its failure to appeal should be excused because (according to Loewen) it had no "reasonable legal alternative" to settlement. See Loewen's Memorial at 135, ¶ 308. In any event, even under the less strict "duress" test urged by claimants, the claim that Loewen had no "reasonable" alternative is unsupportable and cannot satisfy the requirement of a final, non-appealable judgment.[18]

---

[18] Loewen effectively concedes that, if it had a "reasonable" alternative to settlement, then its decision to settle the O'Keefe litigation would not have been made under "duress" (and thus would not

A. Loewen Could Have Sought Review in Federal Court and a Stay of Execution Pending Adjudication of its Claims

One of Loewen's principal contentions in this case is that it "had no reasonable legal alternative" to settling the O'Keefe case. See Loewen Memorial at 135, ¶ 308. Specifically, Loewen claims that, after the Mississippi Supreme Court affirmed the trial court's decision setting an appeal bond at $625 million, it "had no available avenues of relief in U.S. federal court, either on direct review in the Supreme Court of the United States or on collateral review in a U.S. district court." See id. In support of this contention, Loewen offers the statements of Professors Laurence Tribe and Charles Fried. See Loewen's Memorial, Exhibit D ("Tribe Statement"); Exhibit E ("Fried Statement").

Loewen is wrong. As the company itself recognized at the time of the underlying events, it not only had a reasonable opportunity to obtain United States Supreme Court review of the Mississippi Supreme Court's decision to require a $625 million supersedeas bond, but it could have sought and obtained (in a collateral action) federal district court review of its claims of discriminatory and improper conduct by the Mississippi judicial system. Moreover, under either alternative (i.e., U.S. Supreme Court or federal district court review), Loewen could have sought and obtained a stay of enforcement of the O'Keefe judgment pending resolution of its claims by a federal court.

The analysis supporting these conclusions is set forth in detail in the attached statement of Yale Law School Professor Drew S. Days, III, a constitutional law and federal courts expert and former Solicitor General of the United States. See Statement of Drew S. Days, III, at 9-51

---

support a claim under the NAFTA). See Loewen's Memorial at 124, ¶ 285.

(attached as Exhibit —) ("Days Statement"). Professor Days' statement, which we briefly summarize below, explains in detail why the conclusions of Professors Tribe and Fried are exaggerated, legally flawed, and, with respect to the availability of collateral review in U.S. district court, inconsistent with the facts Loewen alleges in this proceeding -- facts that Loewen's experts fail to even acknowledge.[19]

Moreover, as we also explain below, Professor Days' conclusion that Loewen had available avenues of relief in the U.S. Supreme Court and federal district court is supported by numerous statements Loewen and its attorneys made after the O'Keefe verdict (but before Loewen chose to settle). His conclusion that review was available in the U.S. Supreme Court is further supported by legal arguments that Loewen's own expert, Professor Tribe, advanced in litigation before the United States Supreme Court as counsel for the petitioner in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987). Loewen's after-the-fact justification for its failure to pursue available federal court remedies thus does not even square with its own (or its expert's) prior statements.

1. Loewen Could Have Sought, And Would Have Had A Reasonable Opportunity To Obtain, United States Supreme Court Review Of The Mississippi Supreme Court's Decision Requiring It To Post A $625 Million Supersedeas Bond

a. Professor Days' Conclusion

After the Mississippi Supreme Court affirmed the trial court's decision setting a supersedeas bond at $625 million (125% of the total verdict), Loewen could have filed a petition

[19] Professor Days has no independent knowledge of whether the facts alleged by Loewen in its Memorial and supporting materials are true. While, for purposes of formulating conclusions about the availability of federal court relief, he has taken Loewen's allegations at face value, Professor Days makes clear he does not intend to "credit or in any way lend credence" to Loewen's allegations. See id. at 4. Our argument in this Memorial adopts the same approach.

for certiorari in the United States Supreme Court seeking review of the Mississippi Supreme Court's decision. That much is undeniable. Because certiorari review is discretionary, it is not possible to say with absolute certainty that Loewen's petition would have been granted. Nevertheless, the significant federal constitutional questions Loewen could have presented for U.S. Supreme Court review were (in the parlance of Supreme Court practitioners) "certworthy," and would have been sure to attract the Court's attention during the certiorari review process. In the words of Professor Days, after the Supreme Court of Mississippi ruled, Loewen "could have sought and would have had a reasonable opportunity to obtain" U.S. Supreme Court review (and a stay of execution pending such review), if it had only tried. See Days Statement at 3, 31.

Professor Days' Statement sets out in detail the factual and legal basis for his opinion. See Days Statement at 12-34. In brief, U.S. Supreme Court review was a realistic option because the Mississippi Supreme Court's decision raised an "unsettled question[] of federal constitutional [law] of general interest," viz., whether an appeal bond requirement that is neither necessary nor possible to satisfy comports with federal due process. See id. at 17 (internal citation and quotation marks omitted); accord id. at 21-22. This question has percolated in lower state and federal courts for years, resulting in decisions squarely in conflict with the Mississippi Supreme Court's (a factor that would have increased the likelihood of U.S. Supreme Court review).[20] See

---

[20] Loewen's experts' contention that the Mississippi Supreme Court's decision is not in conflict with any other federal appellate decision is curious in light of Loewen's statements to the contrary in its Notice of Claim. Compare Tribe Statement at 22-24 and Fried Statement at 9-11 (both opining that the Mississippi Supreme Court's decision was not in conflict with any other federal appellate decision) with Notice of Claim at 43, ¶ 120 (arguing that the Mississippi Supreme Court's decision was in conflict with a decision of the Fifth Circuit Court of Appeals, the federal appellate court governing federal practice in Mississippi) & 44, ¶ 125 (similar).

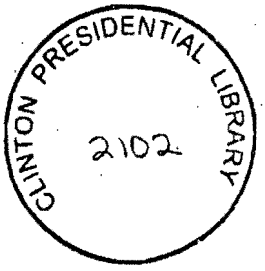
id. at 22-24.

Indeed, in the Pennzoil case, the U.S. Supreme Court had before it the very due process question Loewen could have raised. See Days Statement at 23 & n.10. While the Court declined to decide the question in light of its holding on other grounds (grounds not relevant to Loewen's claim), the Court characterized the due process issue as raising a "substantial federal constitutional claim," see Pennzoil, 481 U.S. at 16 n.15, and made clear its willingness to resolve the issue — if properly presented — in the future. See id. at 18.[21] As Professor Days explains, Loewen could have presented the properly-postured claim the Court found lacking in Pennzoil. See Days Statement at 23-24.

Moreover, while Loewen's experts dismiss the point (see, e.g., Tribe Statement at 19), Loewen's case for Supreme Court review would have been particularly compelling because it would have implicated the constitutionality of punitive damages, an area in which the Supreme Court has "expended much ink" and "will expend much more in the years to come." See Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring). In the years directly preceding the O'Keefe verdict, the U.S. Supreme Court granted certiorari in an unusually large number of cases challenging the constitutionality of punitive damages awards and various states' methods of imposing and reviewing such awards. See Days Statement at 26-30. In those cases, the Supreme Court held not only that the Due Process Clause imposes substantive limits on the

---

[21] See also Pennzoil Co. v. Texaco, Inc., No. 85-1798, Transcript of Oral Argument at 17-18 (Professor Tribe noting that if the state court system had refused to reduce an unreasonable bond, then Texaco "[would] have come straight here [i.e.,to the U.S. Supreme Court].").



amount of punitive damages,[22] but that defendants are entitled to post-verdict judicial review on whether the amount is excessive. See id.

As Professor Days explains, Loewen's claim would have presented the Supreme Court with a unique opportunity to consider a due process challenge to appeal bonds in a context "directly implicat[ing] the Supreme Court's punitive damages jurisprudence." See Days Statement at 28. Specifically, Loewen could have argued that, by requiring a full bond, the Mississippi Supreme Court effectively foreclosed it from obtaining judicial review of the excessiveness of the punitive damages verdict. See Days Statement at 30. Loewen's claim would have been particularly compelling in light of its contention (see Loewen's Memorial at 50-51, ¶ 125) that it could have bonded 125% of the compensatory damages portion of the jury's verdict. See Days Statement at 30-31.

Indeed, at the time of the Mississippi Supreme Court proceeding, Loewen's attorneys recognized the importance of tying the bond to the punitive damages award. In a memorandum to Loewen's legal team attaching a recent decision on punitive damages, one of Loewen's lawyers urged the company to submit the decision to the Mississippi Supreme Court, arguing that:

> an untenable bond requirement would defeat any of constitutionally mandated requirement of "reasonableness" in the amount of the punitive damages award, because a party facing an impossible bond requirement would be unable to avail itself of the constitutional right to reasonableness.

TLGI03853 (memorandum from Kevin E. White to various addressees) (Jan. 9, 1996) (emphasis in original). Taking this suggestion to heart, in its brief in the Mississippi Supreme Court,

---

[22] Indeed, in 1996, the year Loewen would have filed its certiorari petition, the Supreme Court, for the first time, held a punitive damages award unconstitutionally excessive on due process grounds. See BMW v. Gore, 517 U.S. 559 (1996).

Loewen expressly argued that the nature of the underlying verdict should be taken into account in deciding whether execution should be stayed pending appeal. See A1036-A1037.

For all of these reasons, "review in the United States Supreme Court and a stay of the Mississippi Supreme Court judgment pending disposition of such review constituted meaningful options for Loewen," see Days Statement at 18, not, as Loewen's experts claim, mere "theoretical possibilit[ies]." Fried Statement at 7.

b. At The Time Of The Underlying Events, Loewen Acknowledged That U.S. Supreme Court Review Was A Viable Option.

Loewen's own statements between the time of the O'Keefe verdict and its decision to settle buttress Professor Days' conclusion that U.S. Supreme Court review was a realistic option. Indeed, up until the Mississippi Supreme Court's decision, Loewen was actively considering its certiorari strategy and preparing for a U.S. Supreme Court appeal in the event of an adverse decision by the Mississippi court. See, e.g., Letter from James L. Robertson to various addressees (Jan. 4, 1996) (noting the need to preserve Loewen's federal due process challenge "for cert purposes").

For example, in a December 17, 1995 conference call between Loewen and certain interested parties, Peter Hyndman, Loewen's chief legal officer, was asked whether Loewen could (and would) appeal an adverse decision by the Mississippi Supreme Court to the U.S. Supreme Court. Mr. Hyndman stated:

> Yes, we will have an avenue to the Supreme Court of the United States, and because we are leaving no stone unturned, we have added to the Mississippi team for appellate purposes Don [Ayer] from Washington D.C., a former Deputy Solicitor General, probably America's leading expert on US Supreme Court appeals, to ensure that all through the appeal process in Mississippi, every possible

argument is preserved for use if necessary to the US Supreme Court.

A1385;[23] see also Memorandum from Wynne Carvill to various addressees (Nov. 22, 1995) (noting that Mr. Ayers is "in charge of "the federal option" if by some quirk of fate we can't get a stay from the Mississippi courts"); Letter James L. Robertson to Ray Loewen (Nov. 5, 1995) (noting that "[i]f no meaningful relief is secured in the Supreme Court of Mississippi, we could apply to the Supreme Court of the United States and ask that it hear the case").[24]

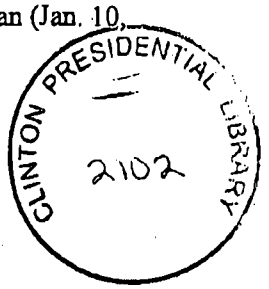
Loewen also stated its intent to seek federal appellate review in a public filing with the United States Securities and Exchange Commission ("SEC"). Corporations which issue securities are required to disclose specific information in periodic reports filed with the SEC. In its November 15, 1995, quarterly report, Loewen stated:

> If relief from the size of the bond is not granted, the Company intends to immediately file an appeal with the Mississippi Supreme Court and, failing that, the federal courts, to have the size of the bond reduced.

---

[23] Even though Loewen was preserving "every possible argument" for U.S. Supreme Court review, it never alleged in any Mississippi court its allegation here that the Mississippi trial judge and/or the Mississippi Supreme Court Justices intentionally set a prohibitively expensive bond because of their anti-Canadian sentiment. See Affidavit of Richard Neely ("Neely Aff.") at 16-17 (attached at Exhibit B to Loewen's memorial). To the contrary, Loewen's lawyers repeatedly advised Loewen it would get a fair hearing in the Mississippi Supreme Court. See, e.g., Letter from James L. Robertson to various addressees (Jan. 4, 1996) ("I remain convinced that, as we speak, within the minds of a solid majority of the [Mississippi Supreme] Court, there is a predisposition to reverse.").

[24] Mr. Ayers is a partner at Jones, Day, Reavis & Pogue, the firm representing Loewen in this proceeding. We note that, notwithstanding Loewen's apparent all-out effort to preserve its appeal rights in the U.S. Supreme Court, Loewen has not produced any memoranda or other documents from Mr. Ayers or his firm evaluating or otherwise discussing Loewen's Supreme Court strategy. We note further that, after reviewing the documents Loewen produced in response to the Tribunal's December 9, 1999 order waiving the attorney-client privilege for discovery related to "duress," undersigned counsel wrote Loewen's attorneys specifically requesting copies of any draft petitions for certiorari. See Letter from Kenneth L. Doroshow to James A. Wilderotter and Christopher F. Dugan (Jan. 10, 2000). To date, the government has received no response to its request.



A1846 (SEC Form 10-Q filing) (Nov. 15, 1995); see also id. at A1858 ("If relief is not granted by the Mississippi Supreme Court, relief may be sought from the federal courts. The requirement to post a bond may be stayed during all or a portion of the emergency review process.") (emphasis added).[25]

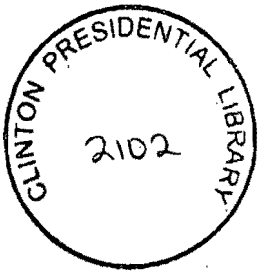
These statements are particularly probative of Loewen's assessment of its chance of obtaining federal court review (and a stay of enforcement pending such review). Under U.S. securities laws, it is unlawful to make a materially false or misleading statement or omission in a report filed with the SEC (provided that the statement is made or omitted with scienter). See 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5(b); see also Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991). Moreover, when a corporation makes a public statement which is reasonably calculated to influence the investing public, it has an obligation to disclose sufficient information so that the statement made is not misleading or so incomplete as to mislead. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir.1968), cert. denied, 394 U.S. 976 (1969). Loewen presumably would not have made the above-quoted statements in its November 1995 SEC filing if it had believed, as its experts now contend, that U.S. Supreme Court review was "practically unavailable." See Fried Statement at 1; Tribe Statement at 2.

c. Professor Tribe's Arguments In *Pennzoil* Further Demonstrate That Loewen Had A Reasonable Prospect Of Obtaining Supreme Court Review Of The Mississippi Supreme Court's Bond Decision

Finally, Professor Tribe's statements on behalf of the petitioner in Pennzoil show beyond

---

[25] It is not clear whether, in its SEC filing, Loewen was using the term "federal courts" to refer to the U.S. Supreme Court, a federal district court, or both. Although the term "appeal" suggests Loewen was referring to the U.S. Supreme Court, whatever Loewen meant, it clearly expressed its intent to seek federal review of any adverse decision in the Mississippi Supreme Court.



any doubt that the due process issue Loewen could have presented was certworthy. In that case, Pennzoil was seeking Supreme Court review of a lower court decision invalidating an appeal bond on due process grounds. While the Supreme Court was obliged to review the due process issue under a then-governing (and since repealed) jurisdictional statute (see Days Statement at 23 n.10), Professor Tribe, as counsel for Pennzoil (the trial court victor), argued that whether the Due Process Clause places limits on appeal bonds:

> is of surpassing practical significance not only in cases like [Pennzoil], involving enormous sums, but in the thousands of routine cases in which litigants cannot afford to post a bond that would stay an adverse judgment pending appeal.

See Pennzoil Co. v. Texaco, Inc., No. 85-1798, Jurisdictional Statement, at 1.[26] Attesting to the importance of the due process issue, Professor Tribe noted that thirty-one states and the District of Columbia presumptively require a supersedeas bond equal to or greater than the judgment as a condition to a stay of execution pending appeal. See id. at 26.

Professor Tribe's principal argument here (reiterated by Professor Fried) is that the Supreme Court would not have considered Loewen's appeal because the issues Loewen could have presented were "fact-intensive," the "resolution [of which would] perforce offer little or no guidance to future litigants, lower courts, or the nation as a whole." See Tribe Statement at 21-22; Fried Statement at 11-12.[27] Needless to say, this is directly contrary to his argument in Pennzoil.

---

[26] Even in an obligatory appeal, the petitioner must establish there is a "substantial federal question" meriting Supreme Court review. See Kansas Gas And Elec. Co. v. State Corp. Comm'n of Kansas, 481 U.S. 1044 (1981) (Mem.) (dismissing appeal in part because petitioner's jurisdictional statement did not present a substantial federal question). The above-quoted statement presumably was Professor Tribe's (successful) attempt to meet that standard.

[27] Professor Tribe (again joined by Professor Fried) also argues that Loewen would not have been able to obtain a stay pending Supreme Court review. See Tribe Statement at 16-18; Fried Statement at

Professor Tribe's change in position is particularly striking given his sweeping statement in the present case that Loewen would have had a better chance of "winning the lottery and using the proceeds to pay off the O'Keefe judgment than it had of securing Supreme Court review." See Tribe Statement at 19. Respectfully, we submit that Professor Tribe was correct in Pennzoil, when he acknowledged that the very issue Loewen could have presented to the U.S. Supreme Court was not just certworthy, but "of surpassing practical significance" to this nation's courts and litigants.[28]

2. Loewen Could Have Filed A Collateral Action In Federal District Court Challenging The Abuses It Allegedly Suffered At The Hands Of The Mississippi Judicial System.

a. Professor Days' Conclusion

After the Mississippi Supreme Court affirmed the trial court's decision setting a supersedeas bond at $625 million, Loewen's options were not limited to seeking certiorari in the

---

13-14. Professor Tribe made the opposite argument in Pennzoil, contending that, if a state court refused to reduce an appeal bond, "a Circuit Justice [of the Supreme Court] could grant a stay of the judgment pending appeal through the state system and review [in the U.S. Supreme Court]."). See Pennzoil Co. v. Texaco, Inc., No. 85-1798, Jurisdictional Statement at 19; see also id. (noting that such a stay would be an "available remedy" for a judgment debtor).

[28] Professor Tribe's arguments in Pennzoil are inconsistent with other positions Loewen has taken in this proceeding. For example, in Pennzoil, Professor Tribe argued that the Due Process Clause does not guarantee a judgment debtor an affordable bond (as explained above, the Supreme Court did not reach this issue). See Pennzoil Co. v. Texaco, Inc., No. 85-1798, Brief For Appellant at 45-50 (Sept. 5, 1996). Moreover, in another Supreme Court case, TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993), Mr. Tribe argued successfully that a jury's decision to award punitive damages in an amount 526 times greater than compensatory damages did not violate due process. See TXO Production Corp. v. Allied Resources Corp., No. 92-479, Brief of Respondents at 50 (Mar. 3, 1993). Perhaps this is why, after the Mississippi trial verdict, Loewen's chief legal counsel, Peter Hyndman, predicted Professor Tribe would represent Mr. O'Keefe in any appeal on the merits. See TLGI02832 (Memorandum from Peter Hyndman to Wayne Carvill) (dated Nov. 22, 1995) ("Concepts/ideas on appeal generally: . . . [e]xpect Larry Tribe to appear on the other side").

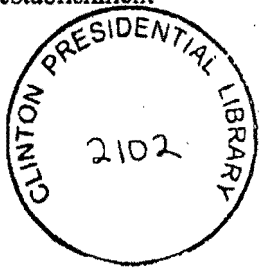
U.S. Supreme Court. As Professor Days explains in his Statement, Loewen had another, equally available alternative: it could have filed a collateral action in federal district court under 42 U.S.C. § 1983, a federal civil rights statute. See Days Statement at 35-39. In an action under Section 1983, Loewen could have presented its allegation that the Mississippi court system discriminated against it based on anti-Canadian bias and prejudice.[29] As relief, Loewen could have sought an order precluding an appeal bond in an amount greater than 125% of the compensatory damages portion of the judgment, which would have allowed Loewen to stay execution pending its appeal of the underlying merits. See id.

Professors Tribe and Fried do not disagree that Loewen could have stated a claim under Section 1983 (although they do not identify what Loewen's claim would have been). Instead, they contend a federal court would have declined to entertain Loewen's claim under three doctrines requiring that federal courts, in certain circumstances, defer to state proceedings and decisions rendered by state judges. See Tribe Statement at 5-16 (discussing the Full Faith and Credit Act, the Rooker/Feldman doctrine, and the Younger abstention doctrine); Fried Statement at 19-24 (same). Indeed, Professor Tribe goes so far as to say that, if Loewen had filed a Section 1983 action in federal court, it would have been subject to judicial sanctions under Rule 11 of the Federal Rules of Civil Procedure (the rules governing federal court practice).[30] See Tribe Statement at 13; cf. Fried Statement at 15 ("[t]he prospect of relief from a federal district court

---

[29] As we explained supra n.--, Loewen could not have presented this claim to the U.S. Supreme Court because it did not raise the point in the Mississippi proceedings.

[30] Rule 11 requires, among other things, that every claim be "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." See Fed. R. Civ. P. 11(b)(2).



was entirely far-fetched").

The problem with this analysis is that Loewen's experts fail to discuss, or even acknowledge, the serious allegations Loewen makes in this proceeding concerning discrimination it allegedly suffered at the hands of the Mississippi judiciary, allegations that go to the very heart of Loewen's NAFTA claims. For example, Loewen alleges, through the sworn affidavit of Richard Neely, that the Mississippi Supreme Court "wilful[ly] and deliberate[ly]" forced Loewen "into an extorted settlement," Neely Aff. at 16, "because of its Canadian citizenship." Id. at 17 (emphasis added). In a similar vein, Loewen alleges that the Mississippi judiciary "treated Loewen less favorably than it treats United States or Mississippi defendants 'in like circumstances'"; Loewen's Memorial at ¶ 171; "committed substantive and procedural denials of justice"; id. at ¶ 174; "violated [] antidiscrimination principles"; id. at ¶ 172; and "failed to provide 'fair and equitable' treatment to Loewen . . . [because the Mississippi courts] violated fundamental principles of fairness, equity and natural justice." Id. at ¶ 222.

Professors Tribe and Fried contend that, if Loewen had merely alleged that the state courts committed legal error in adjudicating Loewen's claims, then its request for federal relief would have been barred by one or more of the doctrines they cite. See Tribe Statement at 5-16; Fried Statement at 19-24. Even assuming, however, that Loewen's experts are correct, they miss the point. Loewen has alleged an injury independent and distinct from the merits of the O'Keefe lawsuit (or the decisions rendered therein). According to Loewen, the Mississippi judiciary, as a whole, intentionally and willfully discriminated against it because of anti-Canadian bias. See, e.g., Neely Aff. at 16-17. As Professor Days explains, none of the doctrines cited by Loewen's experts would have applied on these facts, for each contains an exception — and with good reason

— to allow federal courts to address the very types of civil rights abuses Loewen says it suffered here. See Days Statement at 39-52 (explaining why the Full Faith and Credit Act, Rooker/Feldman, and Younger abstention would not have barred Loewen from bringing its claims of state-court discrimination in federal court). Ignoring these facts, Loewen's experts inaccurately portray the availability of collateral relief.

b. At The Time Of The Underlying Events, Loewen Acknowledged That Collateral Federal Review Was A Viable Option

As in the certiorari context, see supra pp.--, Loewen's statements at the time of the underlying events show that it viewed collateral attack in federal court action as a realistic and practical option, not a sanctionable one. Immediately following the jury's verdict, Loewen's principal Mississippi counsel, James L. Robertson (a former Justice of the Mississippi Supreme Court), wrote an extensive memorandum to Ray Loewen, outlining the options facing the company. In discussing the bond issue, Mr. Robertson stated:

> In the event we secure no meaningful relief from the 125 percent of judgment supersedeas bond requirement in the Supreme Court of Mississippi, we could then apply to the United States District Court for the Southern District of Mississippi for an injunction staying enforcement of the Judgment pending the appeal [on the merits] to the Supreme Court of Mississippi. . . . I would expect the District Court would grant us an immediate hearing on an application for a temporary restraining order and/or a preliminary injunction if the Plaintiffs were threatening immediate attachment or other process of Loewen assets in Mississippi.

See TLGI02179, Letter from James L. Robertson to Ray Loewen at 5 (Nov. 5, 1995).[31]

---

[31] In his letter, Mr. Robertson did not discuss whether Loewen could have sought collateral relief on grounds that the Mississippi trial court discriminated against it (the letter was written before the proceedings in the Mississippi Supreme Court). To the extent Mr. Robertson believed Loewen could have mounted a collateral attack on its due process claim, his conclusion is directly contrary to the conclusions of Professors Tribe and Fried.

These statements do not stand alone. An undated handwritten note produced in discovery states that Loewen could "apply to U.S. District Court" if the Supreme Court of Mississippi denied it relief from the bonding requirement. See TLGI03847. Another handwritten note appears to put Loewen's chance of prevailing in federal court at 30%. See TLGI02764 (dated Nov. 16). Moreover, in its November 1995 10-Q filing, Loewen stated it could (and would if necessary) seek review in "the federal courts, to have the size of the bond reduced." A1846 (10-Q filing) (Nov. 15, 1995); see also id. at A1858; accord A1230 (transcript of conference call) (Nov. 7, 1995) (Loewen informing investors that "[w]e could also go to federal appeals to get a stay"). To the extent Loewen was referring to a collateral action, see supra n.8, the statement in its SEC filing would have been particularly egregious, given Loewen's current position that such an action would have been frivolous. See Tribe Statement at 5.

Loewen's desire to seek relief in federal district court apparently led to at least some form of concrete action. Two weeks before the Mississippi Supreme Court ruled, Robert Wienke, Loewen's general counsel, informed Don Ayers that "we must fully consider an action in Covington based upon both State and Federal constitutional issues over the 'reasonableness' of the bonding of the punitive damage award." See TLGI03366 (Letter from Robert O. Wienke to Donald B. Ayers) (Jan. 11, 1996).[32] Mr. Wienke continued:

> We were prepared to proceed with such a filing and Jeff Cowper was also prepared to file a similar challenge in British Columbia. Jeff Cowper and I felt that there was a possibility of success, and while the results could not be assured, the consequences of a Chapter 11 filing I believe clearly warranted the effort.

---

[32] The reference to "Covington" presumably is to Covington, Kentucky, where Loewen's principal United States subsidiary is headquartered.

> Moreover, the filing of separate actions in Covington and Vancouver can provide a tactical advantage. This would require plaintiffs [sic] contingent fee counsel to litigate in far reaching and unfriendly forums on multiple fronts.

See id. (emphasis added).[33]

In January 1996, when it was seeking to overturn the O'Keefe verdict, Loewen and its lawyers were prepared to file (and so indicated in SEC submissions) a non-frivolous action in federal court challenging the "reasonableness" of the bond requirement. Now, four years later, after Loewen decided to settle the case and seek damages from the United States, Loewen and its experts say to have done so would have been frivolous.[34] Like many of Loewen's changes in position, we respectfully submit that it was right the first time. For all of the above reasons, Loewen plainly had a reasonable opportunity to present its claims to either the United States Supreme Court or a federal district court. Its claim to the contrary here lacks merit, and should be rejected.

B. Loewen Could Have Proceeded With The Appeal Under the Protection of the Reorganization Provisions (Chapter 11) of the U.S. Bankruptcy Code

As Loewen is well aware, Chapter 11 of the United States Bankruptcy Code (Business Reorganization) provides a powerful tool for companies seeking to avoid the posting of

---

[33] Despite the clear implication that Loewen's attorneys had drafted a federal court complaint, Loewen has not produced any such document in discovery. Instead, Loewen has produced what appears to be an internal memorandum discussing the "hurdles" to seeking district court relief, presumably to bolster its claim in this proceeding that a collateral action was not available. See TLGI02754-TLGI02760 (undated). This memorandum does not conclude that a federal action would necessarily have been unsuccessful. See id. at TLGI02754. Moreover, like Professors Tribe and Fried, the memorandum does not discuss whether Loewen could have pursued a federal action based on its allegation that the state judicial proceedings themselves were discriminatory.

[34] It should be noted that Loewen's experts make no mention of having seen any of these documents when they rendered their opinions in this case.

supersedeas bonds to appeal adverse judgments in certain circumstances. The filing of a Chapter 11 proceeding automatically and immediately stays all efforts of creditors, including judgment creditors, to initiate or continue any effort to collect assets from the judgment debtor's estate. 11 U.S.C. § 362(a). Countless companies in the United States have successfully invoked Chapter 11 protection as a means of staying execution of an adverse judgment pending appeal where, as is alleged here, the posting of a supersedeas bond would have been financially ruinous for the company.

If, as Loewen claims, posting the full supersedeas bond in Mississippi would have been "devastating" for the company, Loewen certainly could have petitioned for relief under Chapter 11. In so doing, Loewen would have obtained an automatic stay of execution of the Mississippi judgment (the very aim of the supersedeas bond, but without the high cost of financing such a bond) and would have been free to pursue an appeal of the Mississippi judgment while under Chapter 11 protection. See 11 U.S.C. § 362. Contrary to Loewen's unfounded description of the Chapter 11 alternative as "catastrophic," a Chapter 11 filing in January 1996 "would have afforded Loewen the opportunity to prosecute its appeal in the Mississippi Supreme Court without the necessity of satisfying the supersedeas bond requirement and to continue to conduct its businesses in the ordinary course with little or no disruption during the Chapter 11 proceedings." [Trost Aff.]

Perhaps the best known example of such a strategic use of Chapter 11 is the case of Pennzoil v. Texaco, in which a Texas jury, on _____ __, 198_, awarded a judgment against Texaco in the amount of $11 billion, by far the largest judgment in history at the time. To stay execution of the judgment, under Texas law, Texaco would have had to post a supersedeas bond

in excess of $13 billion, more than twenty times the amount of the bond required of Loewen. Texaco attempted to have the bond requirement waived, arguing -- as Loewen does here -- that the full bond would have devastated the company financially.

The case proceeded to the United States Supreme Court, in which Loewen's own expert in this arbitration, Professor Laurence Tribe, argued that the economic threat imposed by such a large bond requirement was "neither as drastic nor as irreversible" as claimed, given that Chapter 11 bankruptcy protection was a viable means of staying execution of the judgment pending appeal. Pennzoil Co. v. Texaco, Inc., No. 85-1798, Reply Brief for Appellant, pp. 18-19, dated _____, 1986 (L. Tribe, author). Although the Court disposed of the case on other grounds, two Justices endorsed Professor Tribe's view:

> Texaco clearly could exercise its right to appeal in order to protect its corporate interests even if it were forced to file for bankruptcy under Chapter 11. Texaco . . . could go forward with the appeal, and if it did prevail on its appeal in Texas courts, the bankruptcy proceedings could be terminated. Texaco simply fails to show how the initiation of corporate reorganization activities would prevent it from obtaining meaningful appellate review.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 22 (1987) (Brennan J. and Marshall J., concurring) (citations omitted).

Thus unable to avoid the full bonding requirement, Texaco filed for Chapter 11 protection, with great success. The filing immediately stayed execution of the trial court judgment and allowed Texaco to continue with its appeal without having to post a bond. Moreover, because Chapter 11 allows existing management to remain in control of the company, Texaco experienced virtually no disruption of its on-going business while it proceeded with its appeal under Chapter 11 protection. With the significant new leverage that Chapter 11 afforded the company with

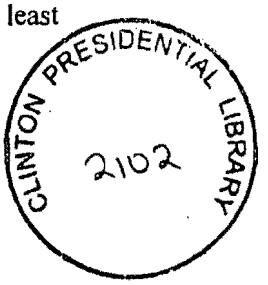
respect to Pennzoil, Texaco was able to negotiate a favorable settlement of the litigation and emerge from Chapter 11 an even stronger company than it had been before the verdict. [H. Miller Aff.]

It is beyond dispute that Loewen, like Texaco, could have filed for Chapter 11 protection and pursued its appeal of the trial court judgment without having to post a supersedeas bond. Indeed, Loewen retained the very same counsel that represented Texaco in its Chapter 11 proceeding precisely to pursue such remedies in this case. See [Harvey Miller aff.]. However, despite receiving advice from Texaco's former counsel that Chapter 11 was a reasonable and effective option for The Loewen Group, the company elected not to file for Chapter 11 protection, choosing instead to settle the O'Keefe litigation. [Id.]

Tellingly, Loewen says little in its memorial on this point, asserting (without support) only that bankruptcy "would have terminated the successful acquisition strategy that . . . was 'the key to maintaining [the company's] credibility,'" and that "reestablishing its reputation as a solid, well-managed growth company" after filing for bankruptcy protection "would [have been] extraordinarily difficult." TLGI Mem. p.55 ¶137. As we explain below, and as Loewen's own counsel advised at the time, neither of these excuses has any merit. Indeed, strong evidence suggests that these professed concerns are merely pretext and that Loewen's decision to ignore the advice of its counsel and forego Chapter 11 protection was made on the basis of illegitimate personal interests rather than sound business judgment.

1. A Chapter 11 Filing Would Not Have Adversely Affected the Loewen Group's Reputation

Both TLGI and Ray Loewen contend that Chapter 11 protection was "by far the least

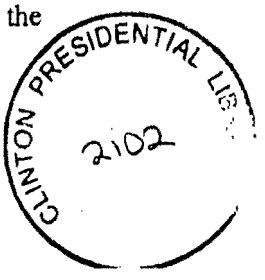


desirable option" because, they claim, bankruptcy would have irreparably damaged The Loewen Group's reputation as a well-managed company. See TGLI Mem. at 55; Ray Loewen Mem. at 36-37 (arguing that bankruptcy would have "injur[ed] its reputation and ability to obtain financing such that it would never recover."). This professed concern had no merit at the time The Loewen Group chose to enter into the settlement, nor does it now.

As explained in detail in the attached affidavit of Professor Elizabeth Warren of the Harvard Law School, "Chapter 11 protection is well established as simply another aspect of ordinary commercial life [in the United States] that bears no inherent stigma." [Warren Aff.] Because Loewen would have filed Chapter 11 for the sole purpose of staying execution of the O'Keefe judgment pending appeal -- an appeal it believed it was virtually certain to win -- "no reputational harm [would have been] caused by the mere fact of the Chapter 11 filing." Id.

To the contrary, as Professor Warren explains, "Chapter 11 is so integral a part of ordinary business planning that a filing under such circumstances would likely be viewed as a sound and responsible business decision." Id. In fact, Loewen is currently operating under Chapter 11 protection (under circumstances far more dire than would have existed in a January 1996 proceeding) and is regularly assuring the public that the company "will re-emerge from the reorganization a stronger business poised for long-term growth." [Loewen 11/1/99 press release; 6/1/99 press release].

In stark contrast to the company's current Chapter 11 proceeding, a filing by The Loewen Group in January 1996 would have been a relatively simple matter with minimal or no disruption to the company's overall operations. As explained in the attached declaration of J. Ronald Trost, Esq., Chapter 11 does not require a company's subsidiaries or affiliates to file along with the



company itself. [Trost Aff.]. As a result, Loewen could have fully avoid execution of the O'Keefe judgment merely by filing for Chapter 11 only on behalf of the four Loewen defendants in the lawsuit. Therefore, "none of Loewen's remaining corporate subsidiaries and affiliates (of which, in 1996, there were more than [____]) would have been required to commence bankruptcy proceedings and each of them could have continued operating their businesses without any interruption, interference or meaningful involvement with the ongoing bankruptcy proceedings." [Trost Aff.]. Loewen's own documents make clear that this was precisely the approach that the company contemplated at the time. [TLGI2964-3132, 3167-3299].

Moreover, in addition to obtaining a bond-free stay of execution of the O'Keefe judgment pending appeal, a Chapter 11 filing on behalf of only the O'Keefe defendants would have conferred significant commercial benefits on Loewen that companies do not have outside of Chapter 11. For example, because Chapter 11 empowers companies to reject executory contracts and unexpired leases, a Chapter 11 filing would have given Loewen the opportunity to reconsider all of its contracts to determine whether, in fact, they "made sense in the context of Loewen's business plan going forward and, if not, to reject the contracts." [Trost Aff.]. Such enhanced powers would have made a Chapter 11 filing all the more sensible in the eyes of the business community. See, e.g., R. Nutt, Loewen's Best Bet Bankruptcy, Prof. Says, Southam Package 1/26/96 [A1490]. Indeed, given the disastrous consequences that Loewen's aggressive acquisition binge ultimately caused the company, the opportunity for Loewen to pause and reconsider its acquisitions under Chapter 11 protection would have been preferable to the course actually chosen.

Given the relative simplicity of the Chapter 11 filing that Loewen would have made in

January 1996, as well as the clear benefits such a filing would have afforded the company, there is no basis for the claim that the mere fact of a Chapter 11 filing would have harmed the company's reputation or its ongoing business operations. Indeed, as even Loewen's own bankruptcy counsel opines, "it is possible that a Chapter 11 filing [and a subsequent, bond-free appeal] would have improved Loewen's position in the capital and equity markets, given that those markets were already assuming that the Company was preparing to post a large supersedeas bond" that would have imposed "significant financial constraints" on the company. [A. Miller aff.]. Loewen's professed concern over the harm of a Chapter 11 filing on its business reputation is thus entirely unfounded. [Trost & Miller Affs.]

2. Chapter 11 Protection Would Not Have Materially Affected Loewen's Acquisition Program, Which Program, In Any Event, Cannot Justify The Decision to Forego Chapter 11 Protection

Claimants also contend that Chapter 11 was not a reasonable alternative to the settlement because "bankruptcy would have terminated the successful acquisition strategy" that was "the key to maintaining [the company's] credibility." TLGI Mem. at 55. Even if this professed concern were sincere (and, as discussed below, it likely is not), it is wholly unfounded and, in any event, cannot justify Loewen's decision to forego its appeal of the O'Keefe judgment under the protection of Chapter 11.

Loewen is simply incorrect that a Chapter 11 filing would have "terminated" the company's acquisition program, and was so advised at the time. As explained in the attached declaration of J. Ronald Trost, Chapter 11 allows the existing management of a debtor to remain in control of the company and to obtain "debtor in possession" financing to fund its ongoing operations. [Trost Aff.]. Loewen's own bankruptcy counsel advised the company that it was "an

extremely attractive candidate to receive a large amount of debtor-in-possession financing that would have supported much, if not all, of Loewen's projected acquisitions during the Chapter 11 process." [A. Miller aff.]. In addition to such financing, Loewen's principal financial advisors believed that the company could have supported its acquisition program with further equity issuances, as "a market would have existed for Loewen equity at that time, even if the company were under Chapter 11 protection . . . ." Id.

Moreover, Loewen's counsel drafted and were prepared to file a motion with the bankruptcy court seeking confirmation of the company's authority to conduct acquisitions in the ordinary course of business, without the need for further court approval. See [TLGI3796]. Loewen's counsel advised the company that such a motion was highly likely to succeed, and that "any effect of a Chapter 11 filing on the company's acquisition program would likely have been modest, at most." [A. Miller aff.]. It cannot seriously be disputed, therefore, that "Loewen could have continued to perform under all aspects of its business plan -- including its acquisition program -- during the pendency of a 1996 bankruptcy proceeding." [Trost Aff.]

In any event, even if a Chapter 11 filing would have restricted Loewen's ability to acquire death-care properties, such a result cannot excuse the company's decision to forego Chapter 11 protection. It is now common-knowledge that The Loewen Group's acquisition strategy was fundamentally flawed, overly aggressive, and the cause of the company's ultimate financial decline. See, e.g., P. Kennedy, Loewen to Seek Approval to Sell 24 Per Cent of its Operations, Globe & Mail 12/16/99 at B3 ("Under former chairman and founder Ray Loewen, the funeral giant got into financial difficulty by growing too quickly."); Loewen Gets Nod for Plan to Sell Assets, Reuters 1/24/00 ("Loewen, a one-time darling of investors, collapsed last year under the

weight of the $2.3 billion debt it built up under what its management now admits was an overly aggressive expansion policy in the mid-1990s."); R. Fields, Grim Time for Funeral Firms L.A. Times 10/24/99 C1 ("'Ray Loewen bought up every cemetery, funeral home and crematory he could,' said Jon Kyle Cartwright, an analyst with Raymond James & Associates. 'All too often, they paid more than they were worth.'"); id. (financial crisis in death-care industry was primarily the result of "unbridled spending."); T. Hirschmann, Death's No Sure Thing, Nat'l Post 10/9/99 C1 ("[T]he free-spending attitude was the root of the problem, say analysts.").[25]

Indeed, even Loewen's own management now concedes that "[t]he main reason for the weak performance has been the Company's aggressive acquisition strategy in recent years . . . ." [Loewen 10/5/98 Press Release]; see also TLGI 1998 Annual Report ("[W]e underestimated the issues associated with such rapid growth, particularly in the cemetery division."). Contrary to Loewen's claim, therefore, any effect that Chapter 11 allegedly could have had on the company's acquisition program was no reason to forego Chapter 11 protection. To the contrary, the acceptance of such restrictions -- even assuming that they would have been imposed -- would have been far more prudent than the course ultimately chosen by the company. See, e.g., [H. Miller aff; A. Miller aff.]; J. Baer, Death Care in the Doldrums, Globe & Mail 10/4/99 B4 ("In the long run, death care companies will recover by cooling on acquisitions . . . ."). Loewen thus cannot advance any credible justification for its claim that Chapter 11 protection was not a reasonable means by which it could have continued its appeal of the O'Keefe judgment.

---

[25]See also B. Milner, The Dying Game, Globe & Mail 6/5/99 B3 ("After expanding far beyond its financial means, Burnaby, B.C.-based Loewen was forced to squeeze ever-higher returns from former family-owned firms as it struggled to stay afloat in a sea of debt.").

3. Strong Evidence Suggests That The Decision To Forego Chapter 11 Protection Was Based On Personal Interests Rather Than Sound Business Judgment

Given that Chapter 11 was so plainly a viable option for The Loewen Group to continue its appeal of the O'Keefe judgment, Loewen's current account of its options following the Mississippi Supreme Court's bond decision reveals a curious illogic. On the one hand, Loewen claims that it could have posted the supersedeas bond only at a "ruinous cost" and that the financing for a bond "would have almost certainly curtailed, or even terminated, Loewen's acquisition strategy." TLGI Mem. at 59. On the other hand, Loewen argues that attempting to post the bond was nevertheless the "preferred option" over a Chapter 11 filing, even though, as explained above, a Chapter 11 filing would have avoided the "ruinous cost" of posting the bond and would have enabled the company to pursue its appeal without any material affect on its acquisition program. TLGI Mem. at 55.

This illogic can best be explained by the fact that Loewen's decision to forego the Chapter 11 option was ultimately not based on concerns over the acquisition program at all, but instead was based on Ray Loewen's personal interests, which he promoted at the expense of the company and its shareholders.[39] As explained in the attached declaration of Alan B. Miller, Esq., one of Loewen's bankruptcy counsel at the time, Ray Loewen was concerned that a Chapter 11 filing would threaten his own personal equity stake in the company, which he had earlier pledged to banks in exchange for a loan [to purchase the yacht? confirm with saltzman]. [A. Miller aff.].

---

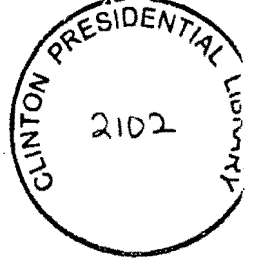
[39] "[T]he Loewen board was long on clergymen and short of business people. The directors, one former insider said, 'were absolutely in the palm of Ray's hand.'" J. Schreiner, "In the Palm of Ray's Hand," Fin. Post (June 2, 1999) C4.

As The Loewen Group's then-Director of Finance explained to Mr. Miller on December 18, 1995, Ray Loewen had pledged his personal shares on a "margin call" basis, according to which the lenders could seize and sell Mr. Loewen's shares if the price of the company's stock fell below $20 per share. Because the stock was then trading in the low $20s per share, Mr. Loewen did not want to risk any further drop in the stock price that a filing for Chapter 11 might cause, as "[Ray] Loewen's equity stake would be grabbed by the lenders that hold it in pledge and he would be wiped out." [A. Miller aff.]. Mr. Miller advised that, while he "understood the problem for Ray Loewen," it was his view that "the Company should continue to be able to file a chapter 11 case . . . ." [A. Miller aff.]. Notwithstanding this advice, The Loewen Group's Director of Finance expressed doubt that "the company would file for Chapter 11 under any circumstances, . . . even if it means giving a lien on every asset of the Company to the . . . [prospective bond] lenders and being unable to expand further." [A. Miller aff.] (emphasis added).

This evidence of a blatant conflict of interest demonstrates that The Loewen Group's professed concern over the company's acquisition program is mere pretext. Indeed, as this evidence makes clear, the company was willing to halt all further expansion as a means of preserving Ray Loewen's own equity interests, even at the ultimate expense of the company itself.[37] Therefore, whatever effect a Chapter 11 filing would have had on the company's acquisition program (and, as the foregoing makes clear, it would not have had an adverse effect), Loewen's professed concern over the acquisition program cannot support a finding that the

---

[37]This evidence also casts serious doubt on the sincerity of Ray Loewen's professed concern for the well-being of the company's shareholders and his alleged "fiduciary" and "moral" duties to "keep the company alive and out of bankruptcy . . . ." RLL Mem. at 37.



decision to forego an appeal of the O'Keefe judgment under Chapter 11 protection was made under duress.

C. Loewen Could Have Continued With Its Appeal Without Posting A Supersedeas Bond

Even assuming, arguendo, Loewen could not have obtained an appeal with supersedeas, it had one additional option: an unbonded appeal. While perhaps the least attractive of the options available to it, an unbonded appeal was, nevertheless, a reasonable course that could have enabled Loewen to appeal the underlying verdict to the Mississippi Supreme Court.[38] Indeed, strong evidence suggests that even Loewen does not believe its own claim, advanced here, that an unbonded appeal "would have, quite literally, destroyed the company . . . ." TLGI Mem. at 54.

Trial court judgments are not self-executing. Under Mississippi law, to execute on a judgment the judgment creditor must first enroll the judgment in every county in which the judgment debtor has property (except for the county in which the trial occurred, where the judgment is enrolled automatically). See Miss. Code Ann. § 11-7-195. Once enrolled, the Circuit Clerk for the county can issue a writ of execution for property located therein, executable by the County Sheriff. See id. § 13-3-111. A creditor seeking to execute before appeals have been exhausted, however, does so at his peril: if the lower court judgment is reversed, the defendant has "the right to be restored to whatever has been taken from him under stress or compulsion of process before the reversal, whether it be money or property." Hall v. Wells, 54 Miss. 289, 306

[38]Loewen estimated that an appeal to the Mississippi Supreme Court on the merits of the case would have taken "one to two years." See A1229 (conference call transcript). Loewen also recognized, however, that it could have moved to expedite the appeal process pursuant to court rule. See TLGI02181 (Letter from James L. Robertson to Ray Loewen) (Nov. 5, 1995) (noting that, because "the amount of the Judgment is so extraordinary," the court "may" expedite appeal).

(Miss. 1877).

If the defendant has property outside the State of Mississippi, the judgment creditor can seek execution under the Uniform Enforcement of Foreign Judgments Act ("UEFJA").[39] See UEFJA, 13 Uniform Laws, § 1. As a general matter, the UEFJA authorizes a judgment creditor to enroll a judgment in a foreign state and, after a designated period of time (during which the creditor must provide notice to the judgment debtor), execute on the judgment as if it had been rendered in the foreign state's courts. See id. §§ 2, 3. Importantly, however, the judgment is subject to attack in the foreign state on grounds that it is not entitled to full faith and credit under the Full Faith and Credit Act. See id. § 1. Moreover, the judgment debtor can seek a stay of execution in the foreign state (pending collateral attack in that state or appeal in the rendering state), even if the rendering state's courts have declined to stay execution. See id. § 4(b).[40]

These rules would have given Loewen a number of opportunities to stave off execution pending its appeal of the underlying verdict (which Loewen thought it was sure to win). See, e.g., TLGI02789 (Letter from James L. Robertson and others to Ray Loewen) (Nov. 3, 1995) (estimating 90% chance of prevailing on a merits appeal). Loewen had a relatively small portion of its total assets in Mississippi. See TLGI03819-TLGI03820 (Letter from David W. Clark to William Stewart (Dec. 27, 1995) (estimating the value of Loewen assets in Mississippi subject to

---

[39]The UEFJA has been adopted in 47 states (including Mississippi) and the District of Columbia. [cite]

[40] Moreover, even where a bond is required, a judgment debtor can request that any bond be limited to the value of debtor assets located within the foreign state. See, e.g., Waters v. Aquatic Sensors Corp., 633 So.2d 475, 477 (Fla. App. 1st Dist. 1994) (intimating that such a procedure is appropriate).

execution at $5,100,060). The overwhelming majority of its assets were located in other states throughout the United States and in Canada.[41]

For assets located outside Mississippi (the bulk of its holdings), Loewen could have challenged any execution attempt under the Full Faith and Credit Act. As Professor Days has explained, in light of its allegations that the Mississippi proceedings were themselves discriminatory, Loewen could have argued that the jury's verdict should not be granted preclusive effect. See Days Statement at 39-41. Moreover, in any foreign state, Loewen could have sought a stay of execution under § 4(b) of the UEFJA, presenting the very arguments it claims were wrongly and unreasonably rejected by the Mississippi courts. See UEFJA, § 4(b).

Indeed, at the time of the underlying events, Loewen was actively considering whether it could challenge any attempt by O'Keefe to execute outside of Mississippi. See TLGI03366 (Letter from Robert O. Wienke to Donald B. Ayer) (Jan. 11, 1996) ("we also may want to consider whether there is any basis for attacking on independent grounds any judgment liens which may have been filed outside of Mississippi"). Loewen was keenly aware that O'Keefe's counsel would have neither the time nor the resources to litigate in courts around the country. See id. (noting that filing actions outside Mississippi would "require plaintiff's contingent fee counsel to litigate in far reaching and unfriendly forms [sic] on multiple fronts"); see also TLGI02293

---

[41]One of Loewen's lawyers described its corporate structure as follows: "The Loewen Group Inc. (TLGI) owns (either directly or indirectly) all of the shares of its American holding company, Loewen Group International Inc. (LGII). LGII, in turn, owns all of the stock of approximately 500 operating subsidiaries in the United States, which subsidiaries make up approximately 90 [percent] of the value of TLGI." See TLGI03771 (Memorandum from Donald B. Ayer to various addressees) (Dec. 8, 1995) (page 2). Loewen had only one operating subsidiary in Mississippi, Reimann Holdings Inc., which in turn owned a number of funeral homes, including the Wright & Ferguson Funeral Home.

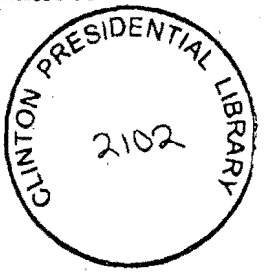
("Summary re Plaintiff's Ability to Lien Assets") (undated) ("It is very unlikely that [plaintiff will register the judgment in other states] . . . given the paper work required to have the judgment enrolled . . . ."). Similarly, Loewen was aware that O'Keefe's potential liability for premature attachment before the conclusion of appeals was a strong disincentive to attachment and that, as a result, O'Keefe was highly unlikely to pursue attachment to any meaningful degree. See _____.

Loewen also was poised to challenge (or at least delay) execution even in Mississippi. See (Memorandum from Peter Hyndman to Wynne Carvill) (Nov. 22, 1995) (undated) (stating that Loewen must "[b]e fully up to speed on the Mississippi attachment process [plaintiff's counsel] is required to follow, with plans to roadblock his actions"); id. ("[c]onsider having (discretely) advisors 'on site' to assist our funeral home managers in dealing with any attempt at unlawful attachment"); TLGI00556 (handwritten notes) (undated) (noting that attachment "takes a long time"); cf. TLGI03335 (Letter from James L. Robertson to Ray Loewen) (Nov. 21, 1995) (page 7) ("[w]e need to continue serious foot dragging on settlement discussions"). Indeed, given the risk of reversal (which Loewen placed at 90%), O'Keefe presumably would have been reluctant to execute even on Loewen's Mississippi assets pending appeal.[42]

For all of these reasons, therefore, even assuming Loewen could not have obtained an appeal with supersedeas, it could have pursued an unbonded appeal and likely avoided execution on at least the vast majority (if not all) of its assets pending merits review by the Mississippi Supreme Court.

---

[42] O'Keefe could have preserved its interest in any Mississippi property simply by enrolling the judgment in counties where Loewen had assets. See Miss. Code. Ann. § 11-7-191 ("A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled . . . .").



* * * * *

In sum, Loewen is simply incorrect in claiming that it had no choice but to enter into the settlement. To the contrary, several reasonable and viable alternatives existed by which Loewen could have appealed the trial court judgment, and Loewen was advised by its counsel of these alternatives at the time. The advice of Loewen's counsel makes clear that the position Loewen advances in this proceeding -- indeed, Loewen's entire claim -- is obviously an afterthought. When the tactics it chose for business reasons proved to be unsuccessful, Loewen simply decided to reverse the positions it had asserted at the time of the Mississippi proceedings and to seek to hold the United States liable under the NAFTA for the company's own tactical mistakes.

The NAFTA, however, cannot be used to such ends. Even if Loewen could somehow attribute its injuries to the judgments of the Mississippi courts, those judgments were rendered only by inferior courts and were still capable of further appeal. Because only judgments rendered by the highest available court could constitute a "measure adopted or maintained" for purposes of NAFTA Chapter 11, Loewen's alleged injuries could not have been caused by any "measure" adopted or maintained by the United States. Accordingly, this Tribunal lacks competence to hear Loewen's claim of injury from the Mississippi judgments.

IV. THE CLAIM IS NOT ARBITRABLE BECAUSE LOEWEN NEVER NOTIFIED OR OTHERWISE GAVE THE UNITED STATES AN OPPORTUNITY, THROUGH ITS COURTS, TO CURE THE ALLEGED VIOLATIONS BEFORE IT ELECTED TO SETTLE THE MISSISSIPPI LITIGATION

Claimants do not dispute that they made no effort to notify the United States government of the alleged misdeeds of the Mississippi judiciary before they entered into their binding agreement to pay the O'Keefe plaintiffs. See, e.g., TLGI Mem. at 146. Instead, claimants merely

contend that their failure to provide notice is "irrelevant" because, they argue, "[n]othing in NAFTA requires a Chapter 11 claimant to have provided such notice." Claimants' Response to Interrogatory 3, dated Aug. 26, 1999. This contention is contrary to both the NAFTA and customary international law.

It has long been held that a "government must have had notice or been notified of the injury before it could be made responsible" under international law. E. Borchard, Diplomatic Protection of Citizens Abroad 191 (1915). Chapter 11 of the NAFTA reflects this principle in Article 1101, which limits the liability of the Parties only to "measures adopted or maintained" by the federal governments. The phrase "adopted or maintained" plainly requires some act of initiation or ratification by the federal government -- whether by some affirmative act or knowing omission -- before liability may be found under NAFTA Chapter 11. Where, as here, the United States is given no notice of a "measure" that allegedly violates the NAFTA, it simply cannot be found to have "adopted or maintained" that measure. See, e.g., J.S. Borek, *Other State Responsibility Issues*, The Iran-United States Claims Tribunal: Its Contribution to the Law of State Responsibility 317 (1998) ("[I]n both domestic and international law, the respondent cannot be responsible without having taken some action or failed to act in some way which resulted in the harm.").

Although Loewen contends that the United States is strictly liable for the actions of its constituent states regardless of whether it has notice of those actions, the NAFTA plainly provides otherwise. NAFTA Article 105 limits the federal government's obligations with respect to actions of state and local governments only to "ensuring that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as

otherwise provided in this Agreement, by state and provincial governments." Although a stricter standard of liability was proposed and considered by the NAFTA's drafters, such a standard was rejected. See Article 102(3), NAFTA Draft Dec. 31, 1991 ("The provisions of this Agreement shall have binding application and shall be observed by state, provincial and local governments . . ."). See also Restatement (Third) of Foreign Relations Law § 207 (a federal government may limit its responsibility for actions of subsidiary governments through use of a "federal-state clause" in international agreements).

Here, the United States has unquestionably met its Article 105 obligation to "ensure[] that all necessary measures" were taken to give effect to the NAFTA's provisions. In particular, the United States ensured that several effective federal venues -- including the U.S. Supreme Court, U.S. District Court and U.S. Bankruptcy Court -- were open and available for Loewen to seek redress for each of the NAFTA violations that it alleges in this case. See supra at [ ].

Indeed, Loewen is merely seeking to vindicate in this forum rights that are fully protected under U.S. law and could have been asserted in U.S. courts had Loewen proceeded with its appeal of the Mississippi judgments. Just as NAFTA Chapter 11 protects aliens against discrimination (Article 1102), ensures a minimum standard of "fair and equitable" treatment (Article 1105), and proscribes uncompensated expropriations, (Article 1110), the United States Constitution guarantees aliens "equal protection" and "due process under the law" in state proceedings (U.S. Const. Amend. XIV), and prohibits states from taking property without just compensation. (Id.). Loewen itself argues that the Mississippi judgments are objectionable, in part, because they allegedly violated these U.S. constitutional guarantees. See, e.g., TLGI Mem. at 70-71; id. at 83-86. Because Loewen elected not to avail itself of these federal protections or

otherwise to give the United States any opportunity to cure the alleged violations through its courts, the United States cannot be held liable for claimants' alleged injuries under the NAFTA.

V. THE MISSISSIPPI COURT'S ALLEGED FAILURE TO PROTECT AGAINST THE ALLEGED REFERENCES TO ALIENAGE, RACE AND CLASS CANNOT BE A "MEASURE" BECAUSE LOEWEN NEVER ASKED THE COURT TO ACT UNTIL AFTER THE VERDICT

Although claimants now contend that the underlying trial was "infected by appeals to the jury's alleged anti-Canadian, racial and class biases," neither claimants nor their lawyers ever objected on such grounds at any point before the jury rendered its verdict, nor did they argue to the court until after the verdict -- as claimants do now -- that a specific jury instruction was needed "to address the heightened risk of improper nationality-based, racial, and class bias." As a result, claimants cannot establish that the Mississippi trial court's alleged failure to prevent the opposing party's attorneys from making inflammatory remarks constitutes a government "measure" for purposes of the NAFTA.

As noted above, NAFTA Chapter 11 applies only to "measures adopted or maintained" by a NAFTA Party. The term "measure," in turn, is defined to include any "law, regulation, procedure, requirement or practice." NAFTA Article 201(1). Setting aside whether judicial inaction (as opposed to an affirmative judicial decision) could ever satisfy this definition, judicial inaction plainly cannot be a "measure" where, as here, the court was never asked to act in the first place.

Mississippi, like most jurisdictions in the world's developed legal systems, adopts a "contemporaneous objection rule," which provides that an objection "must be made contemporaneously with the allegedly improper utterance" or else it is waived. Ivy v. General

Motors Acceptance Corp., 612 So.2d 1108, 1114 (Miss. 1992). See also Vakuta v. Kelly (Austl. 1989) 167 C.L.R. 568 ("By standing by, such a party has waived the right to object"); [cites from other countries]. The reasons for this rule are obvious: "In such a case, if clear objection had been taken to the comments at the time when they were made or the judge had then been asked to refrain from further hearing the matter, the judge may have been able to correct the wrong impression of bias which had been given or alternatively may have refrained from further hearing." Vakuta v. Kelly (Austl. 1989) 167 C.L.R. 568. When a litigant fails to object on a timely basis, therefore, the court cannot be faulted for failing to act. Cf. Kekatos v. Council of the Law Soc'y of New South Wales, 1999 N.S.W.C.A. 288 (26 Aug. 1999) ("[A]bsence of contemporaneous objection may be a guide to whether or not the interventions were inappropriate in occasion, extent or tone," especially where "a party is represented by experienced counsel . . . .").

It is a settled principle of international law that "official inaction" can give rise to state responsibility only where "there was a duty to act," Restatement (Third) Foreign Relations Law § 207 (comment c). Because courts are under no duty to correct allegedly improper utterances as to which there is no contemporaneous objection, judicial inaction in this regard cannot implicate state responsibility. Accordingly, because claimants thus never asked the court to protect against the alleged offending remarks until after the verdict, the Mississippi court's alleged failure to do so cannot be viewed as a "measure" that gives rise to an arbitrable claim under the NAFTA.

VI. THE TRIBUNAL LACKS JURISDICTION TO ADDRESS THE INDIVIDUAL CLAIMS OF RAYMOND L. LOEWEN

VII. THE MATTER OF THE TRIBUNAL'S COMPETENCE SHOULD BE TREATED AS A PRELIMINARY QUESTION

On April 6, 1999, the United States objected to the Tribunal's competence to hear this case and requested that the objection be treated as a preliminary question pursuant to Article 46 of the ICSID Additional Facility Arbitration Rules. The Tribunal, in its procedural order following the first session on May 18, 1999, reserved the issue of bifurcation until after the United States submitted its memorial on competence and jurisdiction. After this filing, the Tribunal explained, it would rule "whether the objection to jurisdiction and competence will be determined as a preliminary matter or joined to the merits of the dispute." Minutes of First Session, dated July 14, 1999.

In light of the foregoing objections to the Tribunal's jurisdiction and competence, bifurcation is now clearly warranted. It is standard practice in international arbitrations to bifurcate proceedings on issues of the tribunal's competence and the merits of a dispute. See, e.g., R. von Mehren, Enforcement of Foreign Arbitral Awards in the United States, 579 PLI/Lit. 147, 163-64 (Feb. 1998) (noting preference in international arbitration to hear and decide jurisdictional issues before hearing merits of a controversy). As one leading treatise explains, "[i]n general, the more prudent course is to conduct a preliminary proceeding on the question of jurisdiction. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on the merits." G. Born, International Commercial Arbitration in the United States, 57 (1994).[43] For this reason, the rules of all NAFTA-approved

[43] See also Redfern & Hunter, Law and Practice of International Commercial Arbitration, 272 (1999) (jurisdictional objections are usually raised as "preliminary issues"); The Mini-Trial: Bifurcation as an

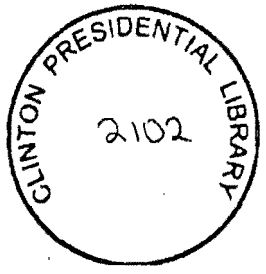
arbitral institutions -- including those governing the present dispute – contemplate the treatment of jurisdiction as a preliminary question in advance of a proceeding on the merits. See Article 21(4) UNCITRAL Rules ("In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question . . . ."); Article 46(4), ICSID Additional Facility Arbitration Rules (objection to competence automatically suspends proceeding on the merits, unless Tribunal affirmatively decides to join objection to the merits); ICSID Convention Rule 41(1).[44]

The cost of a proceeding on the merits of this arbitration will, without question, be extraordinary. This claim is based on a six-year long, complex commercial and antitrust lawsuit, the trial of which lasted two months and was followed by nearly three more months of substantial briefing and hearings in both the Mississippi trial and Supreme courts. The essence of claimants' NAFTA claim is that Loewen was denied justice throughout those lengthy proceedings, as measured by the standards set forth in NAFTA Chapter 11. As part of its defense on the merits of this claim, the United States intends to show that the Mississippi proceedings and their resulting court judgments were fully consistent with the NAFTA's obligations and that claimants and their counsel were themselves responsible for the adverse

---

Efficient Device to Promote the Resolution of Civil Cases, 53 Albany L. Rev. 19, 21 (1988) (it has traditionally been found appropriate to bifurcate issues of jurisdiction and timeliness from the merits of an action).

[44]Bifurcation is common in ICSID arbitrations, even where treating jurisdiction and competence as a preliminary question delays a hearing on the merits for a long time. For example, in Ceskolovenska Obchodni Banka, A.S. v. The Slovak Republic, ICSID Case No. ARB/97/4, the tribunal allowed the parties more than a year for briefing on objections to jurisdiction and did not render a decision on the jurisdictional objections until nearly two years (20 months) after the first session.



results of the litigation.[45] It is no exaggeration to say that a fair evaluation of such defenses will require an extensive analysis of the entire underlying litigation in order to determine whether, in fact, Loewen was denied justice in that case. See, e.g., A. Freeman, International Responsibility of States for Denial of Justice 171-72 (1938) (rejecting notion that merits of denial of justice claim can be decided without reference to "the substance of the original cause of action;" tribunal must make "a thorough examination of the proceedings complained of . . . ."). Bifurcation will ensure that the parties are not forced unnecessarily to undertake the vast expense of such an extraordinarily lengthy and complex proceeding.

Bifurcation is also justified in this case by more than the expense of a hearing on the merits, as substantial as that expense will be. By joining issues of jurisdiction and competence to the merits, the Tribunal would necessarily be subjecting domestic court judgments to international scrutiny without first assuring itself that the NAFTA Parties have given their consent for it to do so. Given the extraordinary intrusion on the sovereignty of the United States that such an unwelcome examination would represent, the question of bifurcation here is best resolved in light of the settled rule that an international tribunal may proceed only upon an "unequivocal indication" of a "voluntary and indisputable" acceptance by a sovereign of the tribunal's jurisdiction. Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), 1995 I.C.J. 6, 63-64. Accordingly, the United States' objections to the Tribunal's jurisdiction and competence should be treated as a preliminary

---

[45] See, e.g., J. Harr, The Burial, The New Yorker (Nov. 1, 1999) at 87-92 (describing numerous errors committed by Loewen's counsel at trial, including "an extraordinary and -- for Loewen -- grievous example of a poorly coordinated presentation by his legal team" on the issue of punitive damages).

question.[46]

[46]Loewen once again makes the astonishing claim that the United States cannot dispute the Tribunal's competence over the subject matter of this case. See TLGI Mem. at 120-21. This assertion is no less frivolous now than when made in Loewen's letter to the Tribunal on May 12, 1999. Through a tortured reading of the arbitral rules, Loewen confuses the competence of the Tribunal with that of the ICSID itself, arguing that limitations on challenges to the latter somehow limit challenges to the former. See id. Much of this confusion stems from Loewen's persistent reliance on Christophe Schreuer's Commentary on the ICSID Convention, an article that has nothing to do with the governing arbitration rules, as it comments only on the ICSID Convention, which has no application to this case. See TLGI Mem. at 121. The ICSID Additional Facility Rules -- which do apply here -- make clear that the Secretary-General's administrative approval of arbitration proceedings confirms only the jurisdiction of the *Centre*, not the competence of the Tribunal. See Art. 4 ICSID (Additional Facility) Arbitration Rules; A. Broches, The 'Additional Facility' of the International Centre for Settlement of Investment Disputes, IV Y. Comm. Arb. 373 (1979). In the Additional Facility, as elsewhere, the Tribunal must first establish that the subject of the dispute falls within the scope of the parties' agreement to submit to arbitration before it may reach the merits of the case. See, e.g., Redfern & Hunter, Law and Practice of International Commercial Arbitration, 260 (1999) ("An arbitral tribunal may only validly determine those disputes that the parties have agreed that it should determine" and the tribunal "must take care to stay within the terms of its authority.").

CONCLUSION

For the foregoing reasons, the United States' objections to the jurisdiction and competence of the Tribunal should be treated as a preliminary question, and the claim for arbitration should be dismissed in its entirety.

Respectfully submitted,

Ronald J. Bettauer
Mark M. Clodfelter
Cynthia S. Francisco
U.S. DEPARTMENT OF STATE
Office of the Legal Advisor
Suite 5519
2201 C Street, N.W.
Washington, D.C. 20520

Kenneth P. Freiberg
Steven F. Fabry
OFFICE OF THE U.S. TRADE REPRESENTATIVE
600 17th Street, N.W.
Washington, D.C. 20508

David J. Anderson
Vincent M. Garvey
Kenneth L. Doroshow
Craig M. Blackwell
U.S. DEPARTMENT OF JUSTICE
Civil Division
901 E Street, N.W., P.O. Box 883
Washington, D.C. 20530
Tel: (202) 514-4263
Fax: (202) 616-8202

Attorneys for Respondent
The United States of America

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Phone No.'s (Partial) (1 page)	n.d.	P6/b(6)
002. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (6 pages)	02/20/2000	P5
003. memo	To: Raymond C. Fisher Through: David W. Ogden From: Philip D. Bartz Re: The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, NAFTA Arbitration (2 pages)	06/15/1999	P5 2103
004. memo	To Raymond C. Fisher Through David W. Ogden From Philip D. Bartz re: The Loewen Group, Inc. v. United States ICSID Case No. ARB(AF)/98/3, NAFTA Arbitration (17 pages)	06/14/1999	P5 2104
005. letter	To Kenneth L. Doroshow from David J. Bederman re: The Loewen Group v. United States (NAFTA Arbitration) (4 pages)	06/07/1999	P5 2105
006. report	The Department of Justice's Position on Arguments that Should be Advanced in the Loewen NAFTA Arbitration (1 page)	n.d.	P5 2106
007a. fax	Phone No. (Partial) (1 page)	08/18/1999	b(7)(C)
007b. memo	David W. Ogden to Cheryl D. Mills re: Loewen Group, Inc. v. United States NAFTA Arbitration (10 pages)	08/18/1999	P1/b(1)
008. memo	Robert G. Dreher to Peter Rundlet re: Exhaustion of Local Remedies in NAFTA chapter 11 Claim (1 page)	11/18/1999	P5 2107
009. memo	To: Philip D. Bartz from Kenneth L. Doroshow re: Loewen - Responses to State Department's Criticism of The Argument That Court Judgments Are Not "Measures" (10 pages)	06/27/1999	P5 2108

COLLECTION:
Clinton Presidential Records
Counsel's Office
Peter Rundlet
OA/Box Number: 23666

FOLDER TITLE:
Loewen (NAFTA [North American Free Trade Agreement] Arbitration) [1]

2010-0021-F
jm470

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. memo	For Kenenth L. Doroshow From Steven F. Fabry re: Loewen v. United States: Concerns About the Argument That Court Orders are Never "Measures" (5 pages)	06/01/1999	P5 2109
011a. fax	Phone No. (Partial) (1 page)	08/18/1999	b(7)(C)
011b. memo	David W. Ogden to Cheryl D. Mills re: Loewen Group, Inc. v. United States NAFTA Arbitration (10 pages)	08/18/1999	P1/b(1)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Peter Rundlet
OA/Box Number: 23666

FOLDER TITLE:
Loewen (NAFTA [North American Free Trade Agreement] Arbitration) [1]

2010-0021-F
jm470

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

U.S. Department of Justice

Civil Division

Washington, D.C. 20530 June 15, 1999

"FOR IMMEDIATE ATTENTION"

EXECUTIVE SUMMARY

To: Raymond C. Fisher
Associate Attorney General

Through: David W. Ogden DWO/PDB
Acting Assistant Attorney General

From: Philip D. Bartz PDB
Deputy Assistant Attorney General

Re: The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, NAFTA Arbitration

Purpose: To elevate to the White House for resolution an interagency dispute over the efficacy of advancing a particular jurisdictional defense on behalf of the United States in this NAFTA arbitration.

Timing: Immediate.

Synopsis:

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Loewen contends that the United States is liable under the NAFTA for $725 million in damages that allegedly resulted from court judgments rendered against Loewen in a Mississippi state court proceeding. The Civil Division, through our Federal Programs Branch, is defending the United States in this matter.

The Civil Division and our client agencies in this case — the Department of State and the Office of the United States Trade Representative ("USTR") — currently disagree over the wisdom of advancing a jurisdictional argument that we have proposed. In defense of the United States against Loewen's claim, we would like to argue that the arbitral tribunal lacks jurisdiction because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the judgments of domestic courts are not "measures" as that term is used in the NAFTA. The State Department and USTR do not want us to make this defense. Because the deadline for making any

jurisdictional arguments is approaching (August 18, 1999) and much work remains to be done, we need a prompt resolution of this disagreement.

Our proposed argument is quite sound given the plain text and stated purposes of the NAFTA. Although State and USTR have attempted to identify weaknesses in the argument, their criticisms suggest only that the NAFTA is, at most, ambiguous as to whether domestic court judgments are subject to challenge under Chapter 11. Because applicable international law requires that ambiguities in international agreements be construed in favor of sovereignty, our argument should prevail even in the face of such criticisms.

Despite the strength of our proposed legal argument, the agencies do not want us to advance it because they believe it could reduce protections for U.S. investments abroad. In our view, however, the adverse consequences (including the possibility of a legislative repeal of the NAFTA itself if we lose this case) that could flow from a decision to allow foreign investors to attack our domestic court judgments in international arbitration outweigh the agencies' concerns and counsel strongly in favor of advancing the argument that we have proposed. In fact, a professor of international law with whom we have consulted at the suggestion of the State Department fully supports our proposed argument on both legal and policy grounds. A copy of his opinion is attached hereto.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

June 14, 1999

MEMORANDUM

To: Raymond C. Fisher
Associate Attorney General

Through: David W. Ogden DWO/PDB
Acting Assistant Attorney General

From: Philip D. Bartz PDB
Deputy Assistant Attorney General

Re: The Loewen Group, Inc. v. United States, ICSID Case No. ARB(AF)/98/3, NAFTA Arbitration

Purpose: To elevate to the White House for resolution an interagency dispute over the efficacy of advancing a particular jurisdictional defense on behalf of the United States in this NAFTA arbitration.

Timing: Immediate.

INTRODUCTION

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Loewen contends that the United States is liable under the NAFTA for $725 million in damages that allegedly resulted from court judgments rendered against Loewen in a Mississippi state court proceeding. The Civil Division, through our Federal Programs Branch, is defending the United States in this matter.

The Civil Division and our client agencies in this case — the Department of State and the Office of the United States Trade Representative ("USTR") — currently disagree over the wisdom of advancing a jurisdictional argument that we have proposed. In defense of the United States against Loewen's claim, we would like to argue that the arbitral tribunal lacks jurisdiction because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the

judgments of domestic courts are not "measures" as that term is used in the NAFTA. The State Department and USTR do not want us to make this defense. Because the deadline for making any jurisdictional arguments is approaching (August 18, 1999) and much work remains to be done, we need a prompt resolution of this disagreement.

BACKGROUND

1. NAFTA Chapter 11

Chapter 11 of the NAFTA was designed to encourage investment in Canada, Mexico and the United States by establishing rules of fair treatment of foreign investment and investors and by providing a means for resolving disputes between investors and their host governments. See, e.g., Daniel M. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Lawyer 727 (1993). Among other things, the Chapter authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11. See NAFTA Article 1116(1). The scope of the Chapter is limited, however, to "measures adopted or maintained" by a government relating to the investor or investment at issue. See NAFTA Article 1101(1).

2. The Loewen Claim

Loewen's NAFTA claim is based on a lawsuit in Mississippi state court in which a Mississippi businessman sued Loewen and its United States subsidiary for $16 million as a result of a failed business deal. After a controversial trial, during which Loewen contends the court improperly permitted the plaintiff's lawyer to inflame the jurors' anti-Canadian, racial and class sentiments, the jury returned a verdict of $500 million against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims that it was unable to post a supersedeas bond in the amount of 125% of the judgment, as required under Mississippi law to stay the judgment pending appeal. After the Supreme Court of Mississippi upheld the imposition of the 125% bond requirement, Loewen settled the case in 1996 for $175 million, arguing that the bond requirement effectively denied it the opportunity to appeal.

Loewen contends that the jury verdict and the Mississippi courts' refusal to waive or reduce the bond requirement were unjust and discriminatory, in violation of several standards set forth in NAFTA Chapter 11 for the equitable treatment of foreign investors. Loewen claims that the United States is liable under the NAFTA for violations committed by individual states and, therefore, seeks to hold the United States liable for damages allegedly caused by the Mississippi judgments. Loewen submitted its claim to arbitration with the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C., seeking at least $725 million in damages.

The arbitral Tribunal held its first session with the parties on May 18, 1999, at the ICSID. At that session, the Tribunal ordered (among other things) that the United States must file all of its jurisdictional objections no later than August 18, 1999.

DISCUSSION

The Civil Division proposes to argue, among other things, that Loewen's claim is not arbitrable because the judgments of domestic courts (as opposed to legislative or regulatory actions concerning trade and investment) are not "measures" within the scope of NAFTA Chapter 11. The State Department and USTR, however, oppose our advancing such an argument. According to State and USTR, the argument is not certain to prevail and, in any event, would undermine the ability of U.S. investors to challenge capricious court judgments in Mexico and Canada. For the reasons that follow, we strongly disagree with the agencies and believe that the argument is vital to our effective defense against the Loewen claim, as well as to the continued viability of the NAFTA as a whole. Given the grave legal and political consequences that could flow from a loss on the merits of the Loewen case, see infra, we believe that the question of whether to advance our proposed jurisdictional argument should be resolved at a policy level within the White House as soon as possible.

I. POLICY CONSIDERATIONS

Both the State Department and USTR have expressed concern that our proposed argument would restrict the ability of U.S. investors to protect themselves from arbitrary, expropriatory or otherwise unfair court judgments in other countries (primarily Mexico). The United States undeniably has a valid and important interest in affording its investors maximum flexibility in protecting their investments abroad. On the other hand, allowing foreign investors to attack the decisions of our domestic courts through international arbitration could severely undermine our system of justice and, as a result, threaten the continued existence of the NAFTA. Given the real possibility of an adverse decision in the Loewen case if we reach the substantive merits, we believe that the balance of these concerns weighs strongly in favor of advancing our argument that court judgments are not "measures."

First, we believe that the argument that court judgments are not "measures" is our strongest jurisdictional argument. Although we have some subsidiary arguments, such as that the judgments complained of are not "measures" because Loewen failed to exhaust the domestic judicial process, we feel that these arguments derive much of their force from the principal argument that court judgments are not "measures" and that, standing alone, these subsidiary arguments may not succeed. Indeed, Professor David Bederman of the Emory University School of Law, an international law expert whom we have been consulting at the suggestion of the State Department, agrees that the principal argument is extremely strong and that, if not advanced, our subsidiary arguments are less likely to prevail. Professor Bederman has provided the Civil Division with a letter setting forth his views on this issue, a copy of which is attached hereto.

Second, a loss on the merits of the Loewen case — which we believe is quite possible in the absence of a favorable ruling on jurisdiction — would establish a dangerous precedent whereby the United States could, as a result of the NAFTA, effectively become a guarantor with respect to any judgment rendered against a foreign investor in the courts of the United States. This could result in a flood of arbitrations against the United States, the cost of which could be extraordinary.

Third, a loss on the merits in Loewen is also likely to generate a great deal of political hostility toward the NAFTA. The case has already received significant media attention as a "potent back-door

way for corporations to challenge the American legal system." William Glaberson, *Nafta Invoked to Challenge Court Award in U.S.*, N.Y. Times (Jan. 28, 1999) at C1; see also, e.g., E. Iritani, *Trade Pacts Accused of Subverting U.S. Policies, Commerce*, L.A. Times (Feb. 28, 1999) at A1. Many individuals, both in and out of government, are likely to be surprised and offended if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors. Cf. Glaberson, supra ("[Loewen] is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination.") (quoting Prof. David W. Leebron, dean of Columbia Law School).[1]

Finally, even if our subsidiary jurisdictional arguments were to prevail in Loewen, we will soon be forced to revisit this same question in another NAFTA arbitration that will be filed against the United States in several weeks.[2] In that case, Mondev Int'l Ltd. v. United States, a Canadian investor challenges a decision of the Massachusetts Supreme Judicial Court, from which a petition for certiorari was filed and denied by the Supreme Court of the United States. Unlike the Loewen case, we cannot argue that Mondev failed to exhaust the domestic judicial process, nor does it appear that we could argue that the alleged harm resulted from a private action rather than a court judgment. As we currently see it, the only way in which the United States can avoid addressing the merits of the Mondev case is if the tribunal finds that domestic judicial decisions are not "measures" for purposes of the NAFTA.

II. THE LEGAL BASIS FOR THE ARGUMENT

It is a familiar and well-settled principle of international law that international agreements are to be "interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Article 31; I. Brownlie, Principles of Public International Law, p. 627 (4th ed., 1990). In substance, these principles require that the NAFTA be interpreted to effectuate the express agreement of the parties; here, the governments of Canada, Mexico and the United States. See R. Jennings & A. Watts, eds., Oppenheim's International Law, 9th ed. at 1267 (1996). Thus viewed, it seems clear from the text of the NAFTA that Chapter 11 does not apply to the judgments of domestic courts, but is instead concerned only with legislative and regulatory actions that affect trade and investment. Other evidence and principles of construction further reinforce the conclusion, made clear by the express terms of the NAFTA, that the parties never intended Chapter 11 to apply to judgments of domestic courts. In our view, therefore, Claimants' challenges to the judgments of the Mississippi courts are not arbitrable under the NAFTA.

---

[1] By way of illustration, shortly after the Loewen case was filed, an aide to Senator Hollings indicated that an unfavorable ruling in the case could lead to abrogation of the NAFTA.

[2] A ninety-day notice of the prospective claimant's intent to file an arbitration was provided pursuant to NAFTA Article 1119.

1. The Ordinary Meaning Of The Term "Measure"

What's included in "measure"?

Article 1101 of the NAFTA limits the application of Chapter 11 only to "measures adopted or maintained by a Party . . . ." Article 201, which sets forth the general definitions of the terms in the NAFTA, defines "measure" to mean "any law, regulation, procedure, requirement or practice." On its face, this definition does not include jury verdicts or court judgments and, instead, is limited only to legislative or administrative rules and requirements. The Mexican and French-Canadian versions of the NAFTA similarly exclude court judgments from their definitions of "measure." See Tratado de Libre Comercio de América del Norte, Artículo 201 ("medida incluye cualquier ley, reglamento, procedimiento, requisito o práctica"); Accord de libre-échange nord-américain, Article 201 ("mesure s'entend de toute législation, réglementation, procédure, prescription ou pratique").

What about hearings?

This definition of "measure" is consistent with the ordinary usage of the term, which does not refer to court judgments, but instead contemplates only legislative or regulatory actions. Indeed, every major dictionary of the English language makes clear that, in the context of government action, the word "measure" has the specific meaning of "[a] legislative bill or enactment." Webster's II, New Riverside University Dictionary (1994); see also Webster's Third New International Dictionary (1986) ("Step; *specif.* a proposed legislative act: Bill"); The New Shorter Oxford English Dictionary, (3d ed. 1993) ("A plan or course of action intended to attain some object, a suitable action; *spec.* a legislative enactment proposed or adopted."); The Random House Dictionary of the English Language, 2d ed. (1987) ("a legislative bill or enactment: *The senate passed the new measure.*") (emphasis in original). Significantly, none of these dictionaries includes anything even approximating jury verdicts or court judgments within the definition of a "measure."[3]

The term "measure" is also routinely used in international agreements to refer exclusively to legislative or regulatory actions rather than court judgments. For example, Canada regularly includes references in its international agreements to "measures of nationalization, expropriation, taking under administration or *any other similar legislative or administrative measures*." Agreement Between the Government of Canada and the Government of the Czechoslovak Socialist Republic Relating to the Settlement of Financial Matters (April 18, 1973) (emphasis added). See also, e.g., Agreement Between the Government of Canada and the Government of the Polish People's Republic Relating to the Settlement of Financial Matters (Oct. 15, 1971) (requiring payment on claims concerning "property, rights or other interests nationalized or otherwise taken by the application of Polish *legislation or administrative decisions*") (emphasis added); Agreement Between the Government of Canada and the Government of the Socialist Republic of Romania Concerning the Settlement of Outstanding Financial Problems (July 13, 1971) (requiring payment on claims concerning "Canadian property, rights and interests affected by Romanian measures of nationalization, expropriation, taking under administration, and *any other similar legislative or administrative measures* . . . .") (emphasis

---

[3]Although the French word "procédure" can refer to judicial proceedings, it does not refer to a judgment rendered by a court in a judicial proceeding. See The Oxford-Hachette French Dictionary at 648 (2d ed. 1997). See also note 5 and accompanying text infra.

added).[4]

State and USTR argue that the NAFTA must have been intended to include court judgments as "measures" because court judgments have, in a few extreme and unusual cases, risen to the level of a "denial of justice" under international law. As Professor David Bederman of the Emory University School of Law explains, however, State and USTR have confused the broad concept of "denial of justice" with the narrower concept of "measures" that limits the scope of trade and investment agreements such as the NAFTA. See Letter from Prof. David Bederman to Kenneth L. Doroshow of the U.S. Department of Justice, dated June 7, 1999 (appended hereto). By its terms, NAFTA Chapter 11 does not address all possible actions that could give rise to a denial of justice, but instead is limited only to those government "measures" that could do so.

Indeed, it is not difficult to conceive of a court decision that unquestionably amounts to a denial of justice under international law — for example, a decision ordering the execution of a foreign national accused of a petty theft without affording that individual an opportunity to be heard — that has absolutely nothing to do with trade and investment and, therefore, is not within the ambit of the NAFTA. Even if domestic court decisions can amount to a denial of justice, therefore, it does not follow that such decisions are "measures" that can be challenged under Chapter 11 of the NAFTA. To the contrary, the NAFTA makes clear that only legislative or regulatory actions that pertain to trade and investment are subject to arbitration under Chapter 11, and that domestic court judgments are not within the scope of the agreement. Because the plain meaning of "measures" does not include court judgments, Loewen should have no claim under the NAFTA.

2. The Meaning Of The Term "Measures" In The Context Of The NAFTA

The term "measures" appears frequently throughout NAFTA Chapter 11 and, without exception, is not used to refer to the judgments of domestic courts. To the contrary, the provisions of NAFTA Chapter 11 appear clearly to exclude domestic court judgments from the Chapter's scope. See, e.g., NAFTA Article 1101(1).

Most notable in this regard is NAFTA Article 1121, which sets forth the conditions that an aggrieved investor must satisfy before it may challenge a government measure through international

---

[4] The General Agreement on Trade and Services ("GATS"), which appears as an annex to the General Agreement on Tariffs and Trade ("GATT"), defines the term "measure" more broadly to include "any measure . . . whether in the form of a law, regulation, rule, procedure, *decision*, administrative action, or any other form." GATS Article XXVIII(a) (emphasis added). Of course, the drafters of NAFTA chose not to include such a definition, even though it was in existence at the time. Moreover, even this broad definition does not include court judgments on its face, as the term "decision" in this context is typically used to refer to administrative, rather than judicial, decisions. See, e.g., Agreement Between the Government of Canada and the Government of the Polish People's Republic Relating to the Settlement of Financial Matters (Oct. 15, 1971) (requiring payment on claims concerning "property, rights or other interests nationalized or otherwise taken by the application of Polish *legislation or administrative decisions*") (emphasis added).

arbitration. Principal among these "conditions precedent" is the requirement that investors "waive their right to initiate or continue before any administrative tribunal or court . . . any proceedings with respect to the measure of the disputing Party that is alleged to be a breach" of Chapter 11. NAFTA Article 1121(1)(b). In other words, to make a claim in arbitration challenging a "measure," the investor must, inter alia, elect to abandon any domestic court challenge to that measure. Because this provision plainly distinguishes between judicial proceedings and the measure challenged in those proceedings (i.e., "proceedings with respect to the measure"), the language of Article 1121 makes clear that a court proceeding itself was not understood by the parties to be a "measure" subject to challenge in international arbitration.

In fact, the parties to the NAFTA appear to have included this requirement in Article 1121 precisely because it "forces investors to choose between local remedies and international arbitration so that international panels cannot act as a court of appeals" over domestic judicial decisions. U.S. White Paper of Talking Points for Carla Hills in Negotiations with Mexico and Canada.[9] If "measures" were construed to include domestic court judgments, Article 1121(1)(b) would arguably permit an aggrieved investor to proceed to international arbitration to challenge any trial court judgment without first having to appeal that judgment domestically, thereby allowing an international tribunal to sit as a substitute for the domestic appellate process. Such a result would be inconsistent not only with the plain language of the NAFTA, but with the intent of the parties, as well as common-sense principles of international law. See, e.g., Barcelona Traction, Light and Power Co., Ltd., 1970 I.C.J. 3, 157-58 ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.") (separate opinion of Judge Tanaka). Indeed, it would frustrate the election of remedies provisions of the NAFTA by creating a mix-and-match hybrid of domestic and international proceedings. Such a result was plainly not contemplated by the NAFTA.

Other uses of the term "measure" in Chapter 11 underscore that the term refers only to trade-related legislative or regulatory actions. Article 1106(2), for example, refers to "measure[s] that require[] an investment to use a technology to meet generally applicable health, safety or environmental requirements," a reference that plainly does not include court judgments. Similarly, Article 1108 refers to the "continuation," "prompt renewal" or "amendment" of any non-conforming measures, while Article 1111 speaks of measures prescribing special formalities in connection with the establishment of foreign investments, "such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party . . . ." Such uses of

---

[9] Although the negotiating history of Chapter 11 is both incomplete and inconclusive, it appears that the United States successfully persuaded Mexico and Canada in the course of the NAFTA negotiations to abandon the traditional requirement that an investor exhaust all local remedies before proceeding to international arbitration, pointing out that an exhaustion requirement, "far from helping to minimize the political problems associated with investment disputes, could actually heighten them, as most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." Id.

the term "measures" are consistent only with legislation or regulation and do not refer to court judgments. See also, e.g., NAFTA Article 1114(2) ("[I]t is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.").

The term "measure" also appears several hundred times in other parts of the NAFTA, each time making clear that the agreement as a whole is concerned only with trade- and investment-related legislative and regulatory actions, and not court judgments. Article 2103, for example, speaks of regulatory measures aimed at the imposition and collection of taxes, setting forth the extent to which such measures are subject to Chapter 11's arbitration provisions. See NAFTA Article 2103(6). The entirety of Chapter 7 of the NAFTA is devoted to "Agriculture and Sanitary and Phytosanitary Measures," while all of Chapter 9 is devoted to "Standards-Related Measures," which are defined as "standard[s], technical regulation[s] or conformity assessment procedure[s]." NAFTA Article 915. "Measures" is used in Article 302 to refer to rules for allocating in-quota imports, and in Articles 309-315 to refer to non-tariff export restrictions "such as licenses, fees, taxation and minimum price requirements." See also NAFTA Article 605. The term appears countless times in similar fashion throughout the NAFTA, reinforcing a definition of "measures" that includes only legislative or regulatory actions that concern trade and investment. See, e.g., NAFTA Articles 315 & 605 (using "export measures" as synonymous with export restrictions, such as higher prices on certain goods); NAFTA Article 512 (administrative customs "determinations, measures and rulings"); NAFTA Articles 602(1), 606 (energy regulatory measures); NAFTA Article 607 (national security measures); NAFTA Article 904(1) (measures relating to safety, the protection of human, animal or plant life or health, the environment or consumers, including prohibitions on importation of goods and services); NAFTA Article 1201 (measures relating to cross-border trade in services); NAFTA Article 1210 (preventing measures relating to licensing and certification from becoming barriers to trade); NAFTA Article 1304 (discussing measures "adopted or maintained" to prevent interference with public telecommunications networks); NAFTA Article 1305 (requiring NAFTA parties to adopt antitrust measures, "such as accounting requirements, requirements for structural separation" and other "rules" to prevent anticompetitive conduct); NAFTA Article 1406 (equating "measures" with "regulation, oversight, implementation of regulation and . . . procedures . . . ."); NAFTA Article 1502(3) (requiring action through "regulatory control, administrative supervision or the application of other measures . . . .").

Indeed, in the more than one thousand pages that constitute the NAFTA, including nearly 300 separate Articles as well as numerous annexes and supplemental agreements, the sole use of the term "measures" in the context of judicial action is a reference in only four Articles to "provisional" or "interim" measures issued by international tribunals, see Article 1134, and by domestic courts in the specific context of intellectual property proceedings. See Articles 1715, 1716, 1718. Although State and USTR believe that these scant references to "provisional" or "interim measures" demonstrates an intent to include court judgments within the definition of "measures," we disagree.

"Provisional" or "interim measures" are well-recognized as having a specialized meaning in the field of international arbitration that bears no relation to the "measures" that are covered by NAFTA Chapter 11. The terms generally refer to preliminary actions taken "to preserve the respective rights of the parties" pending a decision by a court or tribunal where necessary to prevent a party from suffering "irreparable prejudice." Paraguay v. United States, 37 I.L.M. 810, 818 (I.C.J. 1998); see also, e.g.,

D.A. Redfern, Arbitration and the Courts: Interim Measures of Protection -- Is the Tide About to Turn?, 30 Tex. Int'l L. J. 71, 78 (1995); C. Brower & W.M. Tupman, Court-Ordered Provisional Measures Under the New York Convention, 80 Am. J. Int'l L. 24 (1986) ("[T]he rules of most international arbitral regimes authorize a tribunal to order interim or provisional measures . . . .").

This is precisely the manner in which the terms "provisional" or "interim measures" are used in the NAFTA. Article 1134 authorizes international arbitral tribunals to "order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction." Similarly, Article 1716, which applies only to intellectual property disputes, requires each NAFTA party to "provide that its judicial authorities . . . have the authority to order prompt and effective provisional measures" to enjoin an alleged infringement of intellectual property rights and "to preserve relevant evidence in regard to the alleged infringement." NAFTA Article 1716(1). See also NAFTA Article 1715(2)(f) (judicial authorities must have power to order a party who improperly requested provisional measures in an intellectual property dispute to compensate the party "wrongfully enjoined or restrained . . . .").

Clearly, the recognition of an international arbitral tribunal's authority to issue interim measures of relief does not imply that the judgments of domestic courts are "measures" subject to arbitration under Chapter 11. Nor do the references to court-ordered provisional measures in intellectual property disputes suggest that court judgments on the merits of other types of cases are subject to arbitration under Chapter 11. Indeed, under the terms of Chapter 17 ("Intellectual Property"), even provisional measures issued in intellectual property cases are not subject to arbitration under Chapter 11. For example, as already noted, Article 1121 permits an investor to proceed to arbitration in lieu of "initiating or continuing" a proceeding in a domestic court with respect to the challenged measure. See NAFTA Article 1121(1). Article 1716 makes clear, however, that arbitration is not the proper course for challenging a provisional measure, as it requires NAFTA parties to allow defendants to "have those measures reviewed by [the relevant NAFTA party's] judicial authorities . . . ." NAFTA Article 1716(5)(b).

Moreover, even if court-ordered provisional measures could be challenged in an arbitration under NAFTA Chapter 11, such provisional measures are entirely distinct from the sort of court judgments that Loewen is challenging. Perhaps the best illustration of this distinction between provisional measures and court judgments on the substance of a case is Chapter 17 of the NAFTA itself. Article 1716(6) provides that the judicial authorities of the NAFTA parties must "revoke or otherwise cease to apply the provisional measures . . . if proceedings leading to a decision on the merits are not initiated" within a certain period of time. In the event that proceedings leading to a decision on the merits of the case are initiated, NAFTA Article 1718(7) requires the NAFTA parties to provide for a "review" to determine whether the provisional measures should be modified, revoked or confirmed. Both of these provisions show that the issuance of provisional measures is entirely independent of court proceedings on the merits and, indeed, that a proceeding on the merits need not even exist for provisional measures to be issued in the first instance. Thus, even if Chapter 17 could be construed to include court-ordered "provisional measures" within the scope of the term "measures" in Chapter 11, it makes clear that court judgments on the merits of a given case — such as the court judgments challenged here — are not arbitrable "measures" for purposes of Chapter 11. Cf., e.g., C.

Higgins, Interim Measures in Transnational Maritime Arbitration, 65 Tul. L. Rev. 1519, 1523-24 (1991) ("Provisional or interim measures of relief are distinguishable from interim awards. Generally interim awards involve rulings on the merits or substance of the dispute," whereas interim measures of relief are merely "orders given by the arbitrator/s for the preservation of rights and property" pending the proceedings on the substance of the case) (quoting ICC Arb. Comm'n, Report on the Problems of Interim/Partial Awards § 1.1 (1985)); P. Essoff, Finland v. Denmark: A Call to Clarify the International Court of Justice's Standards for Provisional Measures, 15 Fordham Int'l L. J. 839, 841 (1992) (the ICJ's "power to hear a case on the merits is distinct from its power to indicate provisional measures.").

That "measures" do not include court judgments is further underscored by the fact that the scope of Chapter 11 is limited only to "measures *adopted or maintained*" by a NAFTA country. See NAFTA Article 1101(1). As a matter of common usage, legislative proposals are "adopted," and pre-existing rules or practices are "maintained." See, e.g., Webster's Third New International Dictionary of the English Language at 29 (1986) ("adopt" refers to "a bill or measure passed or accepted formally"); id. at 1362 ("maintain" means to "keep up" or "continue"). Court judgments, in contrast, are neither "adopted" nor "maintained," but instead are "issued," "rendered," "entered" or "made." See, e.g., id. at 585 (a "decision" is "arrived at after consideration"); id. at 1223 (a "judgment" is "pronounced" or "given in a cause by a court of law or other tribunal . . . .; a legal judgment entered for one party . . . .").[9] The text of Article 1101(1), therefore, clearly reflects an intention to exclude court judgments from the reach of Chapter 11. Although the phrase "adopted or maintained" is used throughout the NAFTA, it refers in each instance only to legislative or regulatory rules or actions that concern trade and investment, and never to court judgments. See, e.g., Supplemental Agreement on Environmental Cooperation, Annex 36A, ¶ 4 (Sept. 13, 1993) ("procedures adopted or maintained" by Canada); NAFTA Article 2104(3) (requiring certain "measure[s] adopted or maintained" to be "temporary and be phased out progressively"); NAFTA Article 314 (conditions under which a Party "may adopt or maintain any duty, tax or other charge on the export" of goods); NAFTA Article 906(4) ("technical regulation adopted or maintained"); NAFTA Article 910(3)(a) ("any standard or conformity assessment procedure proposed, adopted or maintained"); NAFTA Annex 301.3, § B(2)(b) ("tariff rate quotas adopted or maintained"); NAFTA Article 1210 ("any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party"); NAFTA Article 1302(7)(d) ("a licensing, permit, registration or notification procedure which, if adopted or

---

[9]The Mexican and French-Canadian versions of the NAFTA support this same distinction. Compare, e.g., The Oxford-Hachette French Dictionary at 13 (2d ed. 1997) (illustrating meaning of "adopter" with "adopter une loi -- to pass a law"); id. at 486 ("maintenir" means "to keep") with id. at 219 (one can "make or take" a "décision;" "prendre une décision"); id. at 452 (to "give one's verdict" or "to pass judgment;" "prononcer un jugement"); id. at 1156 ("se décider" means "to reach or come to a decision"); id. at 1387 ("prononcer/rendre un jugement" means "to pass/give a judgment"); id. at 1652 ("rendre une décision" means "to give a ruling"). Compare also, e.g., The Oxford Spanish Dictionary at 18 (1994) ("adoptar" means "to take," as in "drastic measures will have to be taken"); id. at 479-80 ("mantener" means "to keep," as in "keep up the old traditions") with id. at 227 (one can "make" a "decisión"); id. at 441 (one can "express" or "form" a "juicio"); id. at 1524 (one can "give" or "make" a judicial ruling, or "fallo").

maintained, . . ."); NAFTA Article 2005(4)(a) ("a measure adopted or maintained by a Party to protect its human, animal or plant life or health . . . ."); NAFTA Article 719 ("any control or inspection procedure or approval procedure, proposed, adopted or maintained . . . ."); NAFTA Article 702(3) ("measures adopted or maintained pursuant to an intergovernmental coffee agreement.").

In short, we have a strong argument that the term "measures," whether in the context of the NAFTA or in international practice generally, excludes domestic court judgments from its scope. Because Chapter 11 applies only to "measures," we should be permitted to argue that the arbitral tribunal lacks jurisdiction to address Loewen's challenges to the judgments of the Mississippi courts.

3. The Object And Purpose Of The NAFTA

The purpose of the NAFTA is quite clear: to enhance trade and investment among Canada, Mexico and the United States. See NAFTA Chapter 102 ("Objectives"). The agreement's principal goals are to "eliminate barriers to trade" among the three countries, to "promote conditions of fair competition in the free trade area," to increase "investment opportunities" and to "provide adequate and effective protection and enforcement of intellectual property rights" in each of the three countries. Id. To these ends, the NAFTA includes a mechanism for the resolution of disputes concerning government "measures" that pertain to trade and investment. Id.; see also NAFTA Chapter 11. Nowhere in these stated goals is there any suggestion that the NAFTA was intended to apply to court judgments, particularly where the judgment is a jury's award of damages in a purely private contract dispute, unrelated to any government measures, that was eventually settled out of court.

In fact, the inclusion of such proceedings within the scope of Chapter 11's dispute resolution mechanism would be inconsistent with the stated goals of the NAFTA. As noted above, Chapter 11 seeks to facilitate the orderly resolution of trade and investment disputes by requiring aggrieved investors to waive their right to challenge a government measure in a domestic court. See NAFTA Article 1121(1)(b). In the view of the NAFTA's drafters, this requirement was appropriate because the more traditional requirement that an investor exhaust all local remedies before proceeding to international arbitration,"far from helping to minimize the political problems associated with investment disputes, could actually heighten them, as most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." U.S. White Paper of Talking Points for Carla Hills, supra. The NAFTA's drafters themselves thus made clear that the inclusion of domestic court judgments within the scope of measures that could be challenged in arbitration would frustrate the very purpose of the dispute resolution mechanisms that are vital to the NAFTA's success. Cf., e.g., D. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Law. 727 (1993) (Chapter 11 "was an essential element of an agreement that was to provide the basis for hemispheric free trade.").

Because Loewen's challenge is so contrary to the expressed intent of the NAFTA parties, representatives of the NAFTA governments have spoken out against the filing of such lawsuits. For example, Canadian trade officials recently complained that Chapter 11 was never intended to permit lawsuits like the Loewen claim and are seeking an interpretive agreement among the three NAFTA nations to confirm this point. See I. Jack, *Ottawa Pushes for Reform of NAFTA Lawsuit Provisions: $1-Billion in Claims*, Fin. Post (Apr. 20, 1999) at C03; P. Morton, *Washington Cool to Rewriting Key*

NAFTA Clause: Canada Urged Review: Aim is to Limit Firms' Ability to Sue Governments, Financial Post (Jan. 23, 1999) at D09. Such an effort only underscores that the inclusion of court judgments within the meaning "measures" would be inconsistent with the object and purpose of the NAFTA.

4. Even If The Meaning And Scope of The Term "Measures" Were Ambiguous, Canons Of Treaty Interpretation Require That The Term Be Interpreted To Exclude Domestic Court Judgments

It has long been a principle of customary international law that treaties are to be interpreted in deference to the sovereignty of states. See, e.g., EC Measures Concerning Meat and Meat Products (Hormones), 1998 WL 25520, Report of the Appellate Body at *71 n.154 (WTO Jan. 16, 1998); Nuclear Tests Case (Australia v. France), 1974 I.C.J. 267 (ICJ 1974). Under this settled principle of in dubio mitius, "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." R. Jennings and A. Watts (eds.), Oppenheim's International Law, 9th ed., Vol. I, p. 1278 (Longman 1992).

Clearly, an unwelcome review of our domestic court judgments through international arbitration would significantly interfere with the United States' territorial supremacy. Cf. E. Iritani, *Trade Pacts Accused of Subverting U.S. Policies, Commerce*, L.A. Times (Feb. 28, 1999) at A1 (noting the Loewen case's "threats to sovereignty"). The parties to the NAFTA recognized as much in the course of the negotiations of the agreement, and included provisions in Chapter 11 expressly to avoid such interference. See U.S. White Paper, supra. See also, e.g., Barcelona Traction, 1970 I.C.J. at 157-58 ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.") (separate opinion of Judge Tanaka).

Significantly, neither State nor USTR has urged that the language of the NAFTA unambiguously includes domestic court judgments as "measures." Rather, they contend only that the NAFTA can plausibly be interpreted to include domestic court judgments within the scope of government "measures" that can be challenged under Chapter 11. Even if State and USTR are correct and the NAFTA is found to be ambiguous on this point, the principle of in dubio mitius nevertheless requires that the NAFTA be interpreted to exclude domestic court judgments from Chapter 11's scope.

III. WEAKNESSES IN THE ARGUMENT IDENTIFIED BY USTR

At least one individual within USTR has attempted to identify specific weaknesses in the argument that court judgments are not "measures." None of these criticisms, however, establishes that court judgments are unambiguously "measures" within the scope of Chapter 11. Accordingly, our argument would still prevail under the principle of in dubio mitius, noted above. Moreover, each of the criticisms can be met with a satisfactory response, as explained below.

1. Court Judgments That Enforce Or Apply "Measures"

USTR argues that "application, implementation and enforcement of measures were intended to be covered" by NAFTA Chapter 11 and, therefore, court decisions that apply or enforce laws are covered under the NAFTA. Even if we assume that the NAFTA applies more broadly to the application of measures as well as to measures themselves, however, it does not follow that *judicial* application of measures is included in that broader category. Rather, given the language and purposes of the NAFTA as a whole, it seems more likely that the handful of references in Chapter 11 to the application or enforcement of measures concern only executive or administrative enforcement actions, and not judicial decisions.

For example, let us assume that the EPA, following an administrative determination, has brought an enforcement action in federal court under the Clean Water Act against a Canadian company doing business in the United States, and that the court finds in favor of EPA. In this example, the "measure" at issue would be the Clean Water Act, whereas the "enforcement" or "application" of that measure would be the EPA's administrative action. While the Canadian company could arguably challenge the EPA's enforcement action as a covered "application" of a "measure," it does not follow that the company could also challenge the court's judgment on the merits of the EPA's regulatory action. To the contrary, if the company were to proceed to international arbitration under Chapter 11, we would argue that the tribunal can review only the EPA's regulatory action and not the resulting decision or award of the U.S. court.

This same reasoning would apply to eminent domain proceedings, to which USTR also points in support of its view. While it is true that, under U.S. law, a proceeding in federal court is the final step in determining the amount of compensation to be paid for a "taking" of property, it is not true that the final judgment of the court in that proceeding is itself part of the expropriatory act. To the contrary, the expropriatory act would be the executive or administrative action taken by the government — for example, a decision of the Federal Highway Administration to build a road through the property of a Canadian-owned company — for which compensation is sought in federal court. If the court were to award insufficient compensation, the aggrieved party could arguably proceed to international arbitration under Chapter 11, but only to challenge the expropriatory administrative action of building the road through the party's property. While the aggrieved party might also have a claim that the court's compensation decision amounted to a "denial of justice" under international law, that claim would not necessarily be actionable under the NAFTA because, as noted above and in the attached letter from Professor Bederman, denials of justice are distinct from the "measures" that are covered under Chapter 11, just as the court's compensation decision is distinct from the administrative act that is alleged to be confiscatory.

Admittedly, the Mississippi Supreme Court's decision on the supersedeas bond in the underlying Loewen case presents a somewhat more difficult question, because one cannot readily identify an underlying "measure" distinct from the court judgment that gave rise to the alleged harm.[7]

---

[7]It should be noted that Mississippi's supersedeas bond rule, while unquestionably a "measure," is not subject to challenge in the Loewen case because it predates the effective date of the NAFTA. By

Nevertheless, while the court judgment may have been an "application" of Mississippi's supersedeas bond rule, it would not itself be subject to challenge under the NAFTA. As with the eminent domain example, the court's decision is, at worst, viewed as a judicial "denial of justice" for which the NAFTA does not provide a remedy.

Indeed, to argue otherwise would sweep every federal and state law or regulation into the NAFTA's coverage, as a foreign investor would be able to obtain international review of every judicial application of law, whether or not the lawsuit in question was initiated by a regulatory entity. For example, an employee of a Canadian company's U.S. subsidiary might file a Title VII lawsuit against the company alleging discriminatory employment practices. If the company were to lose that suit, it could then, under Mr. Fabry's interpretation of Chapter 11, sue the United States in international arbitration simply because the court decision involved an "application" of Title VII. Because every judicial decision necessarily involves some application of law, Steve Fabry's interpretation would permit foreign investors to bring suit against the United States on the basis of any court judgment that affects their interests. Surely the NAFTA could not have been intended to sweep so broadly.

2. Exemptions from NAFTA That Include Court Proceedings

USTR also points to certain exemptions under Chapter 11 for court proceedings, from which they infer that court proceedings that are not exempted are otherwise covered by the Chapter. See NAFTA 1106 & 1109. This inference is faulty, for two reasons. First, as noted above, there is an important distinction between court proceedings and judgments rendered in those proceedings. We do not argue that court proceedings (and the procedures, rules and practices that govern them) are not actionable under Chapter 11; rather, we argue only that the judgments rendered in those proceedings are not actionable.

Second, to the extent that Chapter 11 purports to apply to the application or enforcement of measures, it does so only with respect to administrative or executive actions. For example, Article 1106 prohibits NAFTA parties (i.e., Canada, Mexico and the United States) from "impos[ing] or enforc[ing] any of the following requirements" relating to a foreign investment in their territories:

(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of

---

subsequent agreement of the NAFTA parties, all "non-conforming measures" of the United States that were in existence before the NAFTA became effective were "grandfathered" out of the scope of Chapter 11. At least in this case, therefore, we will not have to argue that the rule is within the scope of Chapter 11 while the court's application of the rule is not.

its exports or foreign exchange earnings;

(f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

(emphasis added). Not only are these the *only* enforcement actions that Chapter 11 proscribes, but it seems clear that each of the proscribed enforcement actions are highly-specific, trade-related actions that could be taken only by an administrative agency (in particular, the Commerce and Treasury Departments or their foreign equivalents). Although courts as well can effect transfers of technology in an antitrust proceeding, Article 1106 expressly exempts such court actions from the provision's proscriptions. While USTR argues that such an exemption would not have been necessary if court decisions were not covered by Chapter 11, it does not follow that the exemption necessarily implies that court decisions are otherwise covered. It is at least equally plausible that the exemption was intended only to reinforce the point that the NAFTA was not intended to apply to court judgments. See NAFTA Article 1106(1)(f).

Article 1109 is also consistent with our argument that court judgments are not "measures" or even applications of measures. The provision generally requires NAFTA parties to allow transfers of investments "to be made freely and without delay." The Article provides specific exceptions to this requirement, permitting host countries to prevent transfers under limited circumstances. In relevant part, Article 1109 permits a NAFTA party "to prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;
(b) issuing, trading or dealing in securities;
(c) criminal or penal offenses;
(d) reports of transfers of currency or other monetary instruments; or
(e) ensuring the satisfaction of judgments in adjudicatory proceedings."

NAFTA Article 1109(4). Contrary to USTR's view, it does not necessarily follow that this provision refers to *judicial* application of laws. Because the laws in each of the listed areas are applied by administrative bodies through administrative enforcement proceedings as well as by courts, it is at least as likely that the provision was intended to refer only to administrative application of those laws.[8] Indeed, in view of the NAFTA as a whole, it seems more likely that the provision only contemplated

[8] In the U.S., for example, the laws of bankruptcy can be applied by the U.S. Trustee; securities laws can be applied by regulators of securities markets; laws relating to criminal or penal offenses can be applied by prosecutors; laws relating to reports of transfers of currency can be applied by the Treasury Department and bank regulators; and laws relating to satisfaction of judgments can be applied by the Sheriffs' offices and Marshalls' Service.

administrative applications of law.

3. Comparison With Bilateral Investment Treaties

USTR also argues that the United States' bilateral investment treaties ("BITs") do not contain a scope provision similar to NAFTA Article 1101(1) and, therefore, the protections afforded by the NAFTA are arguably fewer than those provided by BITs. According to USTR, the U.S. negotiators of the BITs would be surprised if the NAFTA afforded fewer protections to investors than the BITs.

It is true that the BIT prototypes — which the U.S. has used since the early 1980s and on which Chapter 11 was based, in part — do not include a "scope" provision like NAFTA's Chapter 11 and, therefore, are at least facially broader than Chapter 11. Some of the BITs' substantive provisions are limited by their terms only to "measures," however, and thus at least arguably suggest that the BIT as a whole was intended to be limited only to "measures." See, e.g., 1994 Prototype BIT Article III (prohibiting expropriation or nationalization through "measures"); id. Article IV (national and most favored nation treatment "as regards any measure . . . ."); but see id. Articles II, V, VI, VII.

Even if the BIT was not intended to be limited to "measures," the point is still not dispositive. First, before the NAFTA, BITs played only a small role in the United States' trade negotiations, at least insofar as the U.S. had never negotiated a BIT with a major trading partner. Given the magnitude of the NAFTA and the parties involved, the earlier BITs do not provide a fair basis for comparison with respect to the intended scope of the agreement.

Second, when the NAFTA was signed, Chapter 11 was the only provision in any of the world's major trade agreements that authorized private investors to take governments to binding arbitration over violations of their treaty obligations. Although the United States' BITs had already authorized foreign nationals to claim against host governments, those BITs were narrow investment agreements only with small countries. The inclusion of an "investor-state" provision in a trade agreement like the NAFTA, in contrast, was a matter of great significance, as it represented an unprecedented waiver of sovereignty for major nations in the context of a large-scale trade agreement. It would not be unreasonable to assume, therefore, that, under the circumstances, the parties to the NAFTA wanted to be careful to limit the scope of protections that they were granting to private investors.

Indeed, it appears from the negotiating history of the NAFTA that, when the United States first introduced its proposed language for the "investor-state" provisions of NAFTA (Chapter 11), it did not contain a scope limitation. The Canadians and Mexicans insisted that the Chapter include a scope limitation, unlike the BITs that had preceded the agreement, which limitation eventually became NAFTA Article 1101. Such an effort underscores the fact that the parties intended Chapter 11 to be more limited in scope than the preceding BITs.

CONCLUSION

We have a strong argument that, in light of the plain text and purpose of the NAFTA, domestic court judgments are not "measures" within the scope of NAFTA Chapter 11 and, therefore, Loewen's claim is beyond the jurisdiction of the arbitral tribunal. Although State and USTR have attempted to

identify weaknesses in the argument, their criticisms suggest only that the NAFTA is, at most, ambiguous as to whether domestic court judgments are subject to challenge under Chapter 11. Because applicable international law requires that ambiguities in international agreements be construed in favor of sovereignty, our argument should prevail even in the face of such criticisms. Although we are not absolutely certain that our position will prevail, "absolute certainty" has never been the standard for determining whether an argument should be made.

Despite the indisputable validity of our proposed legal argument, the agencies do not want us to advance it because they believe that it would reduce protections for U.S. investments abroad. In our view, however, the adverse consequences (including political hostility toward the NAFTA itself) that would likely flow from a decision to allow foreign investors to attack our domestic court judgments in international arbitration outweigh the agencies' concerns and counsel strongly in favor of advancing the argument that we have proposed.

EMORY UNIVERSITY
School of Law

Gambrell Hall
Atlanta, Georgia 30322-2770
404/727-6816

June 7, 1999

~~PRIVILEGED & CONFIDENTIAL~~

VIA FACSIMILE (202-616-8202)

Kenneth L. Doroshow, Esq.
Trial Attorney
U.S. Department of Justice
Civil Division - Federal Programs Branch
Room 954
901 E Street, NW
Washington, DC 20530

Re: *The Loewen Group v. United States*
(NAFTA Arbitration)

Dear Mr. Doroshow:

You have asked that I carefully review your preliminary draft (dated May 3, 1999) of an argument challenging the NAFTA arbitration panel's competence in the *Loewen* case. This argument is intended to be introduced in the preliminary phase of the proceedings in the case, in order to persuade the Tribunal that it does not have jurisdiction over The Loewen Group's case, and that the case should, therefore, be dismissed and the proceeding terminated without the Tribunal even considering the merits raised by Loewen.

The crux of the argument you have constructed is that the NAFTA arbitration panel's jurisdiction, under Chapter 11 of the Agreement, is limited to the scope of protection under Chapter 11 itself, and Chapter 11 applies only to review of "measures adopted or maintained by a Party . . . ." NAFTA art. 1101. You contend that because Loewen is complaining of the effect of court proceedings in Mississippi (including allegations of an outrageous trial proceeding, an excessive verdict, and the unavailability of effective appellate review) that such does not constitute a "measure adopted or maintained by a Party" to NAFTA, and, therefore, does not fall within the ambit of Chapter 11.

I entirely concur with your argument. It is consistent with international law and traditional understandings of State responsibility. Moreover, I believe that your submission correctly characterizes the United States' obligations to protect foreign investment in our country. Lastly, I would maintain that your argument is entirely harmonious with United States policy to promote investment protections for our citizens abroad, while also, at the same time, ensuring that NAFTA (as well as other treaty trade regimes, like GATT/WTO) are successfully integrated into our domestic constitutional order.

1. *Consistency with the United States' international law obligations for protection of foreign investment.* Your draft submission quite properly does *not* take the position that the judicial conduct that Loewen alleges (assuming it to be true) could never implicate the responsibility of the United States under international law. Indeed, it is well-established that outrageous judicial conduct can, in extraordinary instances, constitute a "denial of justice" under international law, requiring that the host State compensate the country of the foreign nationals affected by such conduct.

But that is not the issue in the *Loewen* case, nor in any proceeding under Chapter 11 of NAFTA. Rather, the question is whether such a "denial of justice" -- allegedly perpetrated in a private, civil proceeding in which the United States (nor, indeed, any state or political subdivision) is not a party -- can constitute a "measure[] adopted or maintained by a Party." In this respect, the international law of State Responsibility has always differentiated between "measures" (affirmative government actions impacting on investments) and "denials of justice" (where our nation's courts simply serve as adjudicators of private disputes that happen to involve foreigners or their investments).

The sharp distinction between "measures" and "denials of justice" has been so traditionally clear in international law that both phrases are regarded as terms-of-art in international investment agreements. I agree that, on its face, Article 1101 does not cover the kind of conduct that Loewen alleges. "Measures" typically refer to legislative or administrative action, not judicial action. But in no event can a "measure" refer to a court proceeding which is not initiated or prosecuted by a government entity. It might be one thing if Loewen was complaining of a securities law civil enforcement action or even a citizens' suit brought pursuant to a federal or state environmental statute. It is quite another for a common law contract or tort proceeding to be characterized as government action — a "measure" — under NAFTA Chapter 11. Such an argument would make *all* judicial action directly implicate the United States' responsibility under international law.

(*) persuasive

Moreover, I fail to see how a private civil action of the sort here, even *if* regarded as a "measure," could be seen as one "adopted or maintained by a Party." Again, to accept Loewen's argument would be to characterize *all* judges and jurors in the land as an "arm" of the United States government. This profoundly distorts and misunderstands the principle of judicial independence embraced not only in the United States, but also in Canada and Mexico.

If anything, your draft argument may actually *understate* the strength of the United States' contention that private civil proceedings before U.S. courts cannot constitute "measures" under NAFTA Chapter 11. You correctly look to the language and structure of the entire NAFTA to support this argument. Additionally, I believe that the negotiating history of the NAFTA would reveal that none of the parties contemplated that Chapter 11 arbitration could be invoked to review judicial proceedings and verdicts in private commercial disputes.

I am mindful, of course, that the ultimate purpose of the argument is to dissuade the NAFTA arbitration panel to reach the merits of this case. It is neither necessary, nor desirable, for the panel to rule on wider issues of its competence in Chapter 11 proceedings. The United States would be content with the narrowest possible ruling on the tribunal's competence. Such a narrow ruling might be (as suggested above) that judicial proceedings in private commercial cases involving foreign investment (absent some government involvement) can not constitute a "measure."

Alternatively, I endorse the subsidiary argument offered that, while such judicial conduct might notionally constitute a "measure," there is a special burden on the claimant to exhaust all judicial remedies available to it. Loewen certainly appears to have failed to do so here. Exhaustion of local remedies is an enduring and well-established principle of diplomatic protection and the international law of State Responsibility. Although NAFTA relaxed this requirement, it certainly did not do so in the context of judicial action being challenged as a "measure[] adopted or maintained by a Party." I believe that your submission on the exhaustion argument may be ultimately persuasive for the Tribunal, but only if used in conjunction with the wider principle that "measures" are fundamentally different from "denials of justice" in international law.

2. *United States' investment protection policy and constitutional considerations.* I understand that it is vitally important for the United States to vigilantly oppose any form of foreign conduct that is calculated to have a detrimental effect on U.S. investment abroad. Even our most cooperative and friendly trading partners have proven themselves quite able to construct non-tariff trade barriers to trade, and other impediments to investment. But I believe that "denials of justice" -- in the form alleged by Loewen in this case in reference to a private, civil action — are a rare and exceptional occurrence. More importantly, when they have occurred in the past, they have been remedied either by further recourse to the courts of the host country (something that Loewen decided to forego in this case) or by a timely intervention by the United States Government.

We should not, therefore, fail to make the strongest arguments we can in challenging the NAFTA tribunal's jurisdiction under Chapter 11 in this case. Any possible collateral benefits to U.S. investors in Canada and Mexico of taking a position agreeable to the Tribunal's jurisdiction in these

cases would strike me as extremely doubtful.

There may also be a significant constitutional principle at stake in making a strong argument against the applicability of NAFTA Chapter 11 proceedings to review judgments (or settlements) in private commercial disputes decided by U.S. courts. As you are well-aware, a number of constitutional challenges to NAFTA have been contemplated, and one is currently pending. Among the panoply of constitutional arguments raised against NAFTA (almost all of which are frivolous) is the contention that NAFTA Chapter 11 panels will be able to "review" the final decisions of U.S. administrative agencies, and, in this sense, authority is exercised by panel members who are not "officers" of the United States, as required by the Appointments Clause of the Constitution.

While I think this argument can easily be deflected in regards to review of administrative action, a harder case may possibly be presented if NAFTA panels are "reviewing" jury verdicts from state civil proceedings. Of course, I credit the point that a NAFTA Chapter 11 proceeding does not purport to "reverse" or "overturn" any U.S. proceeding; its sole purpose is to assign responsibility to the United States for a breach of NAFTA. This may, however, be a difficult distinction to maintain. After all the Seventh Amendment to the Constitution provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. Amend. VII. The situation raised in the *Loewen* case thus might put the United States in an awkward position in any constitutional defense of NAFTA. On the one hand, the United States may wish to argue that (in some sense) NAFTA arbitration panels *are* staffed by officers of the United States. But to take this tack would conflict with the observation that the NAFTA panel then might be characterized as a "Court of the United States," and to the extent that it is reviewing a jury proceeding in a state court (if only for the purpose of establishing international responsibility on the part of the United States), that is in conflict with the Seventh Amendment.

For consistency sake, the United States should take a strong position before the NAFTA arbitration panel that court proceedings in which no governmental entity is a party are not "measures" covered by Chapter 11 of NAFTA.

* *** *

I fully endorse your preliminary draft of an argument challenging the NAFTA arbitration panel's competence in the *Loewen* case. Do not hesitate to contact me if you have any further questions about my opinion in this matter. With best wishes.

Sincerely yours,

David J. Bederman
Professor of Law

The Department of Justice's Position on Arguments that Should Be Advanced in the Loewen NAFTA Arbitration

DOJ believes that the United States' best hope for success in the Loewen case is to argue that domestic court judgments, particularly those in cases involving only private parties, are not "measures" under the NAFTA. By contrast, the argument favored by State and USTR is unmoored from the text of the NAFTA and is internally inconsistent. If the United States does not argue that domestic court judgments are not "measures," there is a substantial risk that we will lose the Loewen case (which alleges $725 million in damages) which, in turn, would create significant policy problems for the U.S.

NAFTA Chapter 11 applies only to "measures adopted or maintained" by a government. Although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice, " the definition makes no mention of domestic court judgments and, on its face, appears to contemplate only legislative and executive acts as opposed to verdicts rendered by the judiciary. This understanding is supported by the NAFTA's drafting history, which suggests that the U.S. sought to foreclose international review of domestic court judgments. Because international tribunals cannot assert jurisdiction on the basis of ambiguous treaty terms, our argument should present a complete bar to the Loewen claim.

The tribunal's assertion of jurisdiction in Loewen would establish a dangerous precedent whereby the U.S. could face international arbitration with respect to any state or federal court judgment adversely affecting the interests of foreign investors and, as a result, would likely generate a great deal of political hostility toward the NAFTA and other international agreements. Given that the U.S. is alone in its recognition of large punitive damage awards, we believe that the cost to the U.S. of allowing challenges to our court judgments far outweighs the benefits that U.S. investors may gain from being permitted to challenge foreign court judgments. A case such as Loewen highlights that the NAFTA provides foreign investors with more rights than Americans have and arguably gives foreign companies an advantage over domestic companies. While this may be true under any reading of the NAFTA, State's and USTR's view substantially expands the rights given to foreign investors that are not possessed by U.S. investors and corporations domestically. In any event, our interpretation will not cause a significant loss of protection for U.S. investors abroad because executive action, including an enforcement action, that results in a court judgment would still be a "measure" subject to the NAFTA.

for 2d alternative

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 18 1999

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Exhaustion of Local Remedies in NAFTA Chapter 11 Claim

FROM: Robert G. Dreher
Deputy General Counsel

TO: Peter Rundlet
Office of White House Counsel

We understand that the NEC and White House Counsel are considering the issue of whether the U.S. Government should argue, in its defense of the case brought by The Loewen Group under NAFTA Chapter 11, that a Chapter 11 claim may not be brought unless the claimant has exhausted available remedies under domestic law.

We concur in the Department of Justice's conclusion that Article 1121 can be read, and in our view should be read, so as to not have abrogated the local remedies rule. To the extent that federal or subnational regulatory action can give rise to a Chapter 11 claim, it seems elementary that the full regulatory process (including administrative and judicial review) should be completed before an international tribunal is allowed to intercede. Otherwise, the United States could be held financially liable at the international level for actions or inaction that could have been rectified through our own domestic processes. In addition, if exhaustion of local remedies does occur, international arbiters will benefit from a more complete record and fewer uncertainties about how to interpret regulatory measures.

Please address any questions or comments regarding this memorandum to me (telephone (202) 260-8064) or to Joseph Freedman of my staff (telephone (202) 564-5406).

cc: Ken Doroshow, DOJ
Cynthia Francisco, DOS
Steven Fabry, USTR
John Duncan, NEC
Barbara McLeod, EPA

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

June 27, 1999

MEMORANDUM

To: Philip D. Bartz
David J. Anderson
Vincent M. Garvey

cc: Victoria M. Corke

From: Kenneth L. Doroshow

Re: Loewen — Responses to State Department's Criticism of The Argument That Court Judgments Are Not "Measures"

As you know, Michael J. Matheson, Acting Legal Adviser to the State Department, sent a letter to David Ogden on June 22, 1999 (which we received at the end of the day on June 24, 1999), contending that our proposed argument that court judgments are not "measures" under the NAFTA is "unpersuasive legally and undesirable from a policy standpoint . . . ." I have reviewed the arguments and authorities offered in the memorandum that accompanied the letter. As explained in greater detail below, I believe that the arguments advanced by the State Department, while not without some force, do not ultimately undermine our proposed argument. Indeed, when viewed in their proper context, at least some of the authorities that the State Department cites provide additional support for the position that court judgments are not "measures."

I. THE ORDINARY MEANING OF "MEASURES"

State first addresses our argument that the ordinary meaning of the term "measures" excludes court judgments. Significantly, however, State makes no effort to address the fact that NAFTA Chapter 11 is not only limited to "measures," but to "measures adopted or maintained" by a government. As we explained in our May 3, 1999 draft of the proposed argument, governments do not, as a matter of common usage, "adopt or maintain" court judgments; rather, such judgments are "rendered," "issued," "entered" or "made." Regardless of whether the generic term "measures" could refer to court judgments, therefore, State's arguments do not overcome the fact that the further limiting phrase "adopted or maintained" in Chapter 11 independently excludes court judgments from the

Chapter's scope.[1]

Neither does State contend that court judgments are unambiguously included within the ordinary meaning of the term "measures." At most, State points out that the term is ambiguous. Because applicable canons of construction call for such ambiguity to be construed in favor of sovereignty (notwithstanding State's unpersuasive effort to discredit those canons, see infra), the argument that we propose should still prevail even in the face of such criticism.

A. Dictionary and NAFTA Definitions

State points out that "measures" is the only term in NAFTA Article 201 (General Definitions) that is defined to "include" something, whereas all other terms are defined to "mean" something. See State Memorandum at n.2. From this distinction, State infers that the drafters of NAFTA may have intended to include court judgments within the meaning of "measures" because the agreement uses a "non-exhaustive" definition. The definition of "measures" is not, however, necessarily "non-exhaustive."

While "measures" is the only term in Article 201 to be defined to "include" rather than to "mean," it is also the only term to be defined by reference to more than one thing. For example, "person" is defined in Article 201 to "mean[] a natural person or an enterprise." In contrast, "measure" is defined to "include[] any law, regulation, procedure, requirement or practice." The fact that the definition of "measure" uses the word "includes" rather than "means," therefore, could simply have been because, unlike any of the other defined terms, it refers to more than one thing that is "included" in the meaning of the term. In other words, the use of "includes" does not necessarily render the definition of measures "non-exhaustive," but could have been intended merely to encompass each of the specified items within the genus of "measures." Cf. R. Jennings & A. Watts (eds.), Oppenheim's International Law, 9th ed., p. 1280 n.20 (1992) ("The *ejusdem generis* doctrine is to the effect that general words when following (or sometimes preceding) special words are limited to the *genus*, if any, indicated by the special words.").

Moreover, the drafters of NAFTA clearly were capable of identifying court judgments with specificity when they wanted to do so. For example, Article 1109(4)(c) permits each NAFTA government to apply its laws to "ensur[e] the satisfaction of judgments in adjudicatory proceedings." By the principle of *expressio unius est exclusio alterius*, which is well-recognized in the law of treaty interpretation, see Oppenheim's at 1279-80, one can fairly infer that the drafters of NAFTA did not intend to include "judgments in adjudicatory proceedings" within the definition of "measures" in Article 201.

Finally, State argues that there is no basis in the generic definition of "measure" for distinguishing between judicial actions and other forms of government action, as all are considered to be acts of a government under international law. As Professor Bederman explained in his letter of

---

[1]This point is underscored by the linguistic awkwardness of State's claim that the issuance of a court judgment can be equated to "engag[ing] in a 'procedure, requirement or practice."

June 7, 1999, however, "the international law of State Responsibility has always differentiated between 'measures' . . . and 'denials of justice . . . ." Unlike legislative or administrative acts, judicial decisions are rendered in the unique context of an appellate system that is designed to cure errors committed by lower courts. It is entirely reasonable to assume that the drafters of NAFTA had this distinction in mind and did not feel that Chapter 11 was necessary — or even appropriate — to address wrongs committed by courts. In fact, State itself relies on this very distinction in support of the subsidiary argument that court judgments can only be "measures" when rendered by the highest available court. See State Memorandum at 3 ("[T]his argument might depend on a distinction between courts and other state actors" which is based on the unique "appellate structure of the judicial system . . ."). If State is willing to accept this distinction between court judgments and other forms of government action for purposes of the subsidiary argument, it is difficult to understand their claim that no such distinction exists for purposes of the argument that court judgments are not "measures."

B. International Decisions

State contends that the use of the term "measures" in international decisions "suggests that court actions can be measures." The case on which State chiefly relies for this contention is the recent decision of the International Court of Justice ("ICJ") in the Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998). While State quotes accurately (albeit selectively) from the decision, the decision as a whole is far from conclusive on the question and, indeed, provides additional support for the view that court judgments are not "measures."

At issue in the Spanish Fisheries case was a "reservation" in Canada's declaration of acceptance of the ICJ's jurisdiction. The reservation in question removed from the ICJ's jurisdiction "disputes arising out of or concerning *conservation and management measures* taken by Canada" with respect to fishing vessels in certain regions. (emphasis added). After Canada seized a Spanish fishing vessel pursuant to the Canadian Coastal Fisheries Protection Act ("CFPA") and its implementing regulations, Spain brought a claim against Canada in the ICJ alleging that the seizure violated international law.

Canada argued that the ICJ lacked jurisdiction over Spain's claim because the CFPA was a "conservation and management measure" that Canada reserved from the Court's jurisdiction. Spain argued that, while the generic term "measure" ordinarily has a broad meaning, the term as used in the reservation did not include legislation such as the CFPA. The Court rejected Spain's argument and found that the CFPA was plainly a "conservation and management measure" as to which Canada had expressly removed the Court's jurisdiction. In so finding, the Court noted that Canada "stress[ed] the very wide meaning of the word 'measure' . . . , which is used in international conventions to encompass statutes, regulations and administrative action." Id. at ¶ 65 (emphasis added).

Although the question of whether court judgments are "measures" was not at issue in the case, it is significant that the court's explanation of the "very wide meaning" of the generic term did not include court judgments, but was instead limited to "statutes, regulations and administrative action." This is precisely our point. As we set out in our May 3rd draft of the argument, the ordinary meaning of the term "measures" does not refer to court judgments, but only to legislative and regulatory actions.

To be sure, the Spanish Fisheries case does provide some support for the contrary view. For

example, as State points out, the ICJ found that the ordinary meaning of "measures" is "wide enough to cover any act, step or proceeding . . . ." Id. at ¶ 66; see also id. (the text of the reservation "refers not to measures adopted by the executive but simply to 'Canada,' that is to say the State as a whole, of which the legislature is one constituent part."). Similarly, Canada argued in its brief in the case that the term "covers all acts of State taken in pursuance of a high national policy, whether they take a *juridical*, physical, economic or administrative form." Counter-Memorial of Canada on Jurisdiction, Feb. 29, 1996, ("Canada's Brief") at ¶ 94 (emphasis added). See also Canada's Brief at ¶ 96 (quoting from a human rights treaty that applied to "legislative, *judicial*, administrative or other measures") (emphasis added). Nevertheless, even though Canada urged that "the expression 'measures' in international practice is the most comprehensive term available for the description of government actions," Canada's Brief at ¶ 97, the most that it could argue is that the "broadest possible sense" of the term "encompass[es] statutes, regulations and administrative action. Canada's Brief at ¶ 95. That neither Canada nor the ICJ referred to court judgments when they offered the broadest possible definition of "measures" reinforces the view that court judgments are not within the ordinary meaning of the term. Cf. Canada's Brief at ¶ 96 ("[I]ts most common usage is in relation to *legislative* measures.") (emphasis in original).[3]

The two other ICJ authorities identified by State are similarly inconclusive. In both cases, the references to "legislative, administrative, or judicial measures" are made entirely in passing and give no indication of the nature of the measures to which they refer. In Advisory Opinion Concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, the sole reference to "legislative, administrative, or judicial measures" is made in the separate opinion of Vice President Ammoun as part of a general discussion of the legality of South Africa's "racial discrimination, apartheid and related measures . . . ." 1971 I.C.J. at 88. In The Nottebohm Case (Lichtenstein v. Guatemala), 1955 I.C.J. 4, in which Lichtenstein challenged Guatemala's deportation of one of its alleged nationals, the reference to "administrative or judicial measures taken in regard" to the deported individual appeared only as a quote from Lichtenstein's claim and was in no way endorsed or even addressed by the Court, which dismissed Lichtenstein's claims on unrelated grounds .[4]

---

[3]It is also worth noting that, because the term appeared in a reservation against the ICJ's jurisdiction, the broad reading of "measures" in the Spanish Fisheries case was more protective of Canada's sovereignty. In fact, Canada argued that the term should be construed broadly because the law requires an "unequivocal indication" of a "voluntary and indisputable" acceptance of the ICJ's jurisdiction. Canada's Brief at ¶¶52-53 (citing ICJ cases). Had the issue been presented where a *narrow* reading was necessary to protect sovereignty — as in the Loewen case — it is unclear whether the ICJ would have reached the same result.

[4]Reference to "judicial authorities taking the measures in question" is also made in Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v. Sweden), 1958 I.C.J. 55, 88, but this reference clearly has no application here. In that case, the "measures in question" were those of a Dutch guardian taking steps to protect the well-being of a child. The Court noted that "according to Dutch law [guardians] are not administrative authorities" but are instead "judicial authorities applying Dutch law . . . ." Id.

Moreover, these passing references to "judicial measures" appear to be two of only five such references in the entirety of the ICJ's history.[9] See also Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1972 I.C.J. 12, 17 (ordering Iceland to "refrain from applying administrative, judicial or other measures" against British ships); Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), 1972 I.C.J. 30, 35 (ordering Iceland to "refrain from applying administrative, judicial or other sanctions or any other measures" against German ships); Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 319-320. Even if these few references were intended to include court judgments as measures, they hardly establish that the *ordinary* meaning of the term "measures" extends so far, particularly given the ICJ's recent statement in the Spanish Fisheries case that the "broadest possible" definition of measures "encompass[es] statutes, regulations and administrative actions."

The Barcelona Traction case — of which State was apparently unaware when it sent their memorandum — appears to be the only ICJ decision in which a court judgment is referred to (albeit only in the separate opinions of Judge Tanaka and Ammoun) as a "measure" and, as a result, presents some difficulty for our proposed argument. In that case, Belgium challenged an adjudication in bankruptcy as among several "measures" taken by various organs of the government of Spain, the result of which was the transfer of assets of a company that was largely controlled by Belgian interests to a Spanish investment group. 1970 I.C.J. at 319-320 (separate opinion of Judge Ammoun). These references may be distinguishable, however, because the allegations in that case were that the adjudication in bankruptcy was "nothing other than the result of the machinations of Juan March [the Spanish investment group to which the assets of Barcelona Traction were transferred] in collusion with Spanish judicial and administrative authorities." 1972 I.C.J. at 151 (separate opinion of Judge Tanaka). In other words, the court judgment was referred to as a "measure" only because it was part of an alleged orchestrated scheme involving several organs of the Spanish government to strip the Belgian interests of their ownership of Barcelona Traction.

Moreover, because the ICJ's jurisdiction is not limited to "measures adopted or maintained" by a government, the Barcelona Traction Court had no occasion to differentiate between the challenges to Spain's administrative actions and the "denial of justice" claim made against the bankruptcy adjudication. The uses of the term "measures" by Judges Tanaka and Ammoun, therefore, are more properly viewed as generic references to Belgium's claim as a whole and do not conclusively establish that court judgments fall within the ordinary meaning of "measures." Indeed, even with his casual use of the term "measures" in Barcelona Traction, Judge Tanaka made the more important point that international tribunals are not called upon to "examine the regularity of the decisions of municipal courts," as to do so would render the tribunal "a 'cour de cassation', the highest court in the municipal law system." 1970 I.C.J. at 157-58 (separate opinion of Judge Tanaka).

II. THE MEANING OF "MEASURES" IN THE CONTEXT OF THE NAFTA

State asserts that an arbitral tribunal "could easily find" that the uses of the term 'measure' throughout the NAFTA "do not exclude court judgments." In each of the examples given by State,

[9]Based on a search of Westlaw's ICJ database, which includes the Court's cases since 1947.

however, the provisions in question are more naturally read as referring only to legislative or administrative actions. See NAFTA Article 1106(2) ("measure that requires an investment to use a technology to meet generally applicable health, safety or environmental standards . . . ."); NAFTA Art. 1502(3) (requiring action through "regulatory control, administrative supervision or the application of other measures" to prevent monopolies from taking certain actions); NAFTA Art. 904 (standards-related measures). State's reliance on NAFTA Article 904 for their point is particularly misplaced, as the "standards-related measures" to which the provision refers is specifically defined in Chapter 9 to mean a "standard, technical regulation or conformity assessment procedure," a definition that plainly excludes court judgments.[#] See NAFTA Article 915.

Moreover, regardless of their merits, State's arguments in this regard miss the point. Because ambiguities in treaties are resolved in favor of sovereignty, it does not undermine the legal viability of our proposed argument to show that other NAFTA provisions *may* be interpreted to include court judgments. Instead, State would need to show that those provisions *must* be so interpreted, which State's memorandum does not even attempt to do.[#]

III. THE OBJECT AND PURPOSE OF THE NAFTA

State argues that allowing court judgments to be challenged in NAFTA Chapter 11 proceedings would serve the NAFTA's goals of "promot[ing] conditions of fair competition" and "provid[ing] adequate and effective protection and enforcement of intellectual property rights." While this may be true, it nevertheless begs the question of whether court judgments were intended to be included as "measures" subject to challenge under Chapter 11. As Professor Bederman points out, the inclusion of court judgments "would make *all* judicial action directly implicate the United States' responsibility under international law," which "distorts and misunderstands the principle of judicial independence embraced not only in the United States, but also in Canada and Mexico." Bederman Letter at 2-3 (emphasis in original); cf. Barcelona Traction, 1970 I.C.J. at 155-56 ("[A] State by reason of the independence of the judiciary, in principle, is immune from responsibility concerning the activities of judicial organs" except in egregious cases amounting to a 'denial of justice.') (separate opinion of Judge Tanaka). While the drafters of NAFTA clearly intended to subject many forms of government action to challenge under Chapter 11, it does not follow that they took the extraordinary step of subjecting any (or, as Professor Bederman cautions, all) judicial action to challenge as well, even if to do so would have promoted some of the goals of NAFTA.

[#]Of course, the use of the word "means" in the definition of "standards-related measure" arguably undermines our argument advanced above that the use of "includes" in Article 201's definition of "measure" was not intended to make the definition "non-exhaustive."

[#]State makes no effort to address our argument with respect to the NAFTA's references to "provisional" or "interim measures," asserting simply that, in their view, "[i]t is doubtful an arbitral tribunal would see the term "provisional measures" as a term of art" that is distinct from ordinary "measures." Our May 3rd draft addresses this point at length, and Professor Bederman has confirmed that the distinction we make in this regard is clearly recognized in international law.

Indeed, as we discussed in our May 3rd draft, the negotiating history indicates that the NAFTA's drafters (or at least the U.S. negotiators) considered the review of domestic court judgments by an international tribunal to be extraordinary and undesirable and, as a result, included provisions in the agreement to protect against such an occurrence. See U.S. White Paper of Talking Points for Carla Hills. From the negotiating history that we have identified, therefore, it appears that the NAFTA, by permitting challenges only to legislative and administrative actions, was intended to strike a balance between the competing goals of promoting conditions of fair trade and the independence of each country's judicial systems. State's memorandum fails even to mention this point.

IV. IN DUBIO MITIUS AND THE PRESUMPTION IN FAVOR OF SOVEREIGNTY

State notes our heavy reliance on the doctrine of in dubio mitius or "restrictive interpretation," which provides that treaties should be interpreted in deference to the sovereignty of states. While State is correct that the doctrine is not without its critics, the doctrine remains an established and viable part of treaty interpretation and, in any event, the criticisms of the doctrine have no application to NAFTA Chapter 11 disputes.

First, it should be noted that both international case law and scholars appear to distinguish (rather inexplicably) the doctrine of "restrictive interpretation" from the principle that a sovereign's consent to the jurisdiction of an international tribunal cannot be presumed. The ICJ, for example, has repeatedly insisted on an "unequivocal indication" of a "voluntary and indisputable" acceptance by a sovereign of the Court's jurisdiction. See, e.g., Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), 1995 I.C.J. 6, 63-64; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. 325, 341-42. While the reasons for this standard appear to be identical to those underlying the principle of "restrictive interpretation," the principal that consent to jurisdiction cannot be presumed has not been subjected to similar criticism.[7]

Second, even the critics of "restrictive interpretation" acknowledge that the doctrine remains a viable canon of treaty interpretation that is used often by international tribunals. See Charles Brower & Jason Brueschke, The Iran-United States Claims Tribunal (1998) at 265-69 (noting that, while the Vienna Convention should have "dispense[d] with the principle of restrictive interpretation, the Iran-U.S. Claims Tribunal has invoked the doctrine to deny jurisdiction over claims) (citing cases). As we noted in our May 3rd draft, the Appellate Panel of the WTO recently reaffirmed the principle in its decision in EC Measures Concerning Meat and Meat Products (Hormones), 1998 WL 25520, Report of the Appellate Body at *71 n. 154 (WTO Jan. 16, 1998).

---

[7] Indeed, H. Lauterpacht, who authored an influential critique of the doctrine of "restrictive interpretation" in 1949 (which State cites in their memorandum), authored an equally influential opinion nearly a decade later while sitting as a judge on the ICJ, noting that it is a "fundamental principle of international judicial settlement" that " the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt." Qatar v. Bahrain, 1995 I.C.J. at 64 (quoting Judge Lauterpacht's separate opinion in Certain Norwegian Loans, I.C.J. Reports 1957 at 58).

Finally, the criticisms of "restrictive interpretation" have no bearing on the Loewen case or any other NAFTA Chapter 11 dispute. According to the doctrine's critics, "restrictive interpretation" fails to take into account "the benefits which the party bound by the commitment has reaped in consideration of its undertaking." H. Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 1949 Brit. Y.B. Int'l L. 48, 59. See also C. Brower & Jason Brueschke, The Iran-United States Claims Tribunal (1998) at 267 (the "rule of 'restrictive interpretation' has been criticized as leading to restrictions on the obligations of one sovereign State to the detriment of any benefits in a treaty provided to another sovereign State.") (quoting Case No. A1, 1 Iran-U.S. C.T.R. at 190). This criticism presumes, however, that both parties to the dispute were also parties to the agreement. NAFTA Chapter 11 disputes, in contrast, are necessarily between an investor and a government, only the latter of which was a party to the agreement. Regardless of the merits of the foregoing criticism, therefore, application of the doctrine of 'restrictive interpretation' is entirely appropriate in Chapter 11 disputes. State appears to recognize as much in its memorandum. See State Memorandum at 3 ("[O]ne can argue that this interpretive principle should apply in the context of a dispute between a state and an investor . . . .").

V. POLICY CONSIDERATIONS

State claims that "perhaps the most fundamental problem" with our proposed argument is that its logic could extend to exclude all actions by individual government officials from the scope of the NAFTA. According to State, there is no clear basis for distinguishing a judicial decision from an executive decision and, because we argue that the Article 201 definition of "measure" does not expressly include judicial decisions, our argument may lead to the undesirable result that executive decisions are excluded from NAFTA as well.

State is incorrect that there is no textual basis in Article 201 for distinguishing judicial decisions from executive decisions. Unlike a judicial decision, a decision by an individual Executive Branch employee that affects a foreign investment (assuming that the employee is authorized to act on behalf of the government) can be properly viewed as a government "requirement" or "regulation," consistent with the ordinary meaning of the term "measures." To the extent that the individual employee's actions are illegal or unauthorized, however, such actions are plainly outside the scope of NAFTA Chapter 11. If an individual government employee acts ultra vires, even if that act impairs a foreign investment, it cannot be said that the act was a "measure adopted or maintained" by the government.

Perhaps more troubling is the problem that, at least with respect to certain antitrust matters in the United States, the laws are enforced simultaneously by executive agency decisions (i.e., the Federal Trade Commission) and court decisions (i.e., in actions brought by the Department of Justice). At first blush, our proposed argument would seem to lead to the awkward result that FTC decisions are "measures" whereas court decisions on actions brought by the Department of Justice are not, merely because the former is rendered by an agency and the latter by a court. Given the principle of judicial independence at the heart of "denial of justice" jurisprudence, however, the argument that the NAFTA treats national courts as different from administrative agencies is not unreasonable. See, e.g., Barcelona Traction, 1970 I.C.J. at 155-56 ("[A] State by reason of the independence of the judiciary, in principle, is immune from responsibility concerning the activities of judicial organs" except in

egregious cases amounting to a 'denial of justice.') (separate opinion of Judge Tanaka).

State also contends that our proposed argument is undesirable as a policy matter because "[i]rregular and arbitrary judicial actions that deprive U.S. investors of fundamental due process rights, including those done without legislative or regulatory authority, are a serious concern of the executive branch, as well as the Congress." This may be so, notwithstanding the fact that there is no evidence in the legislative or negotiating history even suggesting that Congress or members of the Executive Branch ever considered the specific question of judicial action as opposed to other forms of government action. Even if State is correct, however, the point only underscores our contention that the issue should be elevated to the White House for a decision as to the appropriate balancing of competing policy concerns.[8]

Finally, State misconstrues Professor Bederman's letter as endorsing only the more limited argument that court judgments in private civil cases (as opposed to cases in which a government is a party) are not "measures." As a review of his letter makes clear, Professor Bederman fully endorses the broad argument that no court judgment can be a measure. While he notes that the United States "would be content with the narrowest possible ruling on the tribunal's competence," he does not suggest that, to obtain such a narrow ruling, the United States need not advance the broader argument. To the contrary, Professor Bederman recognizes that, while it may be desirable as a policy matter for court judgments other than those in private civil cases to be covered under the NAFTA, the language of the agreement does not admit of such distinctions. As I read his letter (and based on my telephone conversations with him), Professor Bederman appears to understand that the text of NAFTA requires that we advance the broad argument and, as a matter of litigation strategy, urge the Tribunal to go no further than it needs to determine that the private civil judgments at issue in Loewen are not "measures."

VI. THE SUBSIDIARY ARGUMENT

State believes that, rather than make the broad argument that court judgments are not "measures," we should advance only the subsidiary jurisdictional argument that court judgments are "measures" only when rendered by the highest available court.[9] There are at least two problems with this approach.

First, while we may be able to establish that Loewen must have exhausted the judicial process before a "measure" could be said to exist, the strength of our argument will ultimately rest on the viability of exhaustion in this particular case. Our strongest arguments in this regard are that: (1)

---

[8]Interestingly, State makes no reference to any of the policy concerns that militate in favor of the argument that court judgments are not "measures," suggesting that the agency may not recognize those concerns.

[9]Mr. Matheson's letter curiously asserts that this subsidiary argument is one that neither we nor Professor Bederman have considered. We set forth this very argument in some detail in our May 3rd draft, however, which Professor Bederman reviewed and discusses to in his June 7th letter.

Loewen could have petitioned the U.S. Supreme Court for an emergency stay of execution of the underlying judgment and for a writ of certiorari on the question of the Mississippi courts' refusal to waive the supersedeas bond requirement, and (2) Loewen could have filed for bankruptcy protection (which grants an automatic stay) and pursued its appeal in bankruptcy. As to the former option, Loewen could have a strong "futility" argument, inasmuch as emergency relief and petitions for certiorari are very rarely granted. As to the latter, it may be difficult to persuade the Tribunal that a company should be required to declare bankruptcy in order to be said to have exhausted the judicial process for purposes of an international claim. The likelihood of our succeeding on the subsidiary argument that State prefers, therefore, may not be as strong as State appears to believe. I agree NM

Second, even if we establish that claimants must exhaust the judicial process, the argument preferred by State nevertheless concedes that the decisions of our highest courts are subject to challenge as "measures" under NAFTA Chapter 11. Indeed, the Mondev claim that is expected to be filed in the next several weeks raises this problem in stark terms, as it challenges a decision of the Massachusetts Supreme Judicial Court, from which a petition for certiorari was filed and denied by the U.S. Supreme Court. While State may be content with a waiver of sovereignty that would afford foreign investors (in contrast to U.S. citizens) an additional means to obtain review of high court decisions, with the United States effectively serving as guarantor of those decisions, others with policymaking authority may be of a different view.

Attorney-Client Privilege
Work Product Privilege
Predecisional Material

June 1, 1999

MEMORANDUM FOR: **KENNETH L. DOROSHOW**
Department of Justice, Civil Division

FROM: Steven F. Fabry
USTR, Office of the General Counsel

SUBJECT: *Loewen v. United States*: Concerns About the Argument That Court Orders are Never "Measures"

First of all, thank you again for your memorandum of May 3, 1999, in which you outline your draft jurisdictional arguments. I appreciate your having undertaken to prepare the arguments so far in advance of their submission, and thereby having given us ample time to consider them.

As you know, I have serious concerns about the viability of the draft argument made in Part I of your May 3 memorandum: the argument that Loewen's claim is not arbitrable under Chapter 11 because court orders[1] can "never" (as opposed to "in this case") be "measures" as that term is defined in NAFTA Article 201. This paper is an attempt to sketch out, briefly and informally, some of my concerns. It has not been vetted within USTR, and my colleagues might make additional or different legal points. Moreover, I have also not addressed the separate, important question of whether, as a policy matter, the U.S. Government should advance that argument. Nevertheless, I hope that you will find these particular reactions useful.

1. NAFTA pertains to applications of measures as well as to measures per se.

The draft argument begins with the statement that Article 1101 "limits the application of Chapter 11 only to 'measures adopted or maintained by a Party. . . .'" In addition to noting that the word "only" does not appear in the text of Article 1101, I am concerned that the draft argument depends on too narrow an interpretation of that provision. In effect, the draft argument analyzes whether

[1] I have used the broader term court "orders" rather than "judgments" because, as far as I can tell, Loewen is challenging not only the jury verdict but also the decision of the Mississippi Supreme Court not to lower the amount of the *supersedeas* bond. See, e.g., Notice of Claim, para. 158.

court orders *are* "measures". The draft argument does not seem to take into account the possibility that court orders can apply, implement or enforce measures, and that such application, implementation or enforcement could also fall within the scope of Chapter 11.

The text of Chapter 11 in fact suggests that application, implementation and enforcement of measures were intended to be covered by the Chapter. For example, Article 1106 applies, generally speaking, to certain requirements that a Party might wish to place on the establishment or operation of an investment. The text of Article 1106 applies to a Party's attempts to "impose *or enforce* any of the following *requirements* . . . ." It is not clear how this provision could be operative if Chapter 11 did not extend to the application of measures as well as to measures in the abstract.

Similarly, Article 1109 generally requires the Parties to permit transfers relating to an investment to be made freely and without delay. Article 1109(4) provides exceptions to that requirement. The exceptions are phrased in terms of "application of [a Party's] laws". This set of exceptions would not be necessary if Chapter 11 did not extend to applications of measures.

Finally, it is also difficult to reconcile the draft argument with the investor-state dispute settlement mechanism. That mechanism does not permit measures to be challenged in the abstract, but only if they cause "loss or damage" to the investor. (See, e.g., Article 1116(1).) This case involves at least one "measure" that clearly fits the definition in Article 201: the Mississippi *supersedeas* bond rule. Loewen has challenged the refusal of the Mississippi Supreme Court to exercise its discretion under that rule to lower the bond for Loewen. It would not make sense to say that the rule itself could be challenged in investor-state arbitration, but that the application of the rule by the Supreme Court in this particular case cannot be challenged.

2. The NAFTA implies that court orders can be "measures".

NAFTA Article 201 says that the term "**measure** *includes* any law, regulation, procedure, requirement or practice". All the other definitions in Article 201 use the formulation "[defined term] *means* [definition]". Therefore, the draft argument faces two difficulties: that Article 201 does not provide an exhaustive definition of the term "measure" (and given the remedial nature of NAFTA may be read expansively); and that it does not say that court orders are not measures. Other elements of NAFTA in fact point the other way.

A. Chapter 11

Several provisions within Chapter 11 imply that court orders are measures covered by the disciplines of Chapter 11. To return to the transfers provisions of Article 1109, a number of the specific exceptions in Article 1109(4) seem quite clearly to refer to judicial action: in particular, the application of a Party's laws relating to bankruptcy (exception 'a'), criminal or penal offenses

(exception 'c'), and ensuring the satisfaction of judgments (exception 'e'). These exceptions would not be needed if court orders could not be "measures".

Article 1106 also clearly contemplates that court orders fall within the scope of the Chapter. Article 1106(1)(f) creates an exception to one of the prohibitions contained in Article 1106. The prohibition applies "except when the *requirement* is imposed or the commitment or undertaking is *enforced by a court*, administrative tribunal, or competition authority . . . ." If court orders could not be "measures", there would be no need for this additional exception.

Finally, the term "interim measures" is used in Article 1134, and covers the arbitration equivalent of interlocutory court orders. The draft argument responds to this point by noting that interim measures in an arbitration have a different function from interim or final awards on the merits, but the fact remains that interim measures are a kind of measure.

B. Chapter 17

NAFTA Chapter 17 (Intellectual Property) contains several provisions that seem to confirm that court orders can be measures. Articles 1714 *et seq.* generally requires the Parties to provide for enforcement of intellectual property rights. Those Articles use the word "procedure" -- one of the types of "measure" as defined in Article 201 -- to mean judicial relief. Article 1714(1), for example, provides that:

> Each Party shall ensure that enforcement *procedures*, as specified in this Article and Articles 1715 through 1718, are available under its domestic law so as to permit effective action to be taken against any act of infringement of intellectual property rights covered by this Chapter, *including expeditious remedies* to prevent infringements and remedies to deter further infringements. (Emphasis added.)

Other chapters of NAFTA may provide similar examples, though I have not yet had an opportunity to review them.

C. Trade Agreement Jurisprudence

Although the NAFTA is not one of the trade agreements negotiated under the auspices of the World Trade Organization or its predecessor, the GATT, the negotiators of the NAFTA were familiar with those agreements. Although I do not know of a case in which a *court* order was held to be a measure, jurisprudence under the GATT does clearly hold that adjudications can be measures. The *Spring Assemblies* case includes the following ruling:

> [T]he Panel interpreted the word 'measure' to mean the exclusion order issued by the United States International Trade Commission (ITC) under the provisions and procedures of Section 337 since, in the view of the Panel, it was the exclusion

order which operated as the measure preventing the importation of the infringing product.[2]

If an order issued by the ITC in an administrative adjudication can be a "measure", a court order can presumably be one also. In this connection I recall what Dick Larm mentioned at one of our meetings: the Antitrust Division of the Department of Justice and the Federal Trade Commission both enforce U.S. antitrust laws, the former through the courts, the latter through administrative action. It is not clear why the two should be treated differently.

3. Other matters

The draft argument raises some additional questions that are set out briefly below:

- The bilateral investment treaties that the United States has entered into do not contain a scope provision similar to NAFTA Article 1101(1). Therefore, it seems very difficult to argue that those treaties are limited to "measures". The implication of your draft argument, therefore, is that NAFTA Chapter 11 provides less protection than the bilateral investment treaties do. However, I do not know of any drafting history or other documentation that suggest the negotiators intended such an outcome.

- It is not clear how to reconcile the draft argument with eminent domain proceedings under U.S. law. Those proceedings constitute -- or are the last step in -- a physical taking of property, and therefore seem to be expropriations within the meaning of Article 1110. But under the draft argument, they would seem to be completely excluded.

- You cite Carla Hills' talking points for the proposition that Chapter 11 was not intended to permit investor-state tribunals to review decisions made by courts. As I read the portions that you have cited (I have not seen the original document), those talking points suggest that it is Article 1121 -- *not the definition of "measure"* -- that accomplishes this objective.

- There are other parts of the definition of "measure" to contend with. For example, how are we to deal with the word "practice"? It seems different than "law" or "regulation" -- and therefore suggests that "measure" goes beyond laws and regulations. If Mexican or Canadian courts made it a practice to discriminate against U.S. investors, would that fall within the scope of Chapter 11?

---

[2] *Report of the Panel in "United States - Imports of Certain Automotive Spring Assemblies,"* L/5333, adopted 26 May 1983, BISD 30S/107, para. 54.

Attorney-Client Privilege
Work Product Privilege
Predecisional Material

As I mentioned to you recently, the Government of Mexico uses the word " procedimiento" -- the equivalent in the Spanish text for "procedure" -- to include investor-state arbitration proceedings.

* * * * * * * *

I would be pleased to elaborate on any of these points if you like, or to discuss them with you. I also look forward to working with you on Parts II and III of the draft argument and to our continued close cooperation on this very interesting and challenging case.

cc: Mark Clodfelter/Cynthia Stewart - Department of State, L/CID