IN THE MATTER OF:

THE LOEWEN GROUP, INC. and
RAYMOND L. LOEWEN,

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

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

MEMORIAL OF THE UNITED STATES OF AMERICA ON MATTERS OF COMPETENCE AND JURISDICTION

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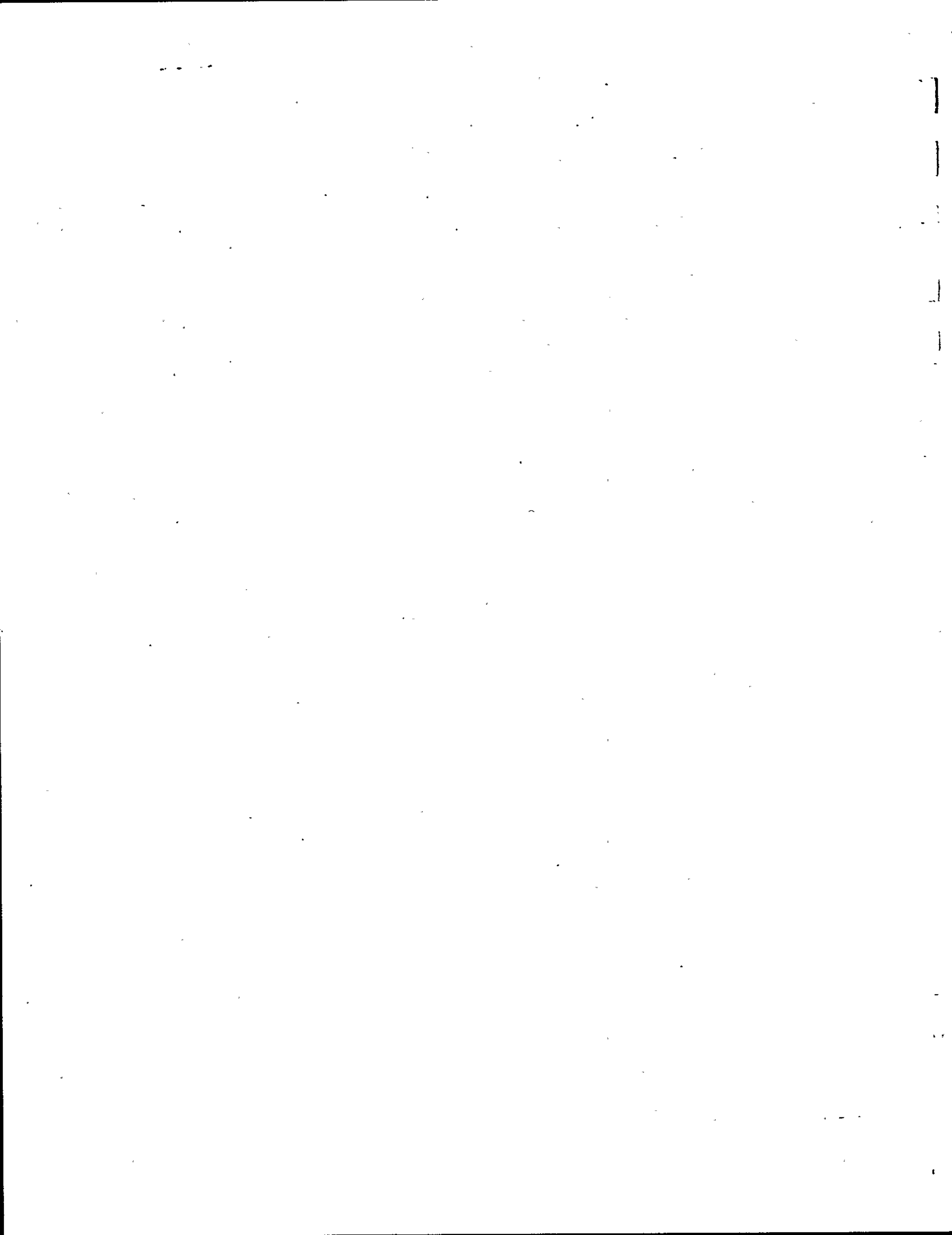

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United States Memorial

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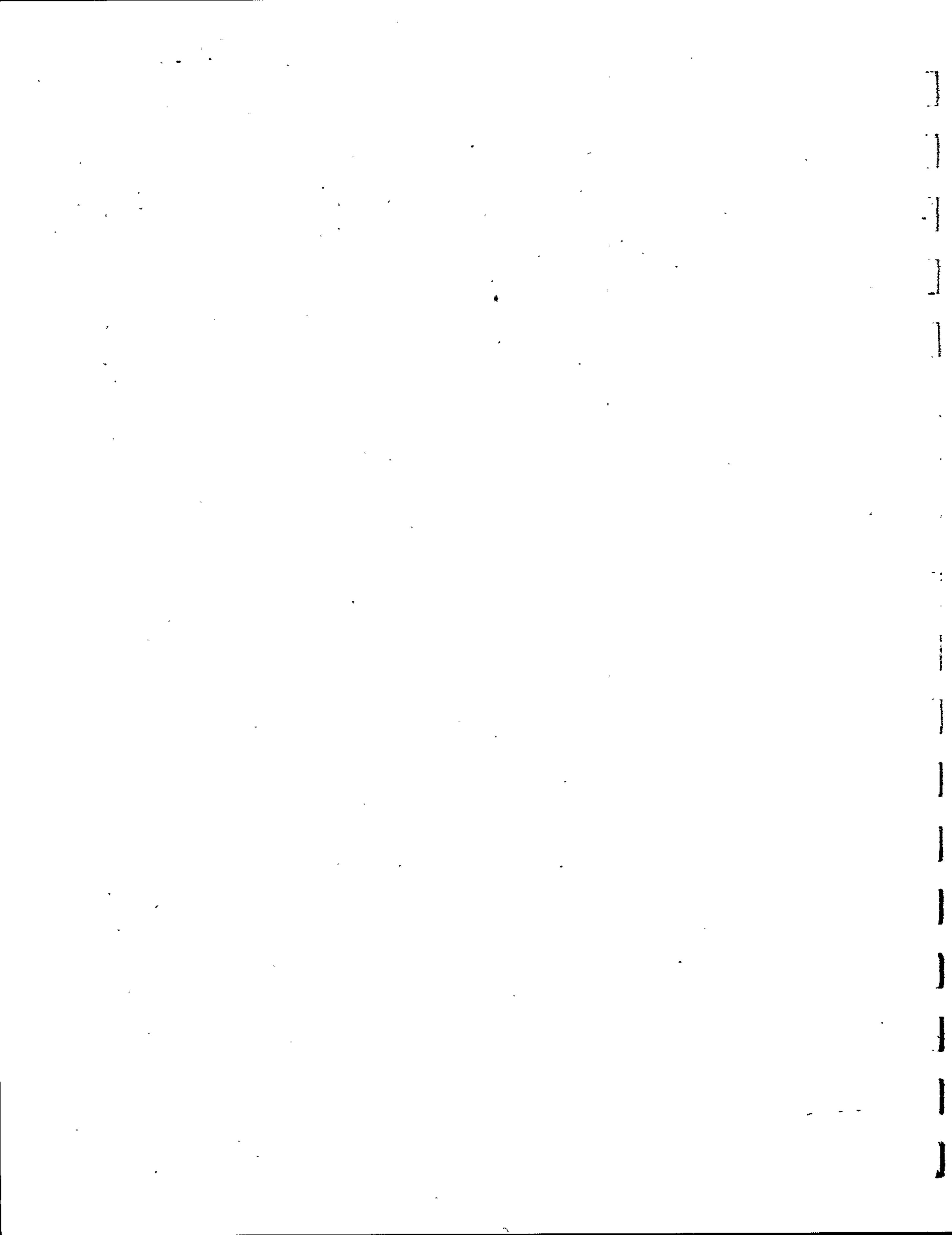

INTRODUCTION

On October 30, 1998, The Loewen Group, Inc. ("TLGI" or "Loewen") and Raymond L. Loewen ("Ray Loewen" or "Mr. Loewen") (collectively "Claimants") 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 Canada, the United Mexican States, and the United States of America (the "Parties"). Chapter 11 of the NAFTA sets forth rules for the treatment of foreign investment and provides a means for resolving certain types of 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 and believed that its chances of success on appeal were overwhelmingly favorable, 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 lower the amount of a supersedeas bond that would have stayed 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 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 Article 1122(1) of 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 Article 1101(1). As a review of the NAFTA text makes clear, the NAFTA Parties did not 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 of the NAFTA 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 a NAFTA Party vis-à-vis a private investor. Because Claimants attribute their alleged injuries exclusively to domestic court judgments rendered in a dispute among private parties, their entire claim is outside the scope of the NAFTA Parties' consent to arbitration.

Moreover, even if it were possible to view domestic court judgments in private disputes as "measures adopted or maintained" by a Party under NAFTA Chapter 11, the particular Mississippi judgments challenged here cannot be considered "measures adopted or maintained" by the United States or, as a matter of law, give rise to a breach of Chapter 11, because they were not final acts of the United States judicial system. Under applicable principles of customary international law, only the highest available court can implicate the international responsibility of a State for its judicial actions in this type of case.[1] Because the Mississippi judgments of which Claimants complain were still subject to appeal at the time Loewen chose to settle, those judgments cannot give rise to an arbitrable claim under the NAFTA.

Claimants attempt to excuse their failure to comply with this jurisdictional requirement of finality by arguing that their supposed inability to post the supersedeas bond prevented further appeals and thus "coerced" Loewen into settling the Mississippi litigation. Claimants' argument, however, is fully undermined by the advice that Loewen received from its counsel at the time, and is otherwise meritless. As explained in detail in the attached statement 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 a federal district court) was available to it -- assuming the truth of Loewen's factual allegations -- is without a proper basis in United States law." See Statement of Drew S. Days, III ("Days Statement") at 51 (attached hereto as Exhibit A). As Professor Days explains, "Loewen could have sought and had a reasonable opportunity to obtain United States Supreme Court review of

[1] Throughout this Memorial, except as the context otherwise requires, the term "State" is used (as is customary in international practice) to refer to a nation-state, not a subnational unit.

the Mississippi bonding requirement or . . . Loewen could have obtained review and relief from a federal district court." Id. at 51-52. In either case, it is Professor Days' opinion that Loewen "would have obtained an order staying execution of the state trial court's judgment pending review of the merits of Loewen's allegations." See id. at 3. Loewen's own documents reveal that the company held this same view at the time, notwithstanding the position it advances now.

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 statements of several prominent U.S. bankruptcy law experts -- J. Ronald Trost, Esq., **REDACTED** **REDACTED**, and Harvard Law School Professor Elizabeth Warren -- which conclusively demonstrate that Chapter 11 reorganization was a reasonable and viable means by which Loewen could have pursued its appeals without posting a supersedeas bond.[2]

REDACTED

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[2] A copy of Mr. Trost's declaration ("Trost Declaration") is attached hereto as Exhibit B; a copy of **REDACTED** is attached as Exhibit C; a copy of is attached as Exhibit D; and a copy of Professor Warren's statement ("Warren Statement") is attached as Exhibit E.

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 final acts of the United States' judicial system. Because those judgments were 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 to be "measures adopted or maintained" by the United States for purposes of NAFTA Chapter 11 and cannot, as a matter of law, give rise to a breach of the United States' international obligations. As a result, Claimants' entire claim of injury as a result of those judgments is not within this Tribunal's competence.

Indeed, Loewen is merely seeking to vindicate in this arbitration 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. The United States Constitution guarantees aliens (as well as citizens) "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.); these constitutional provisions offered Loewen precisely the same sort of protections that it seeks in this NAFTA proceeding. Loewen itself argues that the Mississippi judgments are objectionable, in part, because they allegedly violated those U.S. constitutional guarantees. See, e.g., TLGI Mem. ¶¶167-170, 194-96.[3] Because Loewen elected not to appeal and avail itself of these federal protections, the United States, which was not a party to the Mississippi litigation, cannot be held liable for Claimants' alleged injuries under the NAFTA.

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[3] References to "TLGI Mem. ¶__" are to the cited paragraphs of the Memorial of the Loewen Group, Inc., filed in this arbitration on October 18, 1999. References to "RLL Mem. ¶__" are to the cited paragraphs of the Memorial of Raymond L. Loewen, filed on the same date.

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 repeated appeals to the jury's anti-Canadian, racial, and class biases," Loewen's lawyers never objected on such grounds at any point during the trial. Because Loewen never asked the court to protect it against the alleged misstatements during the trial, 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 Tribunal must dismiss for lack of competence the claims Ray Loewen asserts under NAFTA Article 1117 on behalf of The Loewen Group's United States operating subsidiary, The Loewen Group International, Inc. ("LGII"). Both Ray Loewen and TLGI have filed claims under NAFTA Article 1117 on behalf of LGII. Article 1117, however, permits only one investor to bring a claim on behalf of a particular enterprise. To the extent that any claim may be brought on behalf of LGII. The Loewen Group is the only entity with standing to do so.

Finally, the United States renews its request that these proceedings be bifurcated and that its substantial objections to competence be treated as a preliminary question. This case is one of the first ever to be filed under NAFTA Chapter 11, and its resolution will not only establish the rights and obligations of the parties to this dispute, but will likely also influence the interpretation of NAFTA Chapter 11 as a whole. Given the importance and complexity of the jurisdictional questions presented here, these questions should be resolved carefully without the further complications of a hearing on the merits. Moreover, bifurcation would be most consistent with well-settled and prudent practice in international arbitration, and would spare the parties and

the Tribunal from an unnecessary -- and extraordinarily costly -- exploration of the merits of Loewen's allegations, which may well 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.[4]

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 Jessica Mitford, The American Way of Death Revisited 16 (1998) (U.S. App. at 141).[5] 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. Jonathan Harr, The Burial, The New Yorker, Nov. 1, 1999, at 79 (U.S. App. at 178).

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

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[4] See, e.g., P. Rosenblatt, et al., Grief and Mourning in Cross-Cultural Perspective (1976).

[5] References to "U.S. App. at ___" are to the cited pages of the Appendix submitted with this Memorial.

the body to arranging the services to helping the grieving families cope with their loss. (U.S. App. at 178). 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. (U.S. App. at 57). 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. (U.S. App. at 178).

B. The "Big Three" Consolidators

For most of the twentieth century, funeral homes were operated as family businesses in which succeeding generations routinely carried on the traditional, community-based role of the funeral home. (U.S. App. at 178). 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. (Id.). 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. (Id.)

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. (U.S. App. at 178). 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. (Id.). 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, e.g., D. Roberts, Profits of Death at 139-40 (1997) (U.S. App. at 13, 82).

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. (U.S. App. at 13, 29). 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, at A1 (U.S. App. at 28-29, 179). 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. (Id.) 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. (U.S. App. at 13, 26).

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, at 63 (U.S. App. at 24). 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. (Id.; U.S. App. at 17, 179). 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) (U.S. App. at 17, 58, 83).

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. (U.S. App. at 156, 163). 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 (U.S. App. at 148). 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, at C1 (U.S. App. at 165). 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 The High Cost of Dying, N.Y. City Dep't of Consumer Affairs Report (1999) (U.S. App. at 65); R. Fields & M. Lipka, Death Inc., Sun-Sentinel, March 21, 1999, at 1A (U.S. App. at 84). 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 (U.S. App. at 137).

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. (U.S. App. at 164). 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, at D3 (U.S. App. at 92), 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, at B4 (U.S. App. at 156). 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 in 1993. Service Corp. Warns Investors, Houston Chronicle, Oct. 2, 1999 (citing

Credit Suisse estimates) (U.S. App. at 153). In the end, the Big Three consolidators had saddled themselves with enormous debt to acquire properties whose valuations eventually plummeted when investors discovered their intrinsic worth. (U.S. App. at 78, 93, 155). By October 1999, the stock index of publicly-traded death-care companies had fallen more than 73% for the year. See T. Hirschmann, Death's No Sure Thing, Nat'l Post, Oct. 9, 1999, at C1 (U.S. App. at 159). The troubles of the Big Three continue to this day. (U.S. App. at 206).[6]

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, at C1 (U.S. App. at 164), The Loewen Group quickly earned a reputation as the most aggressive. (U.S. App. at 24). 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. (U.S. App. at 25, 132, 179-80).[7]

[6] 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, at B4 (U.S. App. at 155); J. Schreiner, Loewen Group Stock Dives 27%, Nat'l Post, March 11, 1999, at C1 (U.S. App. at 78).

[7] 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, N.Y. Times, Jan. 27, 1996, at A6 (U.S. App. at 9). See also, e.g., B. Mohl, Growth of Chains Has Led to Rise in Funeral Prices, Boston Globe, Aug. 28, 1995 (The Loewen Group was "very, very ruthless" and "[h]aving a monopoly was not wrong from their viewpoint.") (quoting Massachusetts Assistant Attorney General) (U.S. App. at 6).

Ray Loewen began purchasing funeral homes in Canada in the late 1960s, soon after assuming control of his own family's funeral home. (U.S. App. at 178). 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. (Id.)

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 larger than Canada's and was, at the time, still almost entirely unconsolidated. (U.S. App. at 179). 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).[1]

With this new source of financing in hand, and driven by a personal desire to overtake SCI (the world's largest death-care company), Ray Loewen launched an aggressive buying spree for family-run funeral homes as they came up for sale all over the United States.[2] 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. (U.S. App. at 179).

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[1] References to "A___" are to the cited pages of the Appendices submitted by Loewen in this case.

[2] In the Palm of Ray's Hand, Nat'l Post, June 2, 1999, at 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.") (U.S. App. at 135).

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. See Affidavit of Bradley D. Stam (May 31, 1999) ("Stam. Aff.") at 4; id. at 23 ("reporting and information systems were not able to keep pace with the growth of the Company . . . .") (U.S. App. at 100, 119, 148).

Moreover, Loewen had been raising a substantial portion of its financing for acquisitions through regular offerings of new debt and equity in the company, 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 "fiscal illusion" that was created by "buying more funeral homes at an increasingly fast pace." (U.S. App. at 26). 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. (U.S. App. at 2, 26, 93, 153, 160). 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." (U.S. App. at 26). Moreover, in late

1994, the company significantly expanded its acquisition program to emphasize cemeteries in addition to funeral homes. (A1928).

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. (U.S. App. at 102). 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. (Id.). 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 ambitious earnings growth targets that Ray Loewen had led investors to expect.

As Loewen'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." (U.S. App. at 102). 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 creditworthiness and profitability. See, e.g., R. Fields, Grim Time for Funeral Firms, L.A. Times, Oct. 24, 1999, at C1 ("Their numbers looked good, but their debt was going up as fast as their income. It had to collapse.") (U.S. App. at 166; see also U.S. App. at 40).

With this high-risk and fundamentally flawed approach to acquisitions, The Loewen Group began 1995.[10] 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, at D3 (U.S. App. at 93).

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.[11] Both lawsuits charged The Loewen Group with a variety of unfair and deceptive business practices, and each sought millions of dollars in damages. (A1247). Although Loewen would eventually settle the

[10] Indeed, the dangers of Loewen's business model were noted by some analysts as early as 1992. See S. Lubove, Death Stock, Forbes, June 22, 1992, at 88 ("It's a circle game. . . . [A]s soon as one part weakens, the whole thing collapses.") (U.S. App. at 2). Cf. D. Kansas, Story of a Funeral-Home Stock Has Somber Investment Moral, Wall St. J., Jan. 30, 1996, at 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.").

[11] Loewen was, at the time, a defendant in numerous other lawsuits as well. (U.S. App. 403-418).

Pennsylvania litigation for $30 million before trial, it elected to take the Mississippi case to trial.[12] The Mississippi 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, Loewen 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. (U.S. App. at 9; A1018). The purchase not only provided Loewen with additional funeral properties, but 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. (A1018). 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. (U.S. App. at 9-10, 181; A40-41). 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. (Id.)

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

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[12] Both cases are described in Continental Ins. Co. v. Loewen Group, Inc., 1998 WL 142380 (N.D. Ill. Mar. 17, 1998), a lawsuit in which Loewen sought insurance proceeds to cover the costs of both the Pennsylvania and Mississippi litigation.

companies, Loewen began selling its own funeral insurance through the Wright & Ferguson home. (U.S. App. 10, 25; A41).

In April 1991, following failed negotiations with Loewen, the O'Keefes filed suit in Mississippi state court alleging that Loewen had breached the exclusive contracts between the O'Keefe companies and Wright & Ferguson. (A20). Loewen promptly contacted Jeremiah O'Keefe, the head of the O'Keefe family business, to discuss the possibility of settling the lawsuit. (U.S. App. at 25, 181).

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. (A594-649).

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. (U.S. App. at 181-82; A107, A310). Aware of O'Keefe's constraints and vulnerability in this regard, Loewen delayed implementation of the agreement. (Id.; Tr. 235-240).[13] 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. (U.S. App. at 181-82; A107, A310). After the deal collapsed, O'Keefe was forced

[13] References to "Tr. __" are to the cited pages of the transcript of the Mississippi trial submitted by Claimants with their Notice of Claim on October 30, 1998.

to sell four of his funeral homes to another consolidator in order to raise sufficient cash to meet the state regulatory requirements. (U.S. App. at 9-10, 180-82).

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. (A35-53). 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. (Id.) 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. (Id.)

B. The Trial

Trial in the case of O'Keefe, et al. v. The Loewen Group, et al. 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) that Loewen was deceptive 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. (E.g., Tr. 1218-20, 1228-32, 1837-49, 3072-73).

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After the close of evidence, the court proposed a set of jury instructions, and expressly gave the parties an opportunity to object and state the grounds for any objection. (Tr. at 5388-89). When asked by the court if he had any objection to the court's first instruction (the

instruction highlighted in Loewen's Memorial, see TLGI Mem. ¶ 91), 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."[14] Similarly, although Loewen now contends that the trial was "infected by appeals to the jury's alleged anti-Canadian, racial and class biases," it has pointed to no instance where its lawyers raised an objection on such grounds at any point during the trial, whether in voir dire or the trial itself.[15]

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[14] Loewen's lawyers expressly stated they did not object to an instruction proposed by the court admonishing the jury to "not be influenced by bias, sympathy or prejudice." (Tr. 5390-91; A2229). Loewen's lawyers later proposed what they termed a "more elaborate" instruction on this point, allegedly "tailored to" the O'Keefe case. (Tr. at 5390, 5447). According to Loewen's counsel, however, their proposed instruction was not a "substantive instruction," but a "procedural or formal" one. (Tr. at 5445). The court denied Loewen's request, leaving the court's instruction -- to which Loewen's counsel said he had no objection. (Tr. at 5447). Contrary to what Loewen implies here, its trial lawyers never argued that their proposed instruction was needed to address any "heightened risk of improper nationality-based, racial, and class bias." Indeed, consistent with Loewen's lawyers' characterization of the proposed instruction as a "procedural" matter, Loewen apparently never even considered appealing the court's refusal to give it. (U.S. App. 661; 645-646).

[15] Like all jurisdictions in the United States, Mississippi follows 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). In fact, when it gave the O'Keefe parties an opportunity to object to the proposed instructions, the trial court made clear that "in terms of objections to instructions[,] it's only preserved if you state it." (Tr. 5388).

C. The Verdict

On November 1, 1995, the jury returned a verdict in favor of O'Keefe in the amount of $260 million. (A650-58). After the verdict was announced, the jury foreman[16] 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. (A659). 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 to conduct a separate proceeding on the issue of punitive damages. Neither O'Keefe nor Loewen objected to this proposal. (Tr. 5741-5749).[17]

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. (Tr. 5810). The total verdict of $500 million was reduced to judgment and entered by the trial court on November 6, 1995.

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[16] The jury foreman was born and raised in Canada, is married to a Canadian national, and regularly visits his hometown in Ontario. 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.

[17] Just before the court proposed to reform the verdict in this fashion, Loewen made a perfunctory, oral motion for a mistrial in the judge's chambers, which the court denied. (Tr. 5738-39). The court specifically pointed out Loewen's failure to propose any jury instruction to ensure that the jury would not simultaneously consider compensatory and punitive damages, noting that "if an instruction like that had been offered by [Loewen], it would have been granted." (Tr. 5742). After the judge then expressed his "inclination . . . to reform the verdict to reflect that [the jury] awarded 100 million dollars in compensatory damages and that they've awarded 160 million dollars in punitive damages," id., Loewen expressed no objection at all. (Tr. 5743-52).

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; A18. Under Mississippi law, a party may pursue such an appeal without posting any sort of bond. A party may also stay the 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 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); A818. On November 29, 1995, after the submission of briefs and a full hearing on the matter, the trial court denied Loewen's request. (A1072-78).[18]

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 Mississippi Supreme

[18] 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). Indeed, the court afforded Loewen a lengthy hearing on the matter and, as a review of the transcript makes clear, gave full and careful consideration to the arguments presented by both sides. (A1046-80).

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. (A1027, A1083). 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 . . . ." (U.S. App. at 603, 633).

While the bond question was pending before the Mississippi Supreme Court, Loewen raised $155 million to fund acquisitions by issuing new Loewen stock in the Canadian equity markets, and was preparing to raise an additional $200 million in a debt offering. (TLGI Mem. ¶143; U.S. App. at 653). Loewen's Mississippi counsel strongly advised against such 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. (U.S. App. at 439, 601, 633, 653). 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).

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, without the need for a bond.

Loewen and its counsel were extremely confident of their chances of success on appeal of the jury verdict. 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. (U.S. App. at 384; see also U.S. App. at 401 ("I think the chances are excellent that we will secure substantial, if not complete, relief" from the jury verdict); U.S. App. at 431 (attorneys consulted "were unanimous in the view that any judgment entered on this verdict will be reversed or substantially reduced" by the Mississippi Supreme Court); U.S. App. at 606.

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. (A1503). The total value of the settlement, according to Loewen, was approximately $85 million.[19]

[19] 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 statements to the U.S. Securities and Exchange Commission (a federal agency that regulates the securities markets) and in its press releases at the time, Loewen estimated the after-tax, net present value of the settlement to be approximately $85 million. (A1509).

F. The NAFTA Chapter 11 Arbitration

On October 30, 1998, nearly three years after they settled the O'Keefe litigation, Claimants initiated this arbitration alleging that the judgments of the Mississippi courts in the O'Keefe litigation breached certain NAFTA obligations. Specifically, Claimants alleged that the Mississippi courts violated NAFTA Articles 1102 ("National Treatment"), 1105 ("Minimum Standard of Treatment") and 1110 ("Expropriation and Compensation"). Claimants seek to hold the United States liable for those alleged breaches and have claimed $725 million in damages. See Notice of Claim ¶187.

On April 6, 1999, the United States objected to the Tribunal's competence to hear this case and requested that the matter be bifurcated so that the objection is treated as a preliminary question. The Tribunal, in its procedural order following the first session on May 18, 1999, reserved the issue of bifurcation as follows: Claimants would submit their memorial on the case-in-chief, following which the United States would submit a memorial only on questions of jurisdiction and competence. See Minutes of the First Session of the Tribunal, May 18, 1999, p. 6. The Tribunal ruled that it would decide whether bifurcation was appropriate after the United States submitted its memorial on jurisdiction and competence. Id. The Tribunal also ordered that the United States was "entitled to reasonable discovery" for the purpose of formulating its memorial on jurisdiction and competence, as well as its counter-memorial on the merits (assuming such a counter-memorial would become necessary). Id.

On July 20, 1999, pursuant to the Tribunal's order, the United States served Claimants with its first set of discovery requests. Claimants objected to those discovery requests on August 26, 1999, on the grounds that some of the information sought was (according to Claimants)

beyond the proper scope of discovery and/or was protected from disclosure by the attorney-client privilege. On October 25, 1999, The Loewen Group submitted partial responses to the United States' discovery requests, once again arguing that it was entitled to withhold information on the grounds that the information was beyond the proper scope of discovery and/or was protected from disclosure by the attorney-client privilege.

On November 1, 1999, the United States requested the Tribunal to order Claimants to produce all of the responsive information that they were withholding. On December 9, 1999, the Tribunal concluded that, because Claimants contend that they settled the Mississippi litigation under duress, "the resolution of that issue will inevitably call into question legal advice procured by the Claimants or either of them with respect to matters directly relevant to that issue." Order of the Tribunal dated Dec. 12, 1999, p. 2. Accordingly, the Tribunal ruled that, notwithstanding Claimants' assertion of the attorney-client privilege, the United States "shall be entitled to discovery of attorney-client communications relating directly to the issue of duress." Id., p. 3. On December 30, 1999, following the United States' renewed request for the withheld information, The Loewen Group produced a limited number of documents which, according to its counsel, consisted of "all documents regarding the duress issue that we have been withholding on the grounds of attorney-client privilege."

Because it appeared that some responsive information still had not been produced, the United States, on January 10, 2000, asked Claimants to clarify the extent to which their production purported to be complete. (U.S. App. at 656). On February 14, 2000 -- only four days ago -- Loewen's counsel responded that, although they possessed documents pertaining directly to alternatives available to Loewen by which the company could have continued its

appeal in 1996, counsel did not believe the Tribunal's order obligated them to produce those documents to the United States. (U.S. App. at 658).

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 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1993 I.C.J. 325, 341-42 (hereinafter "Case Concerning Genocide"); see also, e.g., Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 260 (3d ed. 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 this authority."). 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 THE JUDGMENTS OF DOMESTIC COURTS IN PURELY PRIVATE DISPUTES ARE NOT "MEASURES ADOPTED OR MAINTAINED BY A PARTY" 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. NAFTA Article 1101(1).

Although they appear to acknowledge that their agreement to settle the O'Keefe litigation was not itself 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 amount 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.[20]

Even if Claimants truly had been coerced by the Mississippi court judgments to enter into the settlement agreement -- and, as explained below, they most assuredly were not -- Claimants nevertheless could not 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.

The Vienna Convention on the Law of Treaties, which in great part codifies customary international law in this area, is the primary guide to interpreting terms found in the NAFTA. See NAFTA Article 1131(1) ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."). The Vienna Convention provides 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, 1155 U.N.T.S. 331, Art. 31(1). The context comprises, inter alia, the text of the agreement, including its preamble and annexes. Id.,

[20] Claimants do not challenge the supersedeas bond rule itself, Miss. R. App. P. 8, as an offending "measure" under NAFTA Chapter 11. Rather, they claim only that the judgments of the Mississippi courts not to lower the bond amount constituted "measures" under the NAFTA. See Notice of Claim at 58 ¶158, 59 ¶161.

Art. 31(2). Further, the Convention requires that "any relevant rules of international law applicable in the relations between the parties" be taken into account in interpreting agreements. Id., Art. 31(3).

In substance, these principles require that the NAFTA be interpreted to effectuate the express agreement of the Parties. See I Oppenheim's International Law, Parts 2-4, 1267-68 (Robert Jennings and Arthur Watts, eds., 9th ed. 1992). 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 with legislative and administrative actions that affect investment. Other evidence and principles of interpretation further reinforce the fact, made clear by the express terms of the NAFTA, that Chapter 11 does not 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.[21]

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 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,

[21] We do not contend that a domestic court judgment resulting from an action initiated by a government entity, or from an action in which such an entity is otherwise sufficiently involved, cannot be a measure subject to challenge under NAFTA Chapter 11. When such an entity is involved in a domestic court proceeding, it may, in appropriate circumstances, be that the resulting court judgment constitutes a "measure adopted or maintained by a Party." The O'Keefe litigation, however, was a purely private dispute and did not involve government action of any kind other than partial adjudication of the parties' claims by the Mississippi court system.

regulation, procedure, requirement or practice." On its face, this definition does not include jury verdicts, court judgments, court orders, rulings, or other types of judicial action.

This understanding of "measure" is consistent with the ordinary usage of the term, which does not refer to court judgments in private disputes, but instead contemplates legislative or administrative actions. Indeed, the major dictionaries of the English language make 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 736 (1994); <u>see also</u> Webster's Third New International Dictionary 1399-1400 (1986) ("Step; *specif.* a proposed legislative act: Bill"); The New Shorter Oxford English Dictionary 1726 (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 in private cases within the definition of the term "measure."

The term "measure" is also routinely used in international agreements to refer to legislative or administrative actions rather than court judgments in private cases. 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), reprinted in Burns H. Weston, et al., International Claims: Their Settlement by Lump Sum Agreements, 1975-1995 at 201 (1999).[22]

The standard-form contract of the Multilateral Investment Guarantee Agency ("MIGA"), an organization within the World Bank Group that insures investors against certain risks (including expropriations) around the world, adopts the same approach. 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) (U.S. App. at 227).

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 implicates State responsibility, see Notice of Claim ¶ 145, 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

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[22] 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), Weston at 183; 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), Weston at 171.

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." Alwyn V. Freeman, The International Responsibility of States for Denial of Justice, 148 (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 the "political" organs of government, it would be unreasonable to construe the single term "measures" to include court judgments in private disputes in addition to legislative and executive actions. This is particularly so in this case, given that the definition of "measure" in NAFTA Article 201, on its face, does not mention court judgments or make any reference to a "denial of justice." Indeed, the term "denial of justice" does not appear anywhere in the NAFTA.

That Chapter 11 does not extend to court judgments in private cases 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, laws are "adopted," and pre-existing rules or practices are "maintained." See, e.g., Webster's Third New International Dictionary of the English Language 29 (1986) ("adopt" refers to "a bill or measure passed or accepted formally"); id. at 1362 ("maintain" means to "keep up" or "continue"). In contrast, court judgments in private litigation 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 . . . .").

In summary, for all of the above reasons, the plain text of the NAFTA excludes court judgments in private disputes from the scope 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 refer to judgments, decisions, orders, or any other type of judicial decision-making in its definition of a "measure." By contrast, NAFTA Article 1109(4)(e) permits each NAFTA government to apply its laws to "ensur[e] the satisfaction of judgments in adjudicatory proceedings." The use of the term "judgments" in this provision suggests that the drafters would have put that term in the definition of "measure" in Article 201 if they had intended to cover court judgments in private proceedings. Cf., e.g., Oppenheim's at 1279-80 (noting use of principle of *expressio unius est exclusio alterius* in treaty interpretation).

Indeed, the term "measures" appears frequently throughout NAFTA Chapter 11 and, without exception, is not used to refer to the judgments of domestic courts in private cases. To the contrary, the provisions of NAFTA Chapter 11 make clear that the term "measures" refers to investment-related legislative or administrative actions. Article 1108, for example, 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 with legislation or regulation and do not refer to court judgments in private disputes. 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 not with court judgments in individual private disputes but with trade- and investment-related legislative and administrative actions. Article 2103, for example, speaks of 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 certain non-tariff export restrictions "such as licenses, fees, taxation and minimum price requirements." NAFTA Article 315(1)(b); see also NAFTA Article 605 (referring to "Other Export Measures"). The

term appears countless times in similar fashion throughout the NAFTA, reinforcing the same point.[23]

Indeed, from the more than one thousand pages that constitute the NAFTA, including nearly 300 separate Articles as well as numerous annexes and supplemental agreements, Claimants have been able to point to only two places where the term "measures" appears to be used in the context of judicial action: a reference to "interim measures of protection" issued by international tribunals, see Article 1134, and in the specific context of intellectual property proceedings. See, e.g., Article 1716 ("Provisional Measures"). These scant references to "provisional measures" or "interim measures," however, do not expand the scope of Chapter 11 to include jury verdicts or other domestic court judgments in private litigation.

"Provisional measures" or "interim measures of protection" are well-recognized as terms of art that bear no relation to the "measures" of the type 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

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[23] 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 ("measures" as distinct from "determinations" and "rulings" in certain customs matters); NAFTA Articles 602(1), 606 (energy regulatory 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 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 . . . .").

"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 measures" and "interim measures of protection" 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 protection does not imply that the judgments of domestic courts in private disputes are "measures" subject to arbitration under Chapter 11. Neither do the references to court-ordered provisional measures of protection in intellectual property disputes suggest that court

judgments in private litigation are subject to arbitration under Chapter 11. The only relevant textual provision in Chapter 17 in fact suggests the opposite. See NAFTA Article 1716(5)(b) (requiring NAFTA Parties to allow defendants to have *ex parte* measures of protection "reviewed by [the relevant NAFTA Party's] judicial authorities . . . .").

Moreover, Chapter 17 does not permit challenges to provisional measures of protection in individual cases. Certain provisions of Chapter 17 require that the Parties *empower* their courts to take particular actions, as, for example, Article 1716(1), which provides that "each Party shall provide that its judicial authorities shall have the authority to order prompt and effective provisional measures . . . .", but those provisions do not open any individual court decision to challenge under the NAFTA. Other provisions require each Party to ensure "that enforcement procedures . . . 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 . . . ." E.g., Article 1714(1). Such an obligation might not be met if, for instance, a Party's court system displayed a pattern or practice of failing to issue provisional measures to protect intellectual property rights. However, that obligation does not open a court's decision involving such measures in any specific case to a NAFTA challenge along the lines of the proceedings that Claimants have instituted in this case.

For another reason as well, provisional measures of protection under Chapter 17 are entirely distinct from the sort of court judgments that Loewen challenges here. 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 court-ordered "provisional measures" fell within the scope of the term "measures" in Chapter 11, these provisions of Chapter 17 confirm that court judgments on the merits of a given private dispute — 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 in private litigation, as such judgments are not "adopted or maintained," but instead are "rendered," "issued" or "made." See supra at 32. Where the phrase "adopted or maintained" is used elsewhere in the NAFTA, it refers to legislative or administrative rules or

actions that concern trade and investment. 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 719(a) ("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 does not apply to domestic court judgments in private litigation.

In short, in its context, the limiting phrase "measures adopted or maintained" in NAFTA Article 1101 applies to legislative or regulatory actions and excludes domestic court judgments in private disputes 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, H.R. Rep. No.

103-159, Vol. I, at 9 (1993) (emphasis added). Therefore, this Tribunal lacks competence to address Claimants' challenges to the judgments of the Mississippi courts.

C. <u>The Object And Purpose Of The NAFTA</u>

The principal goals of the NAFTA are clear: to "eliminate barriers to trade" among Canada, Mexico and the United States, to "promote conditions of fair competition in the free trade area," to increase "investment opportunities," to "provide adequate and effective protection and enforcement of intellectual property rights" in each of the three countries, and to "create effective procedures . . . for the resolution of disputes . . . ." NAFTA Chapter 102 ("Objectives"). Nowhere in these stated goals is there any suggestion that the NAFTA was intended to apply to court judgments where the judgment consists of a jury's award of damages in a purely private contract dispute, unrelated to any legislative or executive action, that was eventually settled out of court.

In fact, the inclusion of such court judgments within the scope of Chapter 11's dispute resolution mechanism would have undermined the stated goal of the NAFTA to "create effective procedures . . . for the resolution of disputes . . . ." NAFTA Article 102(1)(e). The NAFTA's preparatory work reflects a concern that the agreement not lead to situations in which "an international tribunal act[s] as an appeals court for domestic judicial decisions." (U.S. App. at 272). In talking points for the negotiations, the United States warned that allowing such a result would frustrate the very purpose of the dispute resolution mechanisms that are vital to the NAFTA's success, as it would exacerbate "the political problems associated with investment disputes . . . ." <u>Id</u>. Allowing court judgments in purely private litigation to constitute "measures" under NAFTA Chapter 11 would therefore be contrary to this stated objective. Indeed, because

Loewen's challenge is so contrary to the object and purpose of the NAFTA, this case has been criticized as beyond the scope of the drafters' intent. See, e.g., W. Glaberson, *NAFTA Invoked to Challenge Court Award in U.S.*, N.Y. Times, Jan. 28, 1999, at C1 ("[S]ome of those who were most involved in the debate over the trade agreement five years ago say they did not anticipate claims based on court verdicts.") (U.S. App. at 281).

D. Canons Of Treaty Interpretation Require That The Term "Measures Adopted Or Maintained" Be Interpreted To Exclude Domestic Court Judgments In Private Disputes

It has long been a principle of customary international law that treaties are to be interpreted in deference to the sovereignty of states.[24] 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. 253, 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, 1995 I.C.J. 6, 63-64

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[24] It has been persuasively argued that this interpretive rule -- sometimes referred to as "restrictive interpretation" -- does not apply in disputes between sovereign parties to an international agreement, as a presumption in favor of one party's sovereign interests would necessarily minimize the sovereign interests of other parties to the agreement. See, e.g., C. Brower & J. Brueschke, The Iran-United States Claims Tribunal, 267 (1998) (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.") (quotation omitted). While we agree that restrictive interpretation does not apply in a "State-to-State" context, this criticism has no application where, as here, the interpretive dispute is purely between a State and a private entity that was not a party to the agreement giving rise to the claim. Indeed, in the context of interpretive disputes between an investor and a State, the claimant investor possesses no sovereign interest that would militate against the presumption in favor of the sovereignty of the respondent State.

(dissenting opinion); Case Concerning Genocide, 1993 I.C.J. at 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." Oppenheim's International Law at 1278-79.

Clearly, an unwelcome review of a country's domestic court judgments in private litigation through international arbitration would significantly interfere with that country's territorial supremacy. As one noted scholar has observed, "a stringent control of municipal judicial activity can and will result from submission of [denial of justice] cases to an arbitral tribunal or an international court of justice." Freeman at 172 (1938).[25] As noted above, this concern was recognized in the course of the negotiations of the agreement. See, e.g., U.S. App. at 272; see also, e.g., Case Concerning the Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 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).

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25 Of course, the ultimate question before the Tribunal in such a case remains whether international obligations have been breached; a violation of domestic law alone is insufficient to trigger international responsibility. See, e.g., Case Concerning Elettronica Sicula S.P.A. (ELSI) (United States v. Italy), 1989 I.C.J. 15 ¶124. However, the substance of the national court proceedings may be closely intertwined with an evaluation of whether a denial of justice under international law has occurred; an analysis of international liability may well entail exhaustive analysis of the domestic court proceedings.

In light of the strong concern regarding 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 in purely private cases. Even if the term could plausibly be so construed, see, e.g., Regina v. Pierre Bouchereau, 2 C.M.L.R. 800, 810 (E.C.J. 1977) ("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), settled principles of international law require that any ambiguity must be resolved to exclude domestic court judgments in private cases from the scope of Chapter 11. To do otherwise on the basis of language that is, at most, ambiguous 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." Case of Certain Norwegian Loans (France v. Norway), 1957 I.C.J. 9, 57-58 (separate opinion of Judge Lauterpacht).

E. None Of Loewen's Citations Establishes 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 notes 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. ¶ 315. This argument, however, ignores the settled (and related) interpretive rules of *noscitur a sociis* -- "a word is known by the company it keeps" and *ejusdem generis* -- general words are limited by the meaning indicated by accompanying specific words. See, e.g., Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995); Australian Broadcasting Tribunal v. Bond, (Austl. 1990) 170 C.L.R. 321, ¶21 (Toohey & Gaudron, JJ.); P. Cote, The Interpretation of Legislation in Canada 242 (1984). Courts regularly use these principles "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 legislative and administrative actions and do not describe judicial actions in private disputes. As explained above, if the NAFTA were to include "denials of justice" arising from private litigation within the scope of "measures" challengeable under NAFTA Chapter 11 -- or if, as Loewen would have it, the NAFTA were meant to render the government's liability under Chapter 11 potentially unlimited -- the text easily could have said so explicitly. Given the conceptual distinction between court judgments in private disputes and all other forms of government action, however, it is unreasonable to ascribe so broad a meaning to the single term "measures," the most natural meaning of which refers to legislative or administrative action.

Second, Loewen argues that, even if court judgments are not "measures" in the ordinary sense of the term, court judgments in private cases fall within the subsidiary definitions of

"measure" provided in NAFTA 201(1). As even Loewen's own effort reveals, however, the text simply cannot bear the inclusion of court judgments rendered in a dispute among private parties.

For example, Loewen argues that the Mississippi court judgments can fairly be construed as "procedures," within the meaning of that term in NAFTA Article 201, because the Mississippi courts rendered decisions concerning Rule 8 of the Mississippi Rules of Appellate Procedure (the supersedeas bond rule). See TLGI Mem. ¶ 314; Miss. R. App. P. 8. This argument ignores the obvious difference between rules of procedure and court judgments applying those rules in a given case. Indeed, Loewen expressly does not challenge Rule 8 -- or any other rule of procedure -- as an offending "measure" in this case, but instead challenges only the Mississippi courts' decisions not to vary the bond amount under Rule 8.

Loewen's argument that the Mississippi court judgments are "requirements" is similarly unconvincing. According to Loewen, "civil damages judgments constitute a state-imposed 'requirement'" under United States law. TLGI Mem. ¶314 n.19. 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 state-imposed requirements. 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).[26]

Loewen fails to identify a single case in which the term "measures" 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 (E.C.J. 1977), did not hold that court judgments in civil disputes fall within the ordinary meaning of the term "measures." To the 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 of '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 822. 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 822 (recommendation by U.K. court was statutorily-mandated and a prerequisite to "justifying a subsequent decision by the executive

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[26] 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 . . . ." Cippollone 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 government actions listed in the definition of "measure" in the NAFTA is remarkable for the absence of any reference to "court judgments," "decisions," or "denials of justice."

authority . . . ."), the ECJ's conclusion has no bearing on the proper application of the NAFTA in this case. See, e.g., id. at 810.

Similarly, the International Court of Justice in Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998), did not hold that the term "measures" includes domestic court judgments. In that case, Canada argued that the court 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 with Canada's view that the statute was a "measure" and that the broadest meaning of the term "is used in international conventions to encompass statutes, regulations and administrative action." Id. at ¶¶ 65-73 (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 notably 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).[27] Loewen's reliance on this case is thus misplaced, as the

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[27] 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

court's understanding reflects the most natural meaning of the term "measures," which does not include court judgments in private cases.[28]

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 unusual circumstances. See TLGI Mem. ¶¶ 319-320. These citations miss the point, however. The question presented here is not whether international law ever recognizes state responsibility for court action, but whether the NAFTA in particular affords investors an extraordinary private right of action against national governments to challenge court judgments in private disputes. Given the text of the agreement, as construed with the appropriate deference to the sovereignty of the United States, NAFTA Chapter 11 cannot be read to have conferred such an extraordinary right of action on private parties.

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protect sovereignty — as it is in this case. see supra at 41-42 — the ICJ might well have construed the term narrowly. See, e.g., Fisheries Case at ¶ 71 (noting that narrower interpretation "would deprive the reservation of its intended effect").

28 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. ¶ 322. Unlike NAFTA tribunals, the jurisdiction of the Iran-U.S. Claims Tribunal extends to "debts, contracts . . . 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 318-19.

II. THE COURT JUDGMENTS COMPLAINED OF HERE ARE NOT "MEASURES ADOPTED OR MAINTAINED" BY THE UNITED STATES AND CANNOT GIVE RISE TO A BREACH OF CHAPTER 11 AS A MATTER OF LAW BECAUSE THEY WERE NOT FINAL ACTS OF THE UNITED STATES JUDICIAL SYSTEM

As noted above, tribunals constituted under NAFTA Chapter 11 have competence only to hear disputes alleging injuries arising out of "measures adopted or maintained" by a NAFTA Party. NAFTA Article 1101(1). Moreover, such tribunals may only hear claims that a Party "has breached an obligation" as specified in NAFTA Articles 1116 and 1117. Even assuming that a domestic court judgment in a private dispute could ever give rise to liability under NAFTA Chapter 11, a lower court judgment that is still capable of appeal cannot qualify as a "measure adopted or maintained" by a NAFTA Party and cannot, as a matter of law, establish that a Party has "breached" an obligation under NAFTA Chapter 11. Because all of the judgments challenged here were still subject to appeal in higher courts, Claimants cannot meet their burden of proving that this Tribunal has competence to hear their claims.

These claims are barred by the settled customary international law principles governing international claims of this type: claims for reparation for injuries to foreign nationals that are brought by such nationals directly or on their behalf through espousal. Under these principles, when a claim of injury is based upon judicial action in a particular case, state responsibility may arise only once there has been final action by the state's judicial system as a whole. As Edwin Borchard stated in his seminal treatise, "[i]t is a fundamental principle that [with respect to acts of the judiciary] . . . only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state." Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad 198 (1915) (hereinafter Borchard, Diplomatic Protection). Until

the entire judicial system has acted, as expressed through the highest available court, no breach of an international obligation can have occurred in such a case.[29] See E. Borchard, "'Responsibility of States' at the Hague Codification Conference," 24 Am. J. Int'l L. 517, 532 (1930) ("[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.") (citing Belgian delegate) (hereinafter Borchard, Responsibility of States).

These principles are reflected in a wide variety of sources, including the writings of scholars, the practice of States, and decisions of international tribunals. See, e.g., League of Nations Publications, Bases of Discussion, Vol. III Responsibility of States pp. 41-51 (1929) ("It is not disputed that the courts are able to involve the State in responsibility, but the judicial decision with which it is confronted must be final and without appeal."), reprinted in Freeman at 634; Letter from Mr. Marcy, U.S. Sec. of State, to Chevalier Bertinatti, Sardinian Minister (Dec. 1, 1858), reprinted in 6 Moore's Int'l Digest 748 ("[T]he state is not responsible for the mistakes or errors of its courts . . . when the decision has not been appealed to the court of last resort."); Case of Christo G. Pirocaco, American-Turkish Claims Commission, Nielsen's Opinions and Reports, 587, 599 (as cited in Freeman, at 415) ("'As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort.'"). Though much of this analysis developed in the espousal context, where the exhaustion

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[29] Obviously, these principles do not apply where, for example, a State has undertaken specifically that its lower courts will act, or refrain from acting, in a particular fashion. Moreover, a State can clearly bind itself to establish procedures for its lower courts, as was done, for example, in Chapter 17 of the NAFTA.

of local remedies is a procedural prerequisite for presentation of a claim, these statements nonetheless reflect a fundamental understanding of the type of judicial action that can implicate state responsibility.[30] It is only after domestic judicial action is complete that a State's international responsibility to provide reparation for injuries to foreign nationals can attach. See, e.g., French Indemnity of 1831, 5 Moore, International Arbitrations, 4472-4473 (1898) ("[T]he commissioners recognize[] the principle that a state is politically answerable only for the decisions of its highest tribunals."). In these types of international claims, a series of judicial actions must be seen as a single action because of the framework within which judicial decisions are made. Typically, courts are hierarchically structured, with courts at a higher tier authorized to correct the mistakes of courts at lower tiers. See, e.g., Peter E. Herzog & Delmar Karlen, Attacks on Judicial Decisions, in XVI Int'l Encycl. of Comp. L., at 5-6 (Mauro Cappelletti, ed.

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[30] The principle that state responsibility for judicial action is not engaged until a court system has reached a final resolution frequently arises in discussions of customary international law's procedural requirement of exhaustion of local remedies (the "local remedies rule"). When an international claim is brought to challenge judicial action, however, the requirement of a final, non-appealable judicial action is distinct from the local remedies rule, and its implications extend far beyond mere procedure. The finality requirement is premised on the substantive concept that, unlike non-judicial violations that a claimant may attempt to remedy in domestic courts, an act of a domestic court that remains subject to revision has not ripened into the type of final act that is sufficiently definite to implicate the international responsibility of a state to provide reparation. See, e.g., Freeman at 407 ("[w]ith respect to original violations of international law prior to and unconnected with the administration of justice, [the 'local remedies rule' requiring exhaustion] is a *procedural* condition precedent to diplomatic interposition. With respect to wrongful acts by private persons, it enjoys the *substantive* faculty of creating responsibility where local remedies function defectively; i.e., in the case of inadequate judicial protection.") (emphasis in original). Therefore, even where the procedural prerequisite of exhaustion of remedies has been waived, finality of judicial action is necessary to establish a substantive element of a breach that is premised on judicial action, and there can be no breach in the absence of such finality. See, e.g., id. at 311-12 ("[R]esponsibility is engaged as the result of a definitive judicial decision by a court of last resort which violates an international obligation of the State.").

1982) (describing "the typical judicial hierarchy" as consisting of a "pyramid" of courts, at each level exercising review of the decisions of the level below). This hierarchical structure is necessary in order to ensure that "justice" is done. Id. at 8 ("[T]he desirability of allowing some form of attack upon a judicial decision is deeply embedded in the social consciousness."). Such a structure recognizes that individual decision-makers are not infallible, and that review of a lower court's actions by superior courts may be necessary in a given case. Id. at 4-5.

Indeed, the practical reason why an appealable, lower-tier judicial action cannot engage a State's responsibility to provide reparation is that, until the case has been completely processed through that State's judicial system, reversal is always a possibility: "[i]t 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." Borchard, Responsibility of States at 533. As the International Court of Justice has held, "[b]efore 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." Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6, 45-46.

The requirement of a final, non-appealable judgment before state responsibility may attach in these types of claims is thus well-grounded in common sense. See, e.g., Schooner Ada, Smith and Mason v. Mexico, reprinted in 3 Moore, International Arbitrations, at 3143 ("It would be preposterous to expect that on every occasion when foreigners consider themselves aggrieved by the sentences of inferior courts of justice their respective governments should intervene, should insist upon a reversal of the sentences of those courts, and should pretend to make the

government of the country responsible for all the damages which may be alleged to have accrued."). In fact, if finality were not a prerequisite to stating a claim for judicial breach under NAFTA Chapter 11, recourse to international arbitration would always be available based on lower court action alone, no matter if or why a claimant failed to appeal. Such automatic recourse to international tribunals from judgments of lower domestic courts would prevent higher courts from exercising the supervisory function necessary to a coherent domestic legal system. See Herzog & Karlen, at 5 ("It is important for the courts, the legal profession, and society at large that law develop in a harmonious and consistent manner. This requires that there be some central body to expound, clarify and harmonize it."). Rejecting a finality requirement could lead to a proliferation of claims based on State actions that are provisional in nature, in that they are subject to approval, review, modification, reversal, or remand by a higher court. NAFTA Chapter 11 could not have created such a result. See, e.g., Jennings, Laughland & Co. v. Mex., No. 374 (1874), Convention of July 4, 1868 (U.S. v. Mexico) (Thornton, U.), reprinted in 3 Moore International Arbitrations, at 3135-36 (umpire "[did] not conceive that any government [could] . . . be made responsible for the misconduct of an inferior judicial officer when no attempt whatever has been made to obtain justice from a higher court").

There is no evidence that in Chapter 11 of the NAFTA the Parties meant to derogate from this settled international law requirement when judicial action itself is the focus of the international claim. To the contrary, the terms of NAFTA Chapter 11 fully reflect the requirement of final action prior to any claim that judicial action has breached the obligations of the Chapter. In particular, Article 1101 provides that the Chapter applies to "measures adopted or maintained by a Party." The terms "adopted or maintained by a Party" themselves require

finality of action or ratification by the government. See, e.g., Black's Law Dictionary (6th ed. 1990) at 49 ("adopt" means "to accept, appropriate, choose or select"); id. at 953 ("maintain" means to "sustain" or "uphold"). Only those judicial decisions that have been accepted or upheld by the judiciary as a whole, after all available appeals have been concluded, can be said to have the requisite finality to be measures "adopted or maintained" by a NAFTA Party for purposes of Chapter 11.

Similarly, NAFTA Articles 1116 and 1117 limit the jurisdiction of a NAFTA Chapter 11 tribunal to claims that a Party has "breached" a particular NAFTA obligation. As noted above, no breach of an international obligation for reparation to a foreign national can be premised on a judicial decision that is not a final act of a Party's judicial system. See supra at 48-50. Where, as here, the challenged judicial action was still subject to appeal in higher courts, such action cannot constitute a "breach" for purposes of NAFTA Articles 1116 and 1117. Thus, such an action cannot form the basis of a claim within the scope of Chapter 11 dispute settlement.

While the most obvious indicator of finality is a final decision by a state's highest court on the issue concerned, the conditions under which judicial action may be said to be final (and thus capable of implicating state responsibility) may vary. Under applicable customary international law principles, however, a claimant can establish finality other than through appeal to the highest court only in the most extreme circumstances. It is not enough to argue -- as Claimants do here -- that further appeals would have been difficult, costly or unlikely to succeed. Rather, for a State to be held 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.,

Finland v. Great Britain, 3 R.I.A.A. 1479, 1504 (1934) (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.") (internal citation omitted); Borchard, Diplomatic Protection at 824 ("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 subject to reversal on appeal. (Indeed, Claimants believed that success on appeal was "almost certain[]," see Notice of Claim ¶5). Similarly, Claimants do not contend -- nor could they -- that the posting of the full supersedeas bond was a condition of their right to appeal from the trial court judgment. To the contrary, Claimants initiated an appeal pursuant to Mississippi law and were never required to post a supersedeas bond to do so; rather, the bond was merely a condition for the court to stay execution of the judgment pending the appeal. Claimants argue, instead, that there was "no reasonable legal alternative" to settling the O'Keefe case, and that they settled the case only under "duress." TLGI Mem. ¶¶ 305, 308.

Not only do Claimants fundamentally misstate the legal options available to them at the time, but they misunderstand what they must demonstrate to justify their failure to appeal. While 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[]," Amerasinghe at 195, Claimants do not even try to meet this test in their

Memorials. Instead, they argue only that the failure to appeal should be excused because, they contend, there was no "reasonable legal alternative" to settlement. See TLGI Mem. ¶ 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 jurisdictional finality requirement set forth in NAFTA Articles 1101, 1116 and 1117.[31]

As is shown below, several avenues of appeal were clearly available and known to Loewen -- the company simply chose not to pursue them. The judicial actions that are the basis for this claim thus lack the requisite finality to be "measures adopted or maintained" by a NAFTA Party and cannot, as a matter of law, constitute a breach of NAFTA Chapter 11 by the United States.

A. Loewen Could Have Sought Review In Federal Court And A Stay Of Execution Pending Adjudication Of Its Claims.

In an attempt to meet the jurisdictional prerequisite of establishing obvious futility or manifest ineffectiveness of remedies, see supra at 54, Loewen contends it "had no reasonable legal alternatives" to settling the O'Keefe case. See TLGI Mem. ¶ 308. Specifically, Loewen claims that, after the Mississippi Supreme Court affirmed the trial court's decision setting a supersedeas bond at $625 million, the company "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

31 Claimants effectively concede that, if they had a "reasonable" alternative to settlement, then the decision to settle the O'Keefe litigation would not have been made under "duress" (and for this reason alone the existence of such an alternative would defeat a claim under NAFTA Chapter 11). See TLGI Mem. ¶ 285.

statements of Professors Laurence H. Tribe and Charles Fried. See TLGI Mem. at Exhibit D ("Tribe"); id. at Exhibit E ("Fried").

Loewen is wrong. As the company itself recognized at the time of the underlying events, Loewen not only had a realistic 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. Both of these alternatives offered by the United States judicial system were eminently "reasonable." Moreover, under either alternative, Loewen could have sought and obtained a stay of enforcement of the O'Keefe judgment pending resolution of its claims by a federal court.[32]

The analysis supporting these conclusions is set forth in detail in the attached statement of Yale Law School Professor Drew S. Days, III, an expert in U.S. constitutional law and the law of U.S. federal courts, and former Solicitor General of the United States. See Days Statement (attached as Exhibit A). Professor Days' statement, which we briefly summarize below, explains in detail why Professors Tribe and Fried have reached incorrect conclusions. Indeed, with respect to the availability of collateral review in U.S. district court, their conclusions are inconsistent with the facts Loewen alleges in this very proceeding (facts Loewen's experts may not even know).[33]

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[32] A third alternative, proceeding with an appeal under the protection of the reorganization provisions of the U.S. Bankruptcy Code, is discussed infra Part II.B.

[33] Professor Days has no independent knowledge of whether the facts Loewen alleges 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 factual allegations at face

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 documents Loewen produced in discovery indicating that, at the time of the underlying events, Loewen's attorneys were advising it that federal relief was a realistic option that would have enabled the company to appeal the underlying verdict. As the Tribunal ruled on December 9, 1999, such contemporaneous advice is highly relevant. Finally, Professor Days' conclusion that Loewen could have likely obtained review in the U.S. Supreme Court is further supported by legal arguments that 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).

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 Supersedeas Bond Decision

a. Professor Days' Conclusions

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 sought review of the Mississippi Supreme Court's decision in the United States Supreme Court. Under applicable law, this would have simply required Loewen to file a petition for certiorari (i.e., a petition requesting the U.S. Supreme Court to review the merits of the decision setting the bond amount), and an application for a stay of execution of the underlying trial court judgment

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value, Professor Days has made clear that he does not intend to "credit or in any way lend credence" to those allegations. See Days Statement at 4. Our argument in this Memorial adopts the same approach: assuming the truth of the alleged facts, Claimants still have not shown that, as a matter of law, seeking relief in federal court would have been obviously futile, manifestly ineffective, or (under Claimants' "duress" test) even an "unreasonable" alternative to settlement.

pending such review. Loewen does not deny that it could have taken these steps (but did not). Instead, Loewen claims that any petition for certiorari necessarily would have been denied. See TLGI Mem. at ¶ 308. Not so.

It is true that certiorari review is discretionary, and, therefore, it is not possible to say with absolute certainty that Loewen's petition would have been granted.[34] 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, 51-52.

Professor Days' Statement sets out in detail the factual and legal basis for his opinion. See Days Statement at 4-9, 12-32. In brief, certiorari was a reasonable possibility because the Mississippi Supreme Court's decision raised an "unsettled question[] of federal constitutional [law] of general interest" (id. at 16), namely, whether an order setting a supersedeas bond -- in an amount that is neither necessary nor possible to satisfy -- comports with the Due Process guarantees of the U.S. Constitution. See id. at 18 n.6, 20. This question has percolated in lower state and federal courts for years, resulting in decisions squarely in conflict with the Mississippi

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[34] To defeat Loewen's futility claim, the United States need not show that certiorari necessarily would have been granted. Rather, Loewen must demonstrate that certiorari "obvious[ly]" would have been denied. See supra at 53-54. As explained below, Loewen cannot meet this burden.

Supreme Court's (a factor that would have increased the likelihood of U.S. Supreme Court review even further).[15] See id. at 23-24.

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 22. While Pennzoil did not decide that question (because the party challenging the bond had neglected to raise it in state court), the Supreme Court characterized the due process issue as raising "substantial federal constitutional claims," 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; see also Days Statement at 22. Loewen, of course, raised its due process challenge in the Mississippi Supreme Court. See A1040-41, A1136-38. Thus, Loewen could have presented the properly-postured claim the Supreme Court found lacking in Pennzoil. See Days Statement at 22-23.

Moreover, while Loewen's experts dismiss the point (see, e.g., Tribe at 19), Loewen's case for Supreme Court review would have been particularly compelling because it would have implicated U.S. constitutional issues surrounding punitive damages. See Days Statement at 24-28. 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 id. at

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[15] Loewen's experts' contention that the Mississippi Supreme Court's decision is not in conflict with any federal appellate decision is curious in light of Claimants' statements to the contrary in their Notice of Claim. Compare Tribe at 22-24 and Fried at 9-11 (both opining that the Mississippi Supreme Court's decision does not conflict with any federal appellate decision) with Notice of Claim at ¶ 120 (arguing that the Mississippi Supreme Court's decision conflicts with a decision of the Fifth Circuit Court of Appeals, the appellate court governing federal practice in Mississippi) and ¶ 125 (arguing that the Mississippi decision conflicts with decisions of federal courts).

24-25. In those cases, the Supreme Court held not only that the U.S. Constitution's Due Process Clause imposes substantive limits on the amount of punitive damages,[36] but that defendants are entitled to post-verdict judicial review on whether the amount is excessive. See id. at 25-27.

As Professor Days explains, Loewen's claim would have presented the Supreme Court with a unique opportunity to consider a due process/appeal bond challenge in a context directly "implicat[ing] the constitutionality of punitive damages," see Days Statement at 24, 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). Specifically, assuming that the alleged facts are true, Loewen could have argued that, by ordering 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 27-28. Loewen's claim would have been particularly compelling in light of its contention (see TLGI Mem. at ¶ 125) that it could have bonded 125% of the compensatory damages portion of the jury's verdict. See Days Statement at 28.

Indeed, at the time of the Mississippi Supreme Court proceeding, Loewen's attorneys advised making this very argument. 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 [sic] constitutionally mandated requirement of "reasonableness" in the amount of the punitive damages

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[36] Indeed, in 1996, the year Loewen should have filed its certiorari petition, the Supreme Court, for the first time, held a punitive damages award unconstitutionally excessive. See BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996); see also Days Statement at 25 n.13.

> **award, because a party facing an impossible bond requirement would be unable to avail itself of the constitutional right to reasonableness.**

U.S. App. 0650 (Memorandum from Kevin E. White to various addressees) (Jan. 9, 1996) (emphasis in original). Taking this suggestion to heart, Loewen, in its Mississippi Supreme Court brief, expressly argued that the court should consider the nature of the underlying verdict in deciding whether execution should be stayed pending appeal. See A1036-37.

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 at 7. Accordingly, Loewen cannot establish that pursuing an appeal in the U.S. Supreme Court would have been either obviously futile or manifestly ineffective.

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

The documents Loewen has produced to the United States show that, during the time between the O'Keefe verdict and Loewen's decision to settle, Loewen and its attorneys viewed U.S. Supreme Court review as a viable option, further refuting any contention that petitioning for certiorari would have been futile. 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 ruling. See, e.g., U.S. App. at 0646 (Letter from James L. Robertson to various addressees, dated Jan. 4, 1996) (noting the need to preserve Loewen's federal due process challenge "for cert[iorari] 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 advised:

> 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 (notarized transcript of audio tape recording) (Dec. 17, 1995);[27] see also U.S. App. 0425 (Memorandum from Wynne Carvill to various addressees, dated Nov. 22, 1995) (noting that Mr. Ayer is "in charge of 'the federal option' if by some quirk of fate we can't get a stay from the Mississippi courts").[28]

Indeed, Mr. Ayer and his law firm apparently prepared "draft petitions" for certiorari in the U.S. Supreme Court, confirming that the option was taken very seriously, not — as Mr. Ayer's firm now contends on behalf of Loewen — considered "unavailable." See U.S. App.

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[27] Even though Loewen was preserving "every possible argument" for U.S. Supreme Court review, it never alleged in any Mississippi court its claim 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 TLGI Mem., Exhibit B, Affidavit of Richard Neely at 16-17 ("Neely Aff."). To the contrary, Loewen's lawyers repeatedly advised Loewen it would get a fair hearing in Mississippi state court. See, e.g., U.S. App. 0645 (Letter from James L. Robertson to various addressees, dated 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.").

[28] Mr. Ayer is a partner at Jones, Day, Reavis & Pogue, the law firm representing Loewen in this proceeding.

0658 (Letter from Christopher F. Dugan to Kenneth L. Doroshow, dated Feb. 14, 2000). Regrettably, Loewen has refused to produce these documents to the United States in discovery, and we will soon be filing a request with the Tribunal seeking production of the draft petitions and any similar documents.[39]

Finally, Loewen also stated its intent to seek federal appellate review in a public filing with the United States Securities and Exchange Commission ("SEC"). In its November 15, 1995, quarterly report to the SEC, 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.

A1858 (SEC Form 10-Q filing) (Nov. 15, 1995); see also id. at A1846 ("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.").[40]

These statements (presumably made on advice of counsel) are particularly probative of Loewen's assessment of the likelihood of obtaining federal court review and a stay of enforcement pending such review. Under U.S. securities laws, it is unlawful to make a

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[39] Loewen argues it has no obligation to produce the draft petitions "[b]ecause . . . [they] were never communicated to the client," and thus do not pertain to "Loewen's state of mind as to duress." See U.S. App. 0658. This argument is inconsistent with both the Tribunal's December 9, 1999 order and common sense.

[40] It is not clear whether Loewen was using the phrase "federal courts" to refer to the U.S. Supreme Court, federal district court, or both. Although the term "appeal" suggests Loewen meant to refer 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.

materially false or misleading statement or omission in connection with the purchase or sale of a security (provided that the statement is made or omitted with scienter). See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196, 214 (1976). Moreover, when a corporation makes assertions in a manner reasonably calculated to influence the investing public, it has an obligation to disclose sufficient information so that any assertion made is not misleading or so incomplete as to mislead. Basic Inc. v. Levinson, 485 U.S. 224, 235 n.13 (1988). 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 or other federal review was "practically unavailable." See Fried at 1; see also Tribe at 2.

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

Professor Tribe's own statements on behalf of the petitioner in the Pennzoil case show that Loewen could have presented a certworthy issue to the U.S. Supreme Court. The Pennzoil Company, represented by Professor Tribe, obtained Supreme Court review of a lower court decision invalidating a supersedeas bond requirement on due process grounds (Pennzoil had prevailed at trial). While the Supreme Court was obliged to review the due process issue under a then-governing (and since repealed) jurisdictional statute,[41] Professor Tribe argued that Pennzoil's federalism claims merited consideration because they raised issues:

> 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.

41/ See Days Statement at 22 n.9. As explained above, Loewen would have sought review under the Supreme Court's discretionary jurisdiction.

See U.S. App. 0298 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Jurisdictional Statement).[42] Attesting to the importance of review, Professor Tribe noted that thirty states and the District of Columbia "presumptively require" a supersedeas bond equal to or greater than the judgment as a condition of staying execution pending appeal. See U.S. App. at 0311.

Professor Tribe's principal argument here (reiterated by Professor Fried) is that the Supreme Court would not have considered Loewen's appeal because the due process 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 at 21-22; Fried at 11-12.[43] Professor Tribe's argument in Pennzoil, however, suggests that resolution of the due process issues could well have an impact on the "thousands of routine cases in which litigants cannot afford to post a bond that would stay an adverse judgment pending appeal." Indeed, in Pennzoil, Professor Tribe expressly argued that the lower court's due process

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[42] Even in an obligatory appeal, the petitioner must establish that there is a "substantial federal question" meriting U.S. Supreme Court review. See Kansas Gas & 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 from Professor Tribe's brief presumably was his (successful) attempt to meet that standard.

[43] 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 at 16-18; Fried at 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 U.S. App. at 0307 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Jurisdictional Statement); see also id. (noting that such a stay would be an "available remedy" for a judgment debtor); U.S. App. at 0345-0346 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Transcript of Oral Argument) (Professor Tribe noting that if Texaco had presented its due process challenge to the state courts and lost, then it "[would] have come straight here [i.e., to the U.S. Supreme Court].").

ruling posed a "threat to the orderly administration of justice" in those jurisdictions with supersedeas bond rules. See U.S. App. at 0311. Respectfully, we submit that Professor Tribe was correct in Pennzoil, when he effectively acknowledged that the issue Loewen could have presented to the U.S. Supreme Court was not only certworthy, but "of surpassing practical significance" to this nation's courts and litigants.

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' Conclusions

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 review in the U.S. Supreme Court. As Professor Days explains in his Statement, Loewen had another, equally available alternative: it could have filed an action in federal district court under 42 U.S.C. § 1983 ("Section 1983"), a federal civil rights statute. See Days Statement at 33-37. In an action under Section 1983, Loewen could have presented its allegation that the Mississippi court system discriminated against it based on anti-Canadian (and other) bias and prejudice.[44] 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. at 34.

Professors Tribe and Fried do not disagree that Loewen could have stated a claim for relief under Section 1983 (although they do not identify what Loewen's claim would have been).

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[44] Loewen could not have presented this claim to the U.S. Supreme Court because Loewen did not raise it in the Mississippi proceedings. See supra n.37.

Instead, they contend a federal court would have declined to entertain the substance of 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 at 5-16 (discussing the Full Faith and Credit Act, the Rooker/Feldman Doctrine, and the Younger Abstention Doctrine); Fried at 19-24 (same).

Loewen's experts, however, fail to discuss the serious allegations Loewen makes in this proceeding concerning discrimination it supposedly suffered at the hands of the Mississippi judiciary, allegations that go to the very heart of Loewen's NAFTA claims.[45] For example, Loewen alleges, through the sworn affidavit of Richard Neely, that the Mississippi Supreme Court Justices "wilful[ly] and deliberate[ly]" forced Loewen "into an extorted settlement," Neely Aff. at 16 (emphasis added), "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'"; TLGI Mem. at ¶ 171; "committed substantive and procedural denials of justice"; id. at ¶ 178; "violated [] antidiscrimination principles"; id. at ¶ 172; "violated fundamental principles of fairness, equity and natural justice," id. at ¶ 222; and imposed the full bonding requirement "with the purpose and effect of foreclosing Loewen's appeal rights." Id. at ¶ 158 (emphasis added).

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[45] Indeed, Loewen's experts do not even appear to be aware of Loewen's claim in this proceeding that the Mississippi judges intentionally discriminated against it. See Tribe at 10 (describing Loewen's potential collateral claims as "due process and access to justice challenges"); Fried at 23 (characterizing Loewen's potential collateral claims as "the very claims" Loewen submitted to the Mississippi Supreme Court).

As Professor Days explains, while a federal court ordinarily is required to defer to decisions rendered in state proceedings (under one or more of the doctrines cited by Loewen's experts), this rule does not apply — and for good reason — where the state proceedings themselves are discriminatory. See Days Statement at 37-51. Thus, assuming the truth of Loewen's factual allegations, Loewen could have alleged that the Mississippi judiciary, as a whole, intentionally and willfully discriminated against it because of anti-Canadian (and other) bias. See, e.g., Neely Aff. at 16-17. Accordingly, none of the doctrines cited by Loewen's experts would have prevented a federal court from addressing the civil rights abuses Loewen says it suffered here. See Days Statement at 37-51 (explaining why the Full Faith and Credit Act, the Rooker/Feldman Doctrine, and the Younger Abstention Doctrine would not have barred Loewen from bringing its claims of state-court discrimination in federal court).

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

As in the certiorari context, see supra at 61-65, documents produced to the United States in discovery show that, at the time of the underlying events, Loewen and its attorneys viewed collateral attack in federal court as a realistic and practical option for reducing the amount of the bond. For example, 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 advised that:

> 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 U.S. App. at 0399 (Letter from James L. Robertson to Ray Loewen) (Nov. 5, 1995);[46] see also U.S. App. at 0393 (in-house document summarizing Mr. Robertson's advice, and stating that if Loewen's motion to reduce the bond is denied by the trial court, "we will appeal the motion to the Supreme Court of Mississippi followed by, if necessary, appeal to the U.S. District Court") (undated) (emphasis added).

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 U.S. App. at 0421; see also A1230 (transcript of TLGI conference call) (Nov. 7, 1995) (informing investors that "[w]e could also go to federal appeals [sic] to get a stay"). Another handwritten note appears to put Loewen's chance of prevailing in federal court at 30%. See U.S. App. at 0419 (Nov. 16, 1995). And, as noted above, in its November 1995 10-Q SEC filing, Loewen stated it could (and would if necessary) seek review in "the federal courts, to have the size of the bond reduced." See A1854.

Indeed, in early 1996, Loewen's attorneys apparently stood ready to file a collateral action in federal district court. Two weeks before the Mississippi Supreme Court ruled, Robert Wienke,

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[46] 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 based on its due process claim, his conclusion is directly contrary to the conclusions of Professors Tribe and Fried.

Loewen's general counsel, informed Don Ayer 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 U.S. App. at 0652 (Letter from Robert O. Wienke to Donald B. Ayer) (Jan. 11, 1996).[47] 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.
>
> Moreover, the filing of separate actions in Covington and Vancouver can provide a tactical advantage. This would require plaintiff's contingent fee counsel to litigate in far reaching and unfriendly forms [sic] on multiple fronts.

See id. (emphasis added).[48]

Thus, 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) an 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

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[47] The reference to "Covington" presumably is to U.S. District Court in Covington, Kentucky, where LGII (Loewen's principal United States subsidiary) is headquartered.

[48] We note that Loewen has not produced any draft federal court complaint in discovery (although we will renew our request for production of any such documents, if they exist, in our forthcoming letter to the Tribunal on discovery issues). Instead, Loewen has produced what appears to be an internal memorandum discussing the "hurdles" to seeking district court relief. See U.S. App. at 0440-46 (undated). This memorandum is inconclusive concerning Loewen's chances in federal court. See id. at 0440. Moreover, like the statements of 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.

have done so would have "bordered on the frivolous."[49] See Tribe at 5. We respectfully submit that Loewen 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. Claimants' 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 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). At the same time, Chapter 11 allows companies to remain open for business with their current management firmly in place (as a so-called "debtor in possession"), thus minimizing any disruption to the day-to-day operations of the business. 11 U.S.C. §§ 1107, 1108. 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

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[49] Again, we note that, in their witness statements, Loewen's experts make no mention of having seen any of the documents Loewen produced in discovery.

11. By 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 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 bonding requirement and to continue to conduct its business in the ordinary course with little or no disruption during the reorganization proceedings." Trost Declaration at 4 (appended as Exhibit B). **REDACTED**

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 November 19, 1985, awarded a judgment against Texaco in the amount of $11 billion. To stay execution of the judgment, under Texas law, Texaco would have had to post a supersedeas bond in excess of $13 billion. Texaco attempted to have the bond 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 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, at 18-19, dated Jan. 4,

1986 (L. Tribe, counsel of record) (U.S. App. at 326). 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 & Marshall JJ., concurring) (citations omitted).

Thus unable to post the full bond, 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 any supersedeas bond at all. **REDACTED**

REDACTED Moreover, because Chapter 11 allows existing management to remain in control of the company, Texaco experienced virtually no disruption of its ongoing business while it proceeded with its appeal under Chapter 11 protection. (Id.). 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. (Id.).

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.

However, **REDACTED**

REDACTED 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. ¶137.[59] As we explain below, **REDACTED** **REDACTED** , neither of these excuses has any merit.

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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, business reorganization would have irreparably damaged The Loewen Group's reputation as a well-managed company. See TGLI Mem. ¶137; RLL Mem. ¶¶113-17 (arguing that business reorganization 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 Loewen chose to enter into the settlement, nor does it now.

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[59] Significantly, Loewen offered no such excuses to the Mississippi courts, even after O'Keefe's counsel pointed out to the court that Loewen could "go into Chapter 11 [reorganization] and in the meantime pursue" an appeal. (A1058, See also A1113).

As explained in detail in the attached statements of J. Ronald Trost, Esq. and Harvard Law School Professor Elizabeth Warren, "Chapter 11 is considered part of ordinary business planning by many large corporations today and little, if any, stigma is attached to it." (Trost Declaration at 5) (See Warren Statement at 4-9, appended as Exhibit E). Because Loewen would have filed under 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 -- "there is no evidence of reputational harm [that would have been] caused by the filing itself." (Warren Statement at 18).

To the contrary, as Professor Warren explains, "Chapter 11 is sufficiently integrated into business practices that a filing under the circumstances described in this case would likely be viewed as a sound and responsible business decision, one that preserves rather than diminishes the business's reputation." (Warren Statement at 18). In fact, Loewen is currently operating under Chapter 11 protection (under circumstances far more dire than existed in January 1996) and is regularly assuring the public that the company "will re-emerge from the reorganization a stronger business poised for long-term growth." (U.S. App. at 195; see also id. at 130).

In stark contrast to the company's current Chapter 11 reorganization 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 Mr. Trost explains, Chapter 11 reorganization does not require a company's subsidiaries or affiliates to file along with the company itself. (Trost Declaration at 11-12). As a result, Loewen could have fully avoided execution of the O'Keefe judgment merely by filing for Chapter 11 protection only on behalf of four Loewen defendants in the lawsuit. (Id.) Therefore, "none of Loewen's remaining corporate subsidiaries and affiliates (of which, in 1996, there were more than 975) 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." (Id.) (emphasis in original). Loewen's own documents make clear that this was precisely the approach that the company contemplated at the time. (U.S. App. 447-594).

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 otherwise have. 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 Declaration at 14-15). 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, Jan. 26, 1996 (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.

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Loewen's professed concern over the harm of a Chapter 11 filing on its business reputation is thus entirely unfounded. (Trost Declaration at 5-6; Warren Statement at 17-18).

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

Claimants also contend that Chapter 11 reorganization 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. ¶ 137. 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. 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 Declaration at 5, 12-13).

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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. (U.S. App. at 611).

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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 Declaration at 11).

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 common knowledge that Loewen's acquisition strategy was fundamentally flawed, overly aggressive, and the cause of the company's ultimate financial decline. See, e.g., F. Arsenault, Will Others Follow the Loewen Group?, 14 Turnarounds & Workouts 1 (Jan. 15, 2000) ("The zeal for acquisition of new properties was the primary reason for Loewen's descent into bankruptcy.") (U.S. App. at 204); P. Kennedy, Loewen to Seek Approval to Sell 24 Per Cent of its Operations, Globe & Mail, Dec. 16, 1999, at B3 ("Under former chairman and founder Ray Loewen, the funeral giant got into financial difficulty by growing too quickly.") (U.S. App. at

201); Loewen Gets Nod for Plan to Sell Assets, Reuters, Jan. 24, 2000 ("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.") (U.S. App. at 205); R. Fields, Grim Time for Funeral Firms L.A. Times, Oct. 24, 1999, at 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.'") (U.S. App. at 164); id. (financial crisis in death-care industry was primarily the result of "unbridled spending.") (U.S. App. at 163); T. Hirschmann, Death's No Sure Thing, Nat'l Post, Oct. 9, 1999, at C1 ("[T]he free-spending attitude was the root of the problem, say analysts.") (U.S. App. at 160).[51]

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 . . . ." (U.S. App. at 49). Just last month, Loewen's current spokesman acknowledged that the company's prior management, under Ray Loewen's leadership, was simply "interested in growth for growth's sake, acquisitions at any cost, just to produce big numbers. . . . [S]o much damage had been done by the acquisitions binge of previous years that the damage could only be undone through Chapter 11." (U.S. App. at 204) (quoting Loewen spokesman Michael Kolbenschlag). Contrary to Loewen's claim in this proceeding, therefore, any effect that Chapter 11 reorganization allegedly could have had on the company's acquisition program was no reason to

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[51] See also B. Milner, The Dying Game, Globe & Mail, June 5, 1999, at 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.") (U.S. App. at 137).

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., **REDACTED**

REDACTED J. Baer, Death Care in the Doldrums, Globe & Mail, Oct. 4, 1999, at B4 ("In the long run, death care companies will recover by cooling on acquisitions . . . .") (U.S. App. at 157). 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. Therefore, Claimants must concede that appeal would not have been manifestly ineffective or obviously futile.

3. **REDACTED**

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. ¶ 146. 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 fully avoided the "ruinous cost" of posting the bond and would have enabled the company to pursue its appeal without any material effect on its acquisition program. TLGI Mem. ¶ 138.

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52 "[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, at C4 (U.S. App. at 132).

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55 Given the obvious availability of the foregoing reasonable options by which Loewen could have pursued its appeal, it is unnecessary to examine in detail Claimants' contention that other options would have been "impossible, catastrophic, or both." TLGI Mem. ¶ 130. We note simply that Loewen's own documents cast serious doubt on the claim that obtaining a full supersedeas bond "was effectively impossible." TLGI Mem. ¶ 139. (See, e.g., A1472). Indeed, within just days of entering into the settlement agreement, Loewen was assuring the public that the company was "optimistic that we will be able to meet the financing requirements for the $625 million bond." (A1495; see also A1473-76; A1494). Similarly, evidence suggests that the company does not believe its own claim, advanced here, that an unbonded appeal "would have,

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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 contemporaneous advice of Loewen's counsel makes clear that the position Loewen advances in this proceeding -- indeed, Loewen's entire claim -- is an afterthought. When the tactics it chose 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 court judgments in purely private cases could give rise to liability under NAFTA Chapter 11, the judgments at issue in this case plainly cannot. Those judgments were rendered by lower courts and were still capable of further appeal. Because only judgments rendered by the highest available court are final and therefore could constitute a "measure adopted or maintained" for purposes of NAFTA Chapter 11 or give rise to a breach of Chapter 11 as a matter of law, Claimants cannot state a claim within the competence of this Tribunal.

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quite literally, destroyed the company . . . ." TLGI Mem. ¶ 134. Loewen knew that it could challenge any attempt by O'Keefe to execute on the judgment and was actively preparing to do so. (U.S. App. at 390, 427, 652). Loewen was also keenly aware that O'Keefe's counsel would have neither time nor resources to litigate in courts outside of Mississippi, (U.S. App. at 390, 423, 597, 652), and that the failure to prevent attachment of the company's Mississippi assets would have been of minimal consequence, as the vast bulk of the company's assets was in other states and in Canada. (U.S. App. at 639) (estimating value of Loewen's Mississippi assets subject to attachment at $5,100,060).

It bears repeating what protections the United States judicial system would have offered Loewen in the appeal that the company should have pursued: the United States Constitution guarantees aliens (as well as citizens) "equal protection" and "due process under the law" in state proceedings (U.S. Const. amend. XIV), and prohibits U.S. states from taking property without just compensation (id.). Those constitutional provisions protect precisely the same sort of rights that Loewen seeks to vindicate in this NAFTA proceeding. See, e.g., TLGI Mem. ¶¶ 167-170, 194-95. Because Loewen elected not to appeal and avail itself of these federal protections, the United States cannot be held liable for Claimants' alleged injuries under the NAFTA.

III. 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

The international law of state responsibility has long recognized the tautology that "[s]tate 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, 346 (1990) (citing treatises); see also Restatement (Third) of Foreign Relations Law of the United States § 207, comment c (1986) ("the state is not responsible for injuries caused by private persons that result despite [reasonable] police protection"). 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 Loewen'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.

Contrary to Loewen's unfounded allegations, and as explained above, 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. Neither the United States government nor any component of the State of Mississippi knew of or participated in this arrangement. Because the assumption of the obligation to pay the O'Keefe plaintiffs pursuant to the terms of the settlement agreement was thus entirely Loewen'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.

IV. THE MISSISSIPPI COURT'S ALLEGED FAILURE TO PROTECT AGAINST THE ALLEGED REFERENCES TO ALIENAGE, RACE AND CLASS CANNOT BE A "MEASURE" BECAUSE LOEWEN NEVER OBJECTED TO THOSE ALLEGED REFERENCES DURING THE TRIAL

Although Claimants now contend that the underlying trial was "infected by appeals to the jury's alleged anti-Canadian, racial and class biases," Claimants have identified no instance where their lawyers objected on such grounds at any point during the trial.[56] 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

[56] One of Loewen's affiants, Richard Neely, claims to have discovered 38 references "made or elicited" by plaintiffs' counsel to "race and racial matters," 66 references "made or elicited by plaintiffs' counsel to "wealth disparities," and 268 references "made or elicited" by plaintiffs' counsel to the "foreign status of defendants and the local (Mississippi) status of plaintiffs." See Neely Affidavit at Exhibits B, C, and D. In only one of the cited references, however, could Loewen's counsel even arguably be said to have objected to a line of questioning as improper on grounds of racial, class or nationality "bias." See Tr. at 1139-41 (objecting to testimony relating to pricing in black and white funeral home markets). That objection was *sustained* by the trial judge, to the apparent satisfaction of Loewen's counsel.

"measure" for purposes of the NAFTA. Compare TLGI Mem. ¶ 154 (listing as a "measure" that the trial court allegedly allowed "irrelevant and highly prejudicial testimony[] about the nationality, racial attitudes, and economic class of the parties").

As noted above, NAFTA Chapter 11 applies only to "measures adopted or maintained" by a NAFTA Party. NAFTA Article 1101(1). Even if appealable court action could constitute such measures, they could in no case be "measures adopted or maintained" by a NAFTA Party where, as here, the court was never asked to act in the first place.

Mississippi, like common-law jurisdictions around the world, 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, e.g., Vakauta v. Kelly (Austl. 1989) 167 C.L.R. 568 ("By standing by, such a party has waived the right subsequently to object"); The Queen v. Rivo D'Onofrio, 1994 Ont. C.A. LEXIS 233 (1994) (failure to object to misstatement in trial judge's charge to jury bars appeal on that ground); S. Blake, Administrative Law in Canada 96 (1996) ("If a party was aware of bias during the proceeding but failed to object, it may not complain later when the decision goes against it."). 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." Vakauta 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.[57]

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 Claimants give no reason to believe that the Mississippi court had any obligation to correct allegedly improper utterances in the absence of a timely objection by Loewen's experienced counsel, any alleged judicial inaction in this regard by the Mississippi court cannot implicate the international responsibility of the United States. Accordingly, because Claimants never asked the court to protect against the alleged offending remarks during the trial, 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.

V. RAYMOND LOEWEN'S ARTICLE 1117 CLAIM SHOULD BE DISMISSED BECAUSE HE DOES NOT "OWN OR CONTROL" THE ENTERPRISE AT ISSUE

NAFTA Article 1117 permits an "investor of a Party" to bring a NAFTA claim "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly." Here, Mr. Loewen and TLGI both purport to assert claims on behalf of the same enterprise. LGII. As explained below, however, Article 1117 permits only one investor to prosecute LGII's claim, and TLGI, not Mr. Loewen, is the investor that "owns or controls"

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[57] As a sitting judge, Mr. Neely himself observed that, where "[t]he trial court could have corrected whatever problem there might have been in [a jury] charge, if asked to do so," but where "[n]o objection was made at trial," an error "assigned for the first time in an appellate court will not be regarded . . . ." West Virginia v. Ferrell, 399 S.E.2d 834, 846 (W. Va. 1990) (Neely, C.J.) (quotation omitted).

LGII within the meaning of the Article. Accordingly, Mr. Loewen's Article 1117 claim should be dismissed.

A. Only One Claimant, TLGI, May Present LGII's Claim Under Article 1117

Under NAFTA Article 1117, an investor that "owns or controls" an enterprise may file a claim "on behalf of" that enterprise. Although Article 1117 does not expressly provide that only one investor may file such a claim, the provision plainly is designed to prevent multiple claims on behalf of the same enterprise. For example, the provision expressly bars the enterprise from bringing an Article 1117 claim on its own behalf. See Article 1117(4). Similarly, as a condition precedent to bringing an Article 1117 claim, the disputing investor must obtain a waiver from the enterprise relinquishing (with certain limited exceptions) its right to obtain relief by any other means. See Article 1121(2)(b). Such restrictions make clear that Article 1117 was not intended to permit more than one claimant to file on behalf of the same enterprise.

Indeed, if the rule were otherwise, multiple investors could offer divergent, and possibly conflicting, theories on behalf of the same enterprise. A NAFTA Party could then be forced to defend against such claims in separate, consecutive proceedings, risking duplicative awards for the same loss arising from the same breach. Such a result would be wholly inconsistent with Article 1117(4), the NAFTA as a whole, and common sense. See Article 102(1)(e) (stating NAFTA's general goal to "create *effective* procedures for the . . . resolution of disputes.") (emphasis added).

These concerns are not merely hypothetical. Mr. Loewen and TLGI have already acknowledged their conflict of interest in this very proceeding, retaining separate counsel and filing separate memorials, each (ostensibly) on behalf of LGII. While the Claimants' memorials

thus far are largely duplicative, Mr. Loewen's and TLGI's positions may well diverge down the road, particularly if witnesses (such as Mr. Loewen) testify and are subject to cross-examination at a hearing.

In these circumstances, the Tribunal must ascertain which investor is, in fact, entitled to act "on behalf of the enterprise" and dismiss the other as an Article 1117 claimant. The question is which of the putative claimants, Mr. Loewen or TLGI, "owns or controls" LGII within the meaning of the Article. Given that only one claim may proceed on behalf of LGII, there can be no serious dispute that TLGI, not Mr. Loewen, is the appropriate investor to bring it. TLGI is the nominal, and therefore direct, owner of 85 percent of the shares of LGII. RLL Mem. at 44. See R.J. Reynolds Tobacco Co. and Government of the Islamic Republic of Iran and Iranian Tobacco Co., 7 Iran-U.S. Cl. Trib. Rep. 181, 186 (1984) ("Generally it may be presumed that control follows nominal ownership."). Where, as here, one investor of a Party has direct ownership and control, and another has at most indirect, partial ownership and control, only the former may be considered to be the investor who "owns or controls" for purposes of submitting a claim under Article 1117. (Indeed, an indirect owner may be an investor, but a party with more direct ownership would have a superior right to represent the enterprise.) Thus, TLGI's right to submit a claim under Article 1117 clearly overrides any claim to standing that Mr. Loewen might assert.

B. In Any Event, Mr. Loewen Cannot Bring An Article 1117 Claim Because He No Longer Has Any Control Over LGII

Although Mr. Loewen may have "controlled" TLGI (and indirectly LGII) at some point in the past, whatever measure of control he once enjoyed, he subsequently lost.[58] Under Article 1117, however, whether or not more than one investor may claim, an investor may only submit a claim on behalf of an enterprise if it "owns or controls" the enterprise during the arbitral proceedings. The present tense of the verbs "owns or controls" requires that ownership or control be ongoing.[59] Moreover, customary international law in the context of espousal recognizes that nationals of an espousing state must have owned the claim from the time of injury until the resolution of the claim. See Brownlie, Principles of Public International Law 482-84 (5th ed. 1998). There is no evidence in the NAFTA text or otherwise that the drafters sought to deviate from this requirement.

Requiring that a claimant control the enterprise during the prosecution of the claim also protects the interests of the enterprise — the real party in interest on whose behalf the claim is brought. As noted above, the enterprise itself is barred from bringing an Article 1117 claim, see

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[58] Although Mr. Loewen once held a greater equity interest in TLGI, he lost the vast majority of that interest on November 2, 1998, when the Canadian Imperial Bank of Commerce seized 10,062,125 of his shares to satisfy outstanding loans. See RLL Mem. ¶ 122. Mr. Loewen now owns only 10,738 shares of TLGI common stock, or two one-hundredths of one percent of the approximately 48 million shares outstanding. See id. ¶¶ 119-126. Indeed, before this claim was even filed, Mr. Loewen lost any effective control of TLGI he may have had by virtue of his position as TLGI's Chief Executive Officer, from which he was removed on October 8, 1998. Id. at ¶ 123.

[59] This is not to suggest that a claim may never be assigned or transferred to another entity during the course of the proceedings; it only means that whatever entity has the right to bring the claim "on behalf of the enterprise" must also "own or control" it.

Article 1117(4), and must have waived its right to obtain relief in other fora. See NAFTA Article 1121(2)(b). Only the investor currently in control of the enterprise will have the enterprise's true, and ongoing, interests at heart.[60] For obvious practical reasons, the representative investor must have authority to speak on behalf of the enterprise, consult with the enterprise, and obtain documents and other information from the enterprise, throughout the NAFTA Chapter 11 case. Only TLGI, the entity now in control of the enterprise, can serve these important interests. Accordingly, Mr. Loewen's Article 1117 claim should be dismissed.

VI. 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 objections to the Tribunal's jurisdiction and competence presented in this Memorial, bifurcation is now clearly warranted. This case is among the first ever to be brought under NAFTA Chapter 11 and the first such case to challenge a court decision. The United

[60] This is critical because any award given under Article 1117 will inure to the benefit of the enterprise. See NAFTA Article 1135(2).

States has raised several substantial jurisdictional defenses to this extraordinary claim, many of which raise fundamental questions of sovereignty and public international law obligations. The Tribunal's resolution of these complex and important questions will not only have a profound impact on the rights and obligations of the parties to this dispute, but will likely also influence the interpretation of NAFTA Chapter 11 as a whole. It is essential that such a resolution take place without the significant distractions of a hearing on the merits.

Moreover, 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).[61] For this reason, the rules of all NAFTA-approved arbitral regimes -- 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

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

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 Arbitration Rule 41(3) (similar).[62]

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 in those lengthy proceedings, as measured by the standards set forth in NAFTA Chapter 11. If the United States' objections to competence are rejected, the United States intends to show that the Mississippi proceedings and their resulting court judgments were fully consistent with its obligations under the NAFTA and that Claimants and their counsel were themselves responsible for the adverse results of the litigation.[63] 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,

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[62] 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 Ceskoslovenska 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.

[63] 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).

Loewen was denied justice in that case. See, e.g., Freeman at 171-72 (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 appealable domestic court judgments in private litigation 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 Genocide, 1993 I.C.J. at 341-42. Accordingly, the United States' objections to the Tribunal's jurisdiction and competence should be treated as a preliminary question.[64]

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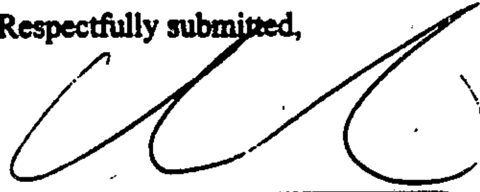
[64] Loewen once again contends that the United States cannot dispute the Tribunal's competence over the subject matter of this case. See TLGI Mem. ¶¶ 275-79. This assertion is no less frivolous now than when made in Loewen's letter to the Tribunal on May 12, 1999. Through a tortured reading of the arbitral 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 Christoph Schreuer's Commentary on the ICSID Convention, 11 ICSID Review 318 (1996), an article that focuses primarily on the ICSID Convention, which has no application to this case. See TLGI Mem. ¶ 276. The ICSID Additional Facility Rules -- which do apply here -- make clear that the Secretary-General's administrative approval of arbitration proceedings confirms

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,



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only the jurisdiction of the *Centre*, not the competence of the Tribunal. See Art. 4 ICSID (Additional Facility) Arbitration Rules; Aron 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 at 260 ("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 this authority.").