

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

**RESPONSE OF THE LOEWEN GROUP, INC. TO THE
ARTICLE 1128 SUBMISSIONS OF CANADA AND MEXICO ON
MATTERS OF JURISDICTION AND COMPETENCE**

Christopher F. Dugan
James A. Wilderotter
Gregory A. Castanias
Melissa D. Stear
Tashena Middleton Moore
Matthew S. Duchesne
Maura K. Frickel
Steven M. Davis
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700

*Attorneys for Claimant
The Loewen Group, Inc.*

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I. INTRODUCTION

1. Claimant The Loewen Group, Inc. (“Loewen” or “TLGI”), respectfully submits this response to the most recent Article 1128 Submissions of Canada and Mexico. (*See Second Submission of the Government of Canada Pursuant to NAFTA Article 1128*, dated June 27, 2002; *Third Article 1128 Submission of the United Mexican States*, dated July 2, 2002.) We offer two preliminary observations:

2. *First*, the sole purpose of Canada’s submission is to inform this Tribunal that “Canada does not agree that either the ICSID Convention or the collection of BITs have crystallized into customary international law.” (Canada’s 2d 1128 Subm. ¶ 3.) As Canada acknowledges, however, accepting that view would require this Tribunal to reach a conclusion directly contrary to the decision so recently reached by the *Pope & Talbot* tribunal. (Canada’s 2d 1128 Subm. ¶ 24.) As the losing party in *Pope & Talbot*, it is perhaps no surprise that Canada would quarrel with that decision. In fact, as we have previously noted, whenever a NAFTA tribunal returns a decision against their interests, the Parties’ standard response is that the issue was “wrongly decided.” (*See, e.g.*, U.S. Counter-Mem. at 175; Mexico’s 3d 1128 Subm. ¶ 40; *see also* Claimants’ Joint Reply at 12.) But it is also worth noting the unusual degree to which the *Pope & Talbot* tribunal censured Canada, first for failing to comply with numerous requests to identify and produce relevant *travaux préparatoires*, and secondly for engaging in conduct toward the claimant that “would shock and outrage every reasonable citizen of Canada.” *Pope & Talbot, Inc. v. Canada*, Award in Respect of Damages ¶¶ 37-42, 67-69 (May 31, 2002). Under the circumstances, it might be expecting too much to think that Canada can be objective where the *Pope & Talbot* decision is concerned.

3. *Second*, while both Canada and Mexico emphasize their view of what customary international law is *not*, they say nothing about what it *is*. More importantly, neither country’s

submission supports the United States' position that customary international law requires continuous nationality and control through the date of award. Consequently, the United States, which now "fully accept[s]" that it "bears the burden of establishing both the existence and the content" of the customary rule it purports to invoke (June 6, 2002 Tr. at 50:4-8), finds no aid in Canada and Mexico's submissions.

4. The remainder of this response focuses on the following points:
 - Chapter 11 creates private rights analogous to a chose in action. (*See* Section II, below.)
 - Mexico is correct that NAFTA's text is controlling, and nothing in that text requires continuous nationality or control beyond the date a Chapter 11 claim is submitted to arbitration. (*See* Section III, below.)
 - Canada's official practices confirm that if continuous nationality is in fact a "rule" of diplomatic protection, the date of submission is the rule. (*See* Section IV, below.)
 - The ICSID Convention's date-of-submission rule is applicable to these proceedings regardless of its contribution to customary international law. (*See* Section V, below.)
 - The ICSID Convention and the worldwide network of BITs satisfy the requirements for creating a rule of customary international law, while the widely variant practices on which the United States relies do not. (*See* Section VI, below.)

II. CHAPTER 11 CREATES PRIVATE RIGHTS ANALOGOUS TO A CHOSE IN ACTION

A. Chapter 11 Creates Private Rights

5. There should be no dispute that NAFTA Chapter 11 creates substantive *private* rights. Section A affirmatively guarantees private investors a host of rights, including the right to fair and equitable treatment, to full protection and security, to national and most-favored-nation treatment, and to freedom from unjust and uncompensated expropriation. *See* Articles 1102, 1103, 1105, 1110. And Section B creates a private cause of action — a right in and of

itself — whenever the rights established in Section A are breached. Even the United States concedes, as it must, the private nature of a Chapter 11 claim: As it explained at the June 6 hearing, the United States has been “treating [Loewen’s claims as] the equivalent to a chose in action,” encompassing a “bundle of rights” that includes the “right to prosecute the claim . . . to receive the proceeds . . . to prosecute all attendant claims [and] to enforce it.” (June 6, 2002 Tr. at 36:7-37:1.)

6. Mexico essentially agrees, conceding that Chapter 11 “create[s] a special *right* of action” on behalf of private individuals — “the legal *right* to assert a claim for redress.” (Mexico’s 3d 1128 Subm. ¶¶ 30, 31 (emphasis added); *see also id.* ¶ 52 (discussing the investor’s “*right* of action”) (emphasis added).) And as Mexico’s own authority observes, “[o]ne way of proving that” a treaty bestows rights on individuals and companies (as opposed to mere benefits) “is to show that the treaty conferring the rights gives the individuals and companies *access to an international tribunal in order to enforce their rights.*” P. Malanczuk, *Akehurt’s Modern Introduction to International Law* 101 (7th ed. 1997) (cited in Mexico’s 3d 1128 Subm. at n.34) (emphasis added). That, as Mexico repeatedly points out, is precisely the situation here. Chapter 11 gives private investors “the right of direct access” to an impartial international tribunal — “the legal right to assert a claim for redress” when a right created by Section A is breached. (Mexico’s 3d 1128 Subm. ¶¶ 28, 30.)

7. Given these repeated concessions by the NAFTA signatories, it is impossible to credit Mexico’s contention that the rights conferred by Chapter 11, Section A “are held by the Parties alone.” (*Id.* ¶ 29.)

B. The Private Rights Created By Chapter 11 Are Distinct From The State Rights Created By NAFTA, And Are Capable of Independent And Simultaneous Enforcement

8. The private rights created by Chapter 11 are separate and distinct from rights the Parties themselves have under NAFTA. There is no question about that. The United States itself acknowledges that Loewen’s Chapter 11 claims are not merely “state-to-state” claims being prosecuted by a private party (*see* June 6, 2002 Tr. at 316:4-6) and both the language and structure of NAFTA make the distinction clear. Just as Section B of Chapter 11 provides a remedy for the breach of private rights, Chapter 20 has its own Section B, creating a separate mechanism by which the NAFTA Parties can resolve disputes related to their own sovereign rights. *See* Chapter Twenty: Section B—Dispute Settlement; *see also In re Cross-Border Trucking Services*, (USA-MEX-98-2008-01), Final Report of the Panel ¶ 21 (Feb. 6, 2001) (Mexico claiming that an alleged U.S. breach of NAFTA could impair “the benefits *that Mexico* reasonably expects to receive from the treaty”) (emphasis added); *see also In the Matter of the U.S. Safeguard Action Taken on Broom Corn Brooms from Mexico*, (USA-97-2008-01), Final Report of the Panel (Jan. 30, 1998) (Mexico challenging U.S. import duties on Mexican brooms); *In the Matter of Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, (CDA-95-2008-01), Final Report of the Panel (Dec. 2, 1996) (United States claiming that Canadian import duties on certain U.S. agricultural products violated NAFTA).

9. Significantly, NAFTA allows these distinct private and State rights to be enforced simultaneously; it expressly permits Chapter 11 and Chapter 20 dispute resolution proceedings to operate at the same time, and provides that an investor’s prosecution of the private rights created by Chapter 11 occurs “[w]ithout prejudice to the rights and obligations of the Parties under Chapter Twenty.” Article 1115. Further, a Chapter 11 investor may make a claim even if its government has already initiated Chapter 20 proceedings challenging the same measure —

indeed, even if such proceedings have already concluded. Nor does a Party have any right to compromise or otherwise become directly involved in a Chapter 11 claim brought by its investor; in fact, a claimant may press a private claim under Chapter 11 even if its government is politically opposed to that claim. All that such a NAFTA Party may do is to make submissions as an interested *third* party, and even then only on questions of general interpretation of the Agreement. *See* Article 1128. Otherwise, its role is limited to, in appropriate cases, “assist[ing] in the enforcement” of a Chapter 11 award in which its investor prevailed on its private claim. (Mexico’s 3d 1128 Subm. ¶ 16 (citing Article 1136(5)).) Even so, the investor may seek enforcement of the award in its own right, “regardless of whether” its government has initiated proceedings under Article 1136(5). Article 1136(6).

10. A dispute-resolution regime that allows for the simultaneous, separate and uncompromised prosecution of distinct State and private rights can hardly be characterized as merely providing private claimants with a “safety net” against the possibility of State inaction. (*See* June 6, 2002 Tr. at 72:10-73:2.) NAFTA thus represents a “major departure” from the traditional view that individuals have no international rights, a departure that Sohn and Baxter, writing long before the investment-treaty revolution, could not possibly have envisioned. *See* L. Sohn & R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens*, Explanatory Note to draft art. 22, ¶ 1, at 188 (12th Draft, 1961) (describing their proposed regime as not “a major departure,” and one that “does not in actuality represent a radical break from the *lex lata*” as it existed in 1961.) Under Sohn and Baxter’s proposal, a private claimant’s government could, by virtue of presenting a claim on the claimant’s behalf, cause “the suspension of the claim by the individual [and] thus assume complete control over the claim of its national.” *Id.*, Explanatory Note to draft art. 22, ¶ 3, at 190; *see also id.* draft art. 23(1) at 199

(establishing same). But that proposal was not adopted in NAFTA, nor in any BIT of which Loewen is aware. Unlike NAFTA, Sohn and Baxter predicted a world in which “the State of which the claimant is a national may ‘waive, compromise, or settle’ his claim, with binding effect upon him” and, “even through action which might be considered to be arbitrary, deny a remedy to the claimant.” *Id.* at 190; *see also id.* (“The claims themselves may even be nationalized.”). Again, nothing in NAFTA allows for States to waive, settle, or compromise investors’ claims on their behalf.

11. Mexico thus errs in concluding that Chapter 11’s “investor-State arbitration” regime is not “new” because “mixed arbitration with rights of direct access . . . dates back to tribunals established after World War I.” (Mexico’s 3d 1128 Subm. ¶ 25 (citing Sohn & Baxter, *supra*, at 188-89).) But, Judge Hudson observed, while “[s]ome of the international claims commissions created in the past have been opened to private claimants . . . in most such cases *the claimant has been subject to control by the agent of his State.*” M. Hudson, *International Tribunals* 67-68 (1944) (emphasis added). So Sohn and Baxter were quite correct that their proposals did not represent a “major departure” from the view that an international claim may be presented only by a State. Sohn & Baxter, *supra*, at 188. Rather, their modest proposals for direct individual-State arbitration were modeled on past practices where States still controlled the claimants. In no way did Sohn and Baxter anticipate the radically different world of investment protection that exists today — a regime that, in the words of the seminal article on the subject, is “dramatically different from anything previously known in the international sphere.” J. Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.–F.I.L.J. 232, 256 (1995). This “dramatically different” modern regime — to use Sohn and Baxter’s words — does “in actuality

represent a radical break from the *lex lata*” of Sohn and Baxter’s world. Sohn & Baxter, *supra*, at 188.

12. In short, NAFTA creates separate and distinct rights for investors of the Parties on the one hand, and for the Parties themselves on the other. Similarly, it creates parallel but separate mechanisms for the enforcement of those rights. It is not a continuation of, nor even a *modest* departure from, the era in which only States had rights and standing to enforce them under international law. Rather, it is a wholesale and conscious rejection of traditional doctrine in favor of a new, more effective, apolitical, investment-protection regime — one that is founded on private rights and remedies, not dependent upon the discretionary and politically motivated grace of the investor’s government.

C. The Private Rights Created By Chapter 11 Are Thus Equivalent To A Chose In Action

13. As the foregoing illustrates, a claim based on the breach of Chapter 11’s private rights is analogous to a chose in action, an issue on which there is no real dispute. The United States, as noted above, has “been treating [Loewen’s claim as] equivalent to a chose in action.” (June 6, 2002 Tr. at 36:12-13.) Canada has not expressed any view to the contrary. And Mexico questions only whether a chose in action under Chapter 11 is “freely assignable.” (Mexico’s 3d 1128 Subm. ¶ 42.) But even the United States agrees that the validity of the assignment in this case is not in dispute. (*See* June 6, 2002 Tr. at 34:8-9 (“there is no dispute as to the validity of the assignment” in this case); *see also id.* at 282:9-10 (“[a]nd, of course, we don’t dispute the assignment’s validity.”); *id.* at 285:19-20 (similar); *id.* at 287:4-5 (similar); U.S. 2d Juris. Reply at 58 (similar); U.S. Juris. Mem. at 91 n.59.) In other words, Mexico’s arguments address an issue of municipal law — the assignability of claims — that is not joined before this Tribunal.

14. Mexico’s authorities are similarly off point. Its reliance upon *Barcelona Traction* and *Nottebohm* (Mexico’s 3d 1128 Subm. ¶¶ 43-47) is wholly inapposite. As Mexico’s own quotations from those cases make clear, neither dealt with the rights of the underlying claimants, but only with the rights of one State or another to exercise diplomatic protection on their behalf. (See, e.g., *id.* ¶¶ 43, 46.) Here, Loewen has exercised its Chapter 11 “right of direct access” to this Tribunal (*id.* ¶ 28). So the question of whether or not, “[o]n the ICJ’s reasoning in *Nottebohm*,” Mexico could ever have “exercised diplomatic protection in respect of TLGI or Mr. Loewen” is simply irrelevant. (*Id.* ¶ 47.) Indeed, even the United States has made it perfectly clear that it is not challenging “any market for TLGI’s claims that Loewen might have found in Canada or Mexico.” (U.S. 2d Juris. Reply at 56.)

15. Similarly, nothing in the *Mihaly* case “suggests that an investor-State claim cannot be assigned in the sense that a chose in action can be assigned,” as Mexico claims. (Mexico’s 3d 1128 Subm. ¶ 49 (citing *Mihaly Int’l Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2 (Award, Mar. 15, 2002)).) In fact, *Mihaly* is entirely inapposite because, as Mexico ultimately concedes, it “actually deals with the converse of the facts of this case.” (*Id.* ¶ 50.) In *Mihaly*, a Canadian investor with a putative investment claim against Sri Lanka wanted to submit the claim to an arbitration under the ICSID Convention. But because Canada is one of the few countries that has not yet signed the Convention, no tribunal established thereunder would have had jurisdiction over the claim. Consequently, the Canadian investor tried to manufacture jurisdiction by assigning the claim to its American partner. See *Mihaly, supra*, ¶ 15. Upholding Sri Lanka’s objection, the tribunal quite logically reasoned:

It follows that *as neither Canada nor Mihaly (Canada) could bring any claim under the ICSID Convention*, whatever rights Mihaly (Canada) had or did not have against Sri Lanka could not have been improved by the process of assignment That is, no one

could transfer a better title than what he really has. Thus, if Mihaly (Canada) had a claim which was procedurally defective against Sri Lanka before ICSID because of Mihaly (Canada)'s inability to invoke the ICSID Convention, Canada not being a Party thereto, this defect could not be perfected vis-à-vis ICSID by its assignment to Mihaly (USA).

Id. ¶ 24 (emphasis added). *Mihaly* thus stands for the rather unremarkable — and inapposite — proposition that the pre-submission assignment of an ICSID claim that could not exist in the first place cannot be used to manufacture jurisdiction under the ICSID Convention.

16. As Loewen has previously shown, the more apposite case for purposes of this proceeding is *CSOB*, which held that the *post-submission* assignment of a claim does not affect a tribunal's "jurisdiction to hear th[e] case *regardless of the legal effect, if any, the assignments might have had on Claimant's standing had they preceded the filing of the case.*"

Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic (CSOB), ICSID Case No. ARB/97/4, 14 ICSID-Review – F.I.L.J. 250, ¶¶ 29, 31 (Decision on Objections to Juris., May 24, 1999); *see also* TLGI 2d Juris. Counter-Mem. at 16. So, taken together, *Mihaly* and *CSOB* establish that both the pre-submission and post-submission assignment of claims do not affect jurisdiction — the former cannot create jurisdiction where none exists, and the latter cannot destroy jurisdiction once a claim is vested. Here, Loewen has a valid chose in action, as the United States itself agrees (June 6, 2002 Tr. at 36:12-13) — a vested claim that is assignable consistent with the express requirements of NAFTA.

17. Thus, Sir Anthony was surely correct when he suggested, at the June 6 hearing, that the characterization of a Chapter 11 claim is a "very important question" (June 6, 2002 Tr. 38:13; *id.* at 287:14-15) that may throw light on the "jurisdictional" issue now before this Tribunal. If, as the United States agrees, Loewen's NAFTA claim is properly characterized as a chose in action, then it is a personal property right that was owned by Loewen, not by any State,

and was freely transferable. If that is the case, then the assignee of a NAFTA claim must receive nothing less than that which the assigning NAFTA investor previously had; it cannot be personal property in the assignor's hands if it evaporates once assigned. If, on the other hand, a NAFTA claim is *not* regarded as a chose in action, it is not a property interest, and therefore not assignable at all. Under that latter circumstance (which all agree is not the case here), the assignment would have no legal effect, meaning that the claim would continue to be "owned" (if "ownership" would even be the correct terminology to use in this circumstance), in its entirety, by TLGI — a Canadian company. Under either circumstance, there is no basis for the United States' objection here.

18. In sum: Where, as here, a private claimant has "the right of direct access" to "assert a claim" on its own behalf, it is irrelevant whether its government might also have a right to espouse the claim. The important point is that Loewen's NAFTA claim is in the nature of a chose in action, which as a personal property right does not belong to the State and is freely assignable.

III. THE CONTROLLING TEXT OF NAFTA SETS THE CRITICAL DATE FOR DETERMINING THE NATIONALITY AND CONTROL OF A CHAPTER 11 CLAIM AT THE DATE OF SUBMISSION.

19. Loewen shares "Mexico's expectation that a NAFTA Tribunal will adhere to the treaty's text." (Mexico's 3d 1128 Subm. ¶ 6.) And as Loewen has now repeatedly shown, the text of Articles 1116 and 1117, the provisions that govern standing for Chapter 11 claims, set the last critical date for determining nationality and control at the date of submission. (*See, e.g.*, TLGI 2d Juris. Counter-Mem. at 4-7; TLGI 2d Juris. Rejoinder at 5-6; June 6, 2002 Tr. at 132:5-136:16.) Again, Mexico appears to concur, acknowledging that Loewen had standing to "make a claim . . . only because it satisfied the Treaty's jurisdictional requirements (*e.g.*, it was an

investor of another Party) in terms of standing and it had a claim that fell with the Tribunal's jurisdiction racione materiae." (Mexico's 3d 1128 Subm. ¶ 12 (emphasis added).)

20. Nevertheless, Mexico argues that it can be *inferred* from the text of other provisions in Chapter 11 that the requisite nationality and/or control must continue, not just up to the date of award, but "through the post-Award judicial review process, potentially up to the highest court of the place of arbitration." (*Id.* ¶ 15.) Like the United States' own now-abandoned textual argument, Mexico seeks to hang its even more extreme construction of Chapter 11 on the tenuous hook of Article 1136(5). (*Id.* ¶¶ 16-19.) That Article provides that if the respondent Party in a Chapter 11 arbitration "fails to abide by or comply with a final award," then "a Party whose investor was a party to the arbitration" may request the establishment of a Chapter 20 panel. Article 1136(5). According to Mexico, the mere possibility that a respondent Party *may* fail to abide by or comply with a final award, and that another Party *may* then initiate new and separate proceedings under Chapter 20, "clearly contemplates that there *must* be two NAFTA interested Parties at the end of the investor-State proceeding." (Mexico's 3d 1128 Subm. ¶ 17 (emphasis added).)

21. As we have previously shown, this argument was untenable when the United States made it (*see* TLGI 2d Juris. Counter-Mem. at 12-13), and it is equally untenable now. *First*, Article 1136 does not leave a successful Chapter 11 claimant dependent on the Parties for enforcement of an award. To the contrary, Article 1136(6) not only allows a successful claimant to pursue enforcement in its own right, but allows the claimant to do so "regardless of whether proceedings have been taken [by a Party] under paragraph 5." Accordingly, enforcement of a Chapter 11 award — like prosecution of the underlying claim — does not require that there be *any* NAFTA Party interested in acting on the claimant's behalf. Moreover, Chapter 20 panels

have no power to enforce Chapter 11 awards in the first place. All they can do is determine whether the respondent Party's failure to abide by the award constitutes a new and separate violation of NAFTA and if so, *recommend* compliance. *See* Article 1136(5).

22. *Second*, the fact that a Chapter 20 panel may be established at the request of “[a] Party whose investor was a party” to the arbitration hardly dictates the “continued link of nationality” suggested by Mexico. (Mexico’s 3d 1128 Subm. ¶ 16 (emphasis added by Mexico).) Despite Mexico’s erroneous conclusion to the contrary, the word “whose” is a possessive pronoun, not a verb, and consequently has no tense. (*See id.*) In contrast, the word “was” *is* a verb, and indicates the past, not the present tense. Thus, on its face, Article 1136(5) would allow Canada to initiate Chapter 20 proceedings should the United States fail to abide by an award rendered by this Tribunal because Canada is “a Party whose investor *was* a party to the arbitration.” Article 1136(5) (emphasis added).

23. Separately, Mexico makes what is essentially a policy argument, expressing its concern that “[i]f the Tribunal were to find that the nationality of the claim has changed but that it can still be advanced, there is a risk that other claimants will seek to invoke Chapter 11 against their own governments.” (Mexico’s 3d 1128 Subm. ¶ 11.) No such risk exists. Properly read, Chapter 11 requires a putative claimant to be an investor of a Party other than the respondent both at the time of injury, and at the time the claim is submitted. Thus, as Mexico points out, the “prospect” of an investor seeking to make a claim — *i.e.*, to submit a claim — against its own government would “clearly offend[] the plain wording of Section B and the structure of Chapter Eleven.” (*Id.*)

24. Nevertheless, the Parties’ shared attempt to narrow NAFTA’s protections retroactively does raise important policy concerns. As Loewen has shown, requiring continuous

nationality and control through the date of award in a Chapter 11 proceeding would undermine NAFTA's objectives, particularly its expressly stated goal of increasing the flow of private investment. (See TLGI 2d Juris. Counter-Mem. at 30-32; TLGI 2d Juris. Rejoinder at 10-11.) None of the Parties has effectively responded to that showing; indeed, none has even attempted to show that those policy goals, which serve as guideposts for interpreting NAFTA (*see* Article 102(2)), support the United States' continuous-nationality "rule."

25. Interestingly, however, the U.S. Supreme Court has relied on similar justifications to support its longstanding interpretation of the U.S. federal courts' diversity-of-citizenship jurisdiction as adopting a date-of-submission rule. As *Loewen* confirmed at the June 6th hearing, in response to Judge Mikva's question (June 6, 2002 Tr. at 151:11-152:8), the Supreme Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*) (citations omitted). What is perhaps even more important, however, is that this U.S. date-of-filing rule is not expressly required by the U.S. Constitution, or by the United States Judicial Code. Instead, it stems from an *implicit* constitutional objective of promoting interstate trade, and the Court's recognition that "[a] contrary rule could well have the effect of deterring normal business transactions during the pendency of what might be lengthy litigation." *Freeport*, 498 U.S. at 429. So it should come as no surprise that NAFTA — a treaty explicitly intended to liberalize trade and encourage cross-border investment — likewise rejects any requirement that would have similarly deterrent business effects.

26. Finally, Mexico asserts that NAFTA's rights and obligations turn on "the origin of goods and the nationality of investors, service providers and even temporary business

travelers.” NAFTA generally, and Chapter 11 specifically, may be concerned with the *origin* of an investment, but only in a formalistic sense, and even then, only up to the time of submission of the claim. *See, e.g.*, Canadian Statement on Implementation, *reprinted in North American Free Trade Agreement: Treaty Materials*, Booklet 12A at 68 (“NAFTA coverage extends to investments made by any company incorporated in a NAFTA country, *regardless of country of origin.*” (emphasis added).) And Mexico does not dispute that, as the United States itself has noted, the term “‘Investor of a Party’ is defined to encompass both firms (including branches) established in a NAFTA-country, *without distinction as to nationality of ownership.*” U.S. Statement of Administrative Action, *reprinted in NAFTA, supra*, Booklet 8 at 128 (emphasis added); *see also* TLGI 2d Juris. Counter-Mem. at 70-71; TLGI 2d Juris. Rejoinder at 9. In any event, it is difficult to see how this concern supports the United States’ continuous-nationality rule when NAFTA’s text establishes a date-of-submission rule.

27. In sum: The text of Articles 1116 and 1117, which govern standing to make and prosecute a Chapter 11 claim, set the date of submission as the last critical date for determining nationality and control. Nothing elsewhere in the text of Chapter 11 explicitly extends the nationality and control requirements beyond that date, nor in any way supports such an extension by implication.

IV. CANADA’S PRACTICES CONFIRM THAT CUSTOMARY INTERNATIONAL LAW DOES NOT REQUIRE CONTINUOUS NATIONALITY BEYOND THE DATE OF SUBMISSION

28. Using the United States and Great Britain as just two examples, Loewen has previously shown that, to the extent States follow the practice of limiting diplomatic protection on continuous-nationality grounds, they do not require continuous nationality beyond the date a claim is presented on the international plane. (*See, e.g.*, TLGI 2d Juris. Rejoinder at 23, 28-30; Fifth Jennings Op. at 7-8.) Canada’s submission in these proceedings may be silent on that

issue, but its official policies and practices are not. An official publication from Canada's Secretary of State for External Affairs confirms that, even in the context of diplomatic protection, Canada's interpretation of customary international law does not require continuous nationality beyond the date of submission:

A. Espousal of Claims

1. General Principles

The Canadian government cannot, in accordance with generally recognized principles of customary international law, espouse claims related to the loss of human life, to assets, to interest, or to the debts of Canadians, unless such individuals are Canadian citizens at the moment of the loss, confiscation, expropriation, or nationalization. Furthermore, claims must have belonged to Canadian citizens since the events that gave rise to them, and the claimants must be Canadian citizens *at the moment of the presentation of claims*.

L'entraide judiciaire internationale: Services juridiques fournis par le Ministère des Affaires extérieures concernant l'entraide judiciaire internationale et certaines autres matières

[International Judicial Assistance: Legal Services Provided by the [Canadian] Ministry of Foreign Affairs Related to International Judicial Assistance and Certain Other Matters]

(undated) (emphasis added) (translation by counsel). Nothing in this *official* document — which is intended to inform Canadian citizens of the eligibility requirements for diplomatic protection — in any way suggests that a post-presentation change in nationality might compromise a valid claim. To the contrary, Canada's official policy is that Canadian citizenship is a necessary condition of diplomatic protection only “at the moment of the loss” and “at the moment of presentation of claims” — a mirror image of the NAFTA requirements.

29. For its part, Mexico has traditionally objected to diplomatic protection and espousal under any circumstances. Consequently, its past practices shed no light on the issue of continuous-nationality principles. On the other hand, the fact that Mexico, a longtime adherent

to the Calvo doctrine, has signed onto a treaty giving *private investors* “a direct right of access” to impartial international tribunals speaks volumes about how much the world has changed since Sohn and Baxter offered their modest proposal almost half a century ago.

V. THE ICSID CONVENTION’S DATE-OF-SUBMISSION RULE IS APPLICABLE TO THESE PROCEEDINGS REGARDLESS OF ITS CONTRIBUTION TO CUSTOMARY INTERNATIONAL LAW

A. The ICSID Convention’s Date-Of-Submission Rule Is “Applicable” Because The United States — The Only “Contesting State” In This Dispute — Has “Expressly Recognized” It

30. As Loewen has previously demonstrated, and Canada now confirms, NAFTA Article 1131 directs this Tribunal to consider and apply applicable rules of *conventional* as well as customary international law. (Canada’s 2d 1128 Subm. ¶ 4; *see also* TLGI 2d Juris. Rejoinder at 13.) Canada also confirms that, under Article 38(a)(1) of the Statute of the International Court of Justice, the Tribunal should apply conventional “rules *expressly recognized* by the contesting states.” (Canada’s 2d 1128 Subm. ¶ 5 (emphasis added).) In this investment dispute, of course, there is only one “contesting state” — the United States. And there is no dispute that the United States is a signatory to the ICSID Convention. Moreover, the United States has incorporated the ICSID Convention not only into NAFTA, but also into virtually all of its BITs. (*See* TLGI 2d Juris. Counter-Mem. at 21-22.) In those BITs, the *only* modification the United States has ever made to the ICSID Convention’s date-of-submission rule is to move the critical date for determining nationality or control *back* to the date of injury. (*See id.* at 22.)

31. Thus, there can be no dispute that the ICSID Convention’s date-of-submission rule is a rule of international law “applicable” to the United States under NAFTA Article 1131 and Article 38(a)(1) of the ICJ Statute, because the United States has “expressly recognized” it. As such, it provides the rule of decision for this Tribunal.

B. Canada And Mexico Have “Expressly Recognized” The ICSID Convention’s Date-Of-Submission Rule As Well

32. There should also be no dispute that by agreeing to incorporate the ICSID Convention into NAFTA Article 1120 — as well as their own respective BITs — without modifying the Convention’s date-of-submission rule, Canada and Mexico have “expressly recognized” that rule as well. Of course, it comes as no surprise that Canada has “expressly recognized” the ICSID Convention’s date-of-submission rule since, as noted above, it officially embraces the date of submission as the last relevant date for determining nationality and control. (*See* Section IV, *supra*.) Nor is it surprising that, as Mexico points out, “[t]he basic principles of the ICSID Convention’s model of investor-State arbitration were of interest to the NAFTA’s drafters.” (Mexico’s 3d 1128 Subm. ¶ 22.) Nevertheless, both Canada and Mexico attempt to distance themselves from the ICSID Convention in these proceedings by misreading Article 38 of the ICJ Statute as providing for the application of only those obligations of conventional international law by which a State has “consented to be bound.” (Canada’s 2d 1128 Subm. ¶ 6; *see also* Mexico’s 3d 1128 Subm. ¶ 22.)

33. It is obvious that treaties generally create obligations only on behalf of their signatories. (Mexico’s 3d 1128 Subm. ¶¶ 22, 34.) But it should be just as obvious that Article 38(1)(a) does *not* read: “international conventions, whether general or particular, establishing *obligations* by which the contesting states have expressly *consented to be bound*.” Rather, the language of Article 38(1)(a) is undeniably broader, providing for the application of *any* “international convention, whether general or particular, establishing rules expressly recognized by the contesting states.” So what matters is whether a party has “expressly recognized” a particular rule, not whether it has expressly consented to be bound by the treaty establishing it.

34. Mexico's quotation from *Oppenheim's* underscores the point: ““The *general* importance of treaties lies *primarily* in the fact that the rules established by them, and the rights and obligations to which they give rise, are binding on the parties to the treaty. It is this aspect of treaties which is *foremost* in Article 38(1)(a) of the Statute of the International Court of Justice.”” (Mexico's 3d 1128 Subm. ¶ 22 (emphasis added).) *Oppenheim's* thus makes clear that Article 38(1)(a) is concerned with more than the party-specific rights and obligations that are of “foremost” concern, and that those rights and obligations may be the “primary,” but scarcely the *only* aspects of treaties that make them important to international tribunals.

35. Finally, despite Mexico's mistaken impression to the contrary, nothing in the recent *Mihaly* case “specifically addressed this issue.” (Mexico's 3d 1128 Subm. ¶ 22.) There, the tribunal merely reached the rather obvious conclusion that because Canada was not a signatory to the ICSID Convention, an ICSID tribunal had no jurisdiction over a Canadian investor's claim, brought pursuant to the ICSID Convention, against Sri Lanka. *See Mihaly, supra*, ¶ 24. Nothing in the facts of the case nor the arguments of the parties required the tribunal to consider, much less decide, whether a conventional rule may be “expressly recognized” by a State who is not a party to the underlying convention.

36. As Loewen has already demonstrated, Canada and Mexico have, through the unmodified incorporation of the ICSID Convention in their respective BITs, “expressly recognized” the date of submission as the last critical date for determining nationality and control. (*See* TLGI 2d Juris. Rejoinder at 13-14.) And given “the NAFTA Parties' inclusion of the ICSID Convention as a potential source of arbitral rules” (Mexico's 3d 1128 Subm. ¶ 24) with no modification of the Convention's date-of-submission rule, there can be no doubt that Canada, Mexico and the United States have all “expressly recognized” this rule in NAFTA

Chapter 11, which makes it an “applicable rule[] of international law” under NAFTA Article 1131(1) and Article 38(a)(1) of the ICJ Statute.

37. In sum: Article 38(a)(1) of the ICJ Statute requires only that Canada and Mexico have “expressly recognized” the ICSID Convention’s date-of-submission rule, not that they have become parties to the international convention in which it appears. That much Canada and Mexico have already done, regardless of whether they ultimately become signatories to the ICSID Convention in the future. Accordingly, the Convention’s date-of-submission rule is “applicable” to these proceedings pursuant to NAFTA Article 1131(1) as a rule “expressly recognized” by *all three* NAFTA Parties.

VI. THE ICSID CONVENTION AND THE WORLDWIDE NETWORK OF BITS SATISFY THE REQUIREMENTS FOR CREATING A CUSTOMARY RULE, WHILE THE WIDELY VARIANT PRACTICES ON WHICH THE UNITED STATES RELIES DO NOT

38. The nationality and control provisions contained in the almost 2000 BITs and in the ICSID Convention satisfy the criteria for creating customary international law.

A. The ICSID Convention And BITs More Than Satisfy Any “Practice Requirement”

39. As Loewen has previously shown, and both Mexico and Canada now confirm, State practice becomes customary international law only when it is “widespread,” “extensive and virtually uniform.” (Canada’s 2d 1128 Subm. ¶ 16 (internal quotation marks and citations omitted); Mexico’s 3d 1128 Subm. ¶ 36 (same); *see also* June 6, 2002 Tr. at 187:15-188:7.) The rule contained in the ICSID Convention and the worldwide network of BITs — that nationality and control need be maintained no later than the date of submission — easily meets that requirement.

40. With regard to State recognition of the ICSID Convention, which unequivocally sets the critical date at the date of submission, it has become so widespread and extensive that the

Convention now has no fewer than 150 State signatories. *See* List of Contracting States and other Signatories of the Convention, *available at* <http://www.worldbank.org/icsid/constate/c-states-en.htm> (last visited July 17, 2002). Moreover, even non-signatory States like Canada and Mexico also recognize the ICSID Convention, and have expressly incorporated it into their investment treaties without modifying Article 25(2)(b)'s date-of-submission rule. As both the United States and Mexico point out, "what is most instructive when a purported rule of custom is based on treaty text is the practice of States that are *not* parties to the treaties." (U.S. 2d Juris. Reply at 50 (citing *North Sea Continental Shelf*, 1969 I.C.J. ¶ 76) (emphasis in original); *see also* Mexico's 3d 1128 Subm. ¶ 37.) Additionally, as discussed in Section IV, above, Canada's official practice rejects any requirement of continuous nationality beyond the date of submission. Thus, whether one looks at Canada's treaty practice, or its diplomatic practice, both confirm the ICSID Convention's date-of-submission rule. So it is hardly surprising that Mexico essentially concedes that "certain aspects of the Convention" satisfy the "State practice" requirement. (Mexico's 3d 1128 Subm. ¶ 22.)

41. With regard to the BITs, Loewen has already shown that 92% of a representative sample either adopt the ICSID Convention's date-of-submission rule, or move the critical date *back* to the date of injury, while the remaining 8% are simply silent on the issue. (*See* TLGI 2d Juris. Counter-Mem. at 19-26; TLGI 2d Juris. Rejoinder at 14; June 6, 2002 Tr. at 191:12-197:9.) Neither Canada nor Mexico disputes that showing. In fact, none of the Parties — not Canada, not Mexico, and not the United States — has cited to a single investment treaty containing a date-of-award rule. And Canada's assertion that "the texts of these agreements vary considerably" (Canada's 2d 1128 Subm. ¶ 25) only highlights that they are virtually uniform on

this narrow point — the only aspect of the BITs at issue here — the critical date for evaluating nationality and control.

42. In sharp contrast, there is not now, nor has there ever been, “widespread” and “extensive” agreement concerning the existence, much less the content, of the continuous-nationality “rule” the United States asks this Tribunal to import from the field of diplomatic protection. For example, as the United States has now twice conceded, only a “plurality of nine states” endorsed its purported rule in their responses to a 1929 survey by the League of Nations. (See June 6, 2002 Tr. at 65:21-66:2; see also U.S. 2d Juris. Mem. at 14 n.23 (listing only *eight* States as supporting its rule).) In other words, even as far back as three-quarters of a century ago, at the height of international friction over diplomatic protection, a majority of States either rejected the United States’ “rule” outright, or otherwise declined to support it. (See TLGI 2d Juris. Rejoinder at 24-25, *citing Bases of Discussion for the Conference Drawn up by the Preparatory Committee*, League of Nations Doc. C.75.M.69.1929.V at 140-45 (1929), *reprinted in* 2 S. Rosenne, *League of Nations Conference for the Codification of International Law* [1930] 423, 562-67 (1975).) More recent State practice — including the practice of the United States, Great Britain and Canada — confirms that States continue to reject any date-of-award rule. (See TLGI 2d Juris. Counter-Mem. at 40-42, 43; TLGI 2d Juris. Rejoinder at 22-24, 28-30; Section IV, *supra*.) And the proposed articles on diplomatic protection currently before the International Law Commission would essentially eliminate any requirement of continuous nationality once and for all. (See TLGI 2d Juris. Counter-Mem. at 42-43.) In short, given all of the opinion and practice to the contrary, it cannot be concluded that continuous nationality through the date of award *ever* achieved the status of a “rule,” even in the context of diplomatic protection.

43. In any event, it is the ICSID Convention and the worldwide network of BITs that represent the modern customary law of investment protection. Both demonstrate that it is the “widespread” and “extensive” — in fact, the “virtually uniform” — practice of States in this context to reject any requirement of continuous nationality beyond the date of submission.

B. *Opinio Juris* Is Not Always A Necessary Element Of Customary International Law, And Is Satisfied In This Case In Any Event

44. As numerous authorities have recognized, including most recently the NAFTA Tribunal in *Pope & Talbot*, “applying the ordinary rules for determining the content of custom in international law, one must conclude that the practice of states is now represented by [the bilateral investment] treaties.” *Pope & Talbot v. Canada*, Award on Damages ¶ 62; *see also* TLGI 2d Juris. Counter-Mem. at 19-20; TLGI 2d Juris. Rejoinder at 14. And “[a]s Canada points out, these treaties are a ‘principal source’ of the general obligations of states with respect to their treatment of foreign investment.” *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 ¶ 110 (Apr. 10, 2001).

45. Nevertheless, both Canada and Mexico assert that “the *Pope & Talbot* Tribunal’s reasoning was flawed” because it “referred to no *opinio juris* surrounding” the BITs. (Canada’s 2d 1128 Subm. ¶¶ 24, 26; *see also* Mexico’s 3d 1128 Subm. ¶¶ 39-40.) The obvious answer to that charge, of course, lies in Canada’s own practices. Its own published practice of not requiring continuous nationality beyond the date of submission demonstrates that Canada does not believe that, as a matter of legal obligation, a post-presentation change in nationality precludes it from continuing to press the claim.

46. Ultimately, however, the invocation of *opinio juris* amounts to little more than a red herring. Where, as here, there are literally hundreds upon hundreds of treaties, all “habitually framed in the same way, a court may regard the usual form as the law even in the absence of a

treaty obligation.” I. Brownlie, *Principles of Public International Law* 13 (1998). Thus, despite the Parties’ assertion to the contrary, *opinio juris* is not required because “the frequency and identity of treaty provisions on a given subject, far from proving that they constitute an exception from the customary rule, result in the creation of international custom.” H. Lauterpacht, *The Development of International Law by the International Court* 378 (1982) (citation omitted).

47. That is exactly the situation here. Countries that in the past resented and even vigorously resisted *any* international action on private claims now readily tout the promise of international arbitration as a means of inducing private foreign investment. *See, e.g.,* G. Aguilar Alvarez & W. Park, *The New Face of Investment Arbitration: Capital Exporters as Host States under NAFTA Chapter 11*, at 6-7 (forthcoming in ICSID Review). In so doing, their “widespread,” “extensive” and even “virtually uniform” practice has been to reject any requirement of continuous nationality beyond the date of submission. Indeed, as Loewen’s survey of recent BITs demonstrates, even former adherents to the Calvo Doctrine now regularly agree to international arbitration of investment disputes with private foreign investors and, in numerous instances, with their own nationals. (*See, e.g.,* TLGI 2d Juris. Counter-Mem., Treaty Appendix at Tab F, Nos. 39, 53, 60, 63, 64, 72, 83.) Far from constituting “an exception from the customary rule” as it stands today, these countless treaties “result in the creation of international custom.” H. Lauterpacht, *supra*, at 378; *see also* *Pope & Talbot*, Award on Damages ¶ 62. And, again, that custom rejects any requirement of continuous nationality beyond the date a private claim is submitted to international arbitration. *Cf. Hudson, supra*, at 83 (recognizing more than a half century ago that “[t]he standards by which [tribunals of limited and special jurisdiction] will be guided cannot be too rigid, and they will change from time to time”).

VII. CONCLUSION

48. However the Tribunal chooses to approach the issue of its continuing jurisdiction over Loewen's claims, the outcome is the same. Under a textual approach, the controlling language of Chapter 11 sets the last critical date for determining nationality and control at the date of submission. That date is confirmed by the ICSID Convention's date-of-submission rule, applicable both because it proves that arbitration of a Chapter 11 claim under *any* of the potentially available arbitral rules must be subject to the same date-of-submission rule, and because it is a conventional rule of international law adopted by treaty by the United States and "expressly recognized" by all of the NAFTA Parties. Even were that not the case, the ICSID Convention and the worldwide network of BITs have created a customary rule of investor-State arbitration that rejects any requirement of continuous nationality or control beyond the date of submission. As Canadian practice confirms, the customary rules of diplomatic protection do the same. And even were it otherwise, the rules of diplomatic protection could not be applied to destroy the substantive private rights, properly understood as a freely assignable chose in action, that were created by NAFTA Chapter 11, and vested thereunder in Loewen upon the filing of its NAFTA claims.

49. Finally, with all that said about the law, we remind the Tribunal that the reorganization transaction at issue here was designed in a way that should have avoided the United States' jurisdictional objection under *any* view of the law: As we showed at the hearing and in our pleadings (*see, e.g.*, June 6, 2002 Tr. at 222:5-6; TLGI 2d Juris. Rejoinder at 33), TLGI — the original Canadian claimant in this case — continues to own legal title to these NAFTA claims, which continue to be prosecuted on TLGI's behalf by a Canadian company.

50. Accordingly, this Tribunal continues to have jurisdiction over all of Loewen's claims, should return an award in favor of Loewen on the merits without further delay, and should order a prompt damages proceeding.

Respectfully submitted,

Christopher F. Dugan

James A. Wilderotter

Gregory A. Castanias
Melissa D. Stear
Tashena Middleton Moore
Matthew S. Duchesne
Maura K. Frickel
Steven M. Davis
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Tel: (202) 879-3939
Fax: (202) 626-1700

*Attorneys for Claimant
The Loewen Group, Inc.*

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