

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

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**COUNTER-MEMORIAL OF THE LOEWEN GROUP, INC.  
ON MATTERS OF JURISDICTION AND COMPETENCE**

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## I. INTRODUCTION

1. The United States' desire to have this case resolved on jurisdictional grounds is certainly understandable. But the United States' implausible assertions — that the bankruptcy and creditor-driven reorganization of The Loewen Group, Inc. (“TLGI”) and its related companies has somehow extinguished this Tribunal’s jurisdiction over Loewen’s NAFTA claims — are wholly lacking in legal and factual merit. The Tribunal should reject the United States’ last-ditch effort to defer or avoid a decision on the merits. The Tribunal should rule for Loewen on the merits, and if it does, order a very prompt damages phase.

2. Attached to this Counter-Memorial are opinion statements from the following experts:

- The Fifth Opinion of Sir Robert Jennings (Tab A), which addresses the United States’ misplaced reliance on discretionary principles of diplomatic-espousal cases in lieu of the text of NAFTA Chapter 11 and the customary international law of investment protection;
- The Statement of Peter deC. Cory, Q.C., former Justice of the Supreme Court of Canada (Tab B), which addresses the present, continuing status of TLGI as a valid and existing corporation under the laws of British Columbia, as well as the inapplicability of equitable veil-piercing doctrines with respect to Nafcanco ULC;
- The Statement of Patrick Furlong, Esq., a prominent, longtime British Columbia corporate-law solicitor with the firm of Davis & Company (Tab C), which addresses the requirements of British Columbia corporate law as applied to TLGI, as well as TLGI’s continued status as a an existing, valid, and legally recognized corporation under British Columbia law;
- The Statement of Martin R. Taylor, Q.C., former judge of the Supreme Court of British Columbia and the British Columbia Court of Appeal (Tab D), which addresses the practices of British Columbia courts with respect to orders for security for costs, as those practices might relate to this arbitration; and
- The Affidavit of Jonathan B. Cleveland, Director of Houlihan Lokey Howard & Zukin, the international investment-banking firm that provided financial advice to the official committee of unsecured creditors of the Loewen bankruptcy estates (Tab E), which addresses the *involuntary* nature of the Loewen bankruptcy reorganization and resulting corporate restructuring, a restructuring demanded not

by Loewen's management, not by Loewen's shareholders, but by Loewen's *creditors* — all forces external to the company.

3. The text of NAFTA Chapter 11, the investment and trade-protection purposes of that chapter, the ICSID Convention (which Article 1120 incorporates into NAFTA Chapter 11), and the customary international law of investment protection (as demonstrated by the vast array of bilateral investment treaties (BITs)), all establish that the date a claim is submitted to arbitration is the critical date for determining whether a disputing investor under NAFTA Articles 1116 and 1117 has the requisite nationality and control. To the extent that the United States addresses the text of NAFTA in its submission, its arguments ignore the most important textual provisions, and abuse the text of those provisions on which it does rely. We address these critical and dispositive sources of law in Section II, *infra*.

4. The United States' submission, that a disputing investor must maintain the same nationality and control of its investment throughout the entire course of a potentially lengthy arbitration, ignores all of the relevant sources of law described above. Instead, the United States — and its expert, Professor Greenwood — rely on diplomatic-espousal cases, which are inapposite for purposes of investment-protection treaties such as NAFTA. Furthermore, to the extent that diplomatic-espousal cases could be said to yield a single, customary rule — a dubious proposition in any event — that rule requires continuous nationality *only* up through the date of presentment of a claim, not through to a final award. As the proponent of a jurisdictional objection, the United States bears the burden of establishing that the law is as it asserts, and that it is applicable here. It cannot meet that burden. We respond to the United States' arguments based on diplomatic-espousal precedents in Section III, *infra*.

5. Even if the United States' misguided version of international law provided the rule of decision in this case, its arguments would still depend on its twin propositions that TLGI

no longer exists, and that the separate corporate structures of Nafcanco and Alderwoods Group International (“AGI”) should be disregarded as matters of Canadian law. Neither of these necessary propositions can be sustained, however — TLGI continues to be a valid and existing corporation recognized by the law of British Columbia (as confirmed recently by its Registrar of Corporations), and there is no basis in law or equity to disregard the separate corporate structures of Nafcanco and AGI so that both are regarded as United States companies. As the proponent of a jurisdictional objection, the United States also bears the burden of establishing these necessary facts. It has again failed to do so. We respond to the United States’ misguided factual submissions in Section IV, *infra*.

6. Finally, even if there were no other basis for ruling in Loewen’s favor on this jurisdictional issue, fundamental principles of equity and justice should compel a ruling that Loewen’s bankruptcy and creditor-driven corporate reorganization have had no effect on the Tribunal’s jurisdiction. There can be no dispute, as Loewen’s filings in the parallel Canadian and U.S. bankruptcy proceedings have demonstrated, that the illegal and excessive *O’Keefe* verdict and judgment — for which the United States is responsible — was a substantial cause of those bankruptcy proceedings and the concomitant creditor-driven restructuring. Equity prevents the United States from gaining benefits from its own wrong in this fashion, and equity will not allow such a wrong to be suffered without a remedy. That is, after all, why the jurisdictional requirements of the NAFTA investment-protection regime look to the time a claim is submitted, not the date of award. Were the rule otherwise, completed and injurious international wrongs such as the *O’Keefe* verdict and judgment could go uncorrected. We show the proper role of equity as applied to the United States’ latest jurisdictional objection in Section V, *infra*.

## II. THE CRITICAL DATE FOR DETERMINING NATIONALITY AND JURISDICTION IS THE DATE OF SUBMISSION

7. As with any treaty, the interpretation of NAFTA Chapter 11's jurisdictional requirements must begin with the text. Where the text is clear, that is the end of the inquiry. The United States has long understood this principle:

The authority of this commission . . . is not derived from tradition; it is not derived from the habits or usages of countries . . . ; not dependent upon opinion anywhere, but it is derived exactly and specifically from the treaty, and from nothing else.

*Case of Archbishop Perché (Fr. v. U.S.)*, reprinted in 3 *Moore's International Arbitrations* 2401, 2414 (1898) (United States counsel's oral argument).<sup>1</sup> The text of NAFTA, which must be interpreted in light of NAFTA's purposes (*see* Article 102(1)), demonstrates that a disputing investor must meet the nationality and control requirements for jurisdiction *only* up to the time the claim is submitted to arbitration; subsequent events are irrelevant. The United States' contrary arguments depend on avoiding or abusing the text of NAFTA, and would create a bizarre regime under which NAFTA, a free-trade agreement, would simultaneously forbid a claimant from restructuring itself across national borders, and from disposing of its investments, throughout the typically lengthy course of a Chapter 11 arbitration.

### A. The Text Of Chapter 11 Makes The Date Of Submission To Arbitration The Critical Date For Jurisdictional Purposes

8. Loewen's claims in this arbitration proceed under NAFTA Articles 1116 and 1117. It is therefore surprising that the United States barely notes either provision in its "textual" arguments against jurisdiction. (*See* Memorial of the United States of America on Matters of

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<sup>1</sup> *See also Iran-United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 257-58 (1984) (argument of the United States: Where a treaty's claim-nationality requirements are clear, "resort to international law for interpretation is not necessary"); *id.* at 257 (argument of the United States: it is not permissible to "ad[d] language to the [treaty] which the parties did not agree to include").

Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc. (hereinafter “U.S. 2d Juris. Mem.”) at 10-13, 16-18.) Yet it is these articles that establish Loewen’s standing to prosecute these claims, and their text clearly indicates that what is important is the date of submission to arbitration, not any later date.

9. Article 1116 provides, in pertinent part:

An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under [Section A or two specified provisions of Chapter 15], and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

Article 1116(1). Article 1117 similarly provides, in pertinent part:

An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under [Section A or two specified provisions of Chapter 15], and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

Article 1117(1).

10. Read fairly, the text of NAFTA makes clear that standing to arbitrate a claim under Article 1116 has only four requirements: *One*, the injured claimant must have been an “investor of a Party” at the time “another Party has breached an obligation”; *two*, the claim must be against “another Party” other than the NAFTA Party that the claimant is an “investor of” at the time of the breach; *three*, the claimant must be an “investor of a Party” other than the respondent at the time the claim is submitted, since only such investors “may submit [a claim] to arbitration,” and *four*, the claimant must have “incurred loss or damage.” Article 1117 adds a fifth requirement — that at the time of breach and at the time the claim is submitted, the claimant investor “owns or controls, directly or indirectly,” the injured enterprise of the respondent Party.

11. Indeed, Article 1117(1)'s purposeful use of mixed verb tenses demonstrates that the latest critical date for determining a claimant's nationality and control of its investment is the date of submission of the claim. Article 1117 uses the past tense for two requirements for a valid claim: that the respondent "has breached" its obligations, and that the claimant "has incurred loss." But it uses the present tense to provide that an investor (of another Party) "may submit" a claim on behalf of an enterprise the investor "owns or controls" at the time of submission. The fact that Article 1117 (as well as Article 1116) requires these conditions precedent to be satisfied only at the time the claim is submitted demonstrates that the NAFTA Parties were concerned only with the state of affairs up to the submission of the claim. Indeed, the United States successfully advanced a similar argument in the *Case of Archbishop Perché, supra*, at 2402, urging that where the underlying treaty gave the commission jurisdiction over all claims "presented to them by the citizens of either country," it "*thus speaks in the present tense*, and bars any and every claim unless the person presenting it is, *at the time of its presentation*, a citizen of the country through whose agency the claim is to be enforced." (Emphasis omitted and added.)

12. Article 1135(2) confirms that Article 1117 is aimed only at the state of affairs existing at the date a claim is submitted to arbitration. That Article provides that "where a claim is made under Article 1117(1)," a Tribunal's award of restitution or damages shall provide that the award be made or paid "to the enterprise." Article 1135(2)(a), (b). If continuous "ownership or control" of the enterprise up to the date of the award were required by Article 1117, this provision would scarcely be necessary, because a claimant that still "owned or controlled" the enterprise could still direct the flow of the sums once paid to the enterprise. Article 1135(2) thus



ensures that the injured enterprise — regardless of who controls it at the time of award — is compensated for its injury.

13. Indeed, in certain circumstances, an investor need not even have ownership or control of the injured enterprise at the time of *submission* in order to bring an Article 1117 claim: Article 1121(4) provides that “where a disputing Party has *deprived a disputing investor of control* of an enterprise . . . a waiver from the enterprise under paragraph 1(b) [for Article 1116 claims] *or 2(b)* [for Article 1117 claims] shall not be required.” (Emphasis added.) This language demonstrates that where a respondent State has illegally expropriated the enterprise, or otherwise contributed to the investor’s loss of control, ownership or control will not be required for Article 1117 standing purposes beyond the date of injury.

14. Articles 1116 and 1117 are thus clear about what they require, *and* what they do not. Nowhere in either Article — indeed, *nowhere in the entirety of NAFTA Chapter 11* — is there a requirement, or even an implicit concern, for any sort of “continuity” of nationality or control beyond the submission of the claim. Quite to the contrary: Articles 1116 and 1117 speak *only* to requirements which must be met at the time the claim is submitted for arbitration. The absence of any language expressly or implicitly requiring continuity beyond that date is compelling evidence that no such requirement exists in NAFTA.

15. This can also be seen in the structure of Chapter 11. The provisions of Chapter 11 that deal with post-submission events, such as enforcement of an award (Article 1136(6)), confirm that nationality and control are to be evaluated as of the making of a claim. Each of these provisions simply requires that the claimant be a “disputing investor.” *See, e.g.*, Articles 1119, 1120, 1121, 1122, 1124, 1125, 1126, 1136, 1137. The term “investor of a Party,” which is used in Articles 1116 and 1117 to determine who “may submit” a claim — and which contains a

nationality element — is used consistently throughout Section A of Chapter 11 and in the first three Articles of the dispute-resolution section (Section B). But after Articles 1116 and 1117 — the articles that define the two types of Chapter 11 claims — the term “investor of a Party” is never used again in Section B’s dispute-resolution provisions. Instead, the subject of the post-submission articles becomes a “disputing investor,” which is defined in Article 1139 as “an investor that *makes a claim* under Section B.” (Emphasis added.)

16. Even Article 1121 (“Conditions Precedent to Submission of a Claim to Arbitration”), which uses both “investor” and “disputing investor,” only uses the term “investor” to describe the putative claimant *prior to* satisfying the “conditions precedent.” *See* Article 1121(1)(a), (1)(b), (2); *see also* Article 1120(a), (b) (to same effect). But once the conditions precedent have been satisfied, the “investor” becomes a “disputing investor.” *See* Article 1121(1) (first clause), 1121(2) (first clause), 1121(4). Thus, the textual structure of Chapter 11 confirms that it is concerned with nationality only up to Articles 1116 and 1117 — submission of a claim — and thereafter concerns itself only with the claimant’s status as an investor that makes a claim. So as long as a claimant “make[s] a claim” in accordance with Articles 1116 and 1117, that “disputing investor” meets the requirements for all of the post-submission provisions in Chapter 11.

17. And there is no question about the meaning of “make a claim” — it means, consistent with the textual arrangement of Chapter 11, the singular act of submitting a claim to arbitration, nothing more. Another NAFTA Chapter 11 tribunal, in the case of *Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, *reprinted in* 40 I.L.M. 615, 622 (2001) (Interim Decision on Preliminary Juris. Issues, Dec. 6, 2000), recently interpreted the phrase “make a claim,” as it appears in Article 1117(2), to “denote the definitive activation of an

arbitration procedure” pursuant to Article 1137(1). This ruling essentially adopted the position set forth by the United States in its Article 1128 submission in *Feldman Karpa*: “It is the United States’ position that only the submission of a claim to arbitration . . . effectuates the ‘making of a claim’ for purposes of Article 1117(2).” *Feldman Karpa, supra* (Submission of the United States on Preliminary Issues, Oct. 6, 2000), at 4. So all that is required for a claimant to become a “disputing investor” is for that claimant to submit a claim to arbitration — to (in the words of *Feldman Karpa*) “activat[e]” the arbitration process. Article 1137(1), captioned “*Time when a Claim is Submitted to Arbitration*,” defines what it means to “submit a claim” under Chapter 11. And there is no dispute in this case that Loewen satisfied all of NAFTA’s standing requirements at the time its claim was “received by the Secretary-General” of ICSID. *See* Article 1137(1)(b). The United States has never contended otherwise. That should be the end of the inquiry.

18. The fact that all of Chapter 11’s relevant provisions, including its definition of “disputing investor,” are concerned with the state of affairs existing at the time a claim is submitted — particularly when coupled with Chapter 11’s total lack of post-submission jurisdictional requirements — demonstrates that there are no additional requirements for standing under Chapter 11, and no basis for implying additional requirements from customary international law into the agreement. *See, e.g., Tradex Hellas S.A. (Greece) v. Republic of Albania*, ICSID Case No. ARB/94/2, 14 ICSID Review – F.I.L.J. 161, 181-82 (1999) (Decision on Juris., Dec. 24, 1996) (where definition of “Foreign Investor” contained “clear and detailed wording,” ICSID tribunal held that there was no “room for further conditions”; in particular, no requirement could be added “that the investment still exists at the time the law comes into force or the dispute arises to qualify Tradex as a ‘foreign investor’ . . .”). Had Canada, Mexico or the

United States desired continuing nationality or control throughout the entirety of a NAFTA arbitration, they certainly could have drafted a provision setting out that requirement.

19. In light of the drafters' clear and repeated textual concern with the state of affairs at the time the claim is submitted, and at no other relevant time, there is no basis for the United States' argument that ancient cases relating to diplomatic-espousal policies should be used to fill a nonexistent textual gap. (*See* Fifth Jennings Op., at 12 (“it is difficult to see grounds upon which the United States believes that it can persuade this Tribunal gratuitously to supplement these very detailed provisions, with a considerable addendum of other rules derived from a quite different institution”).) But this is the United States' obvious strategy: to ignore the text of NAFTA and instead ground its submission largely on inapplicable and dubious principles of diplomatic espousal. Indeed, before even mentioning the relevant provisions of Chapter 11, the United States begins with what it claims to be “the applicable customary international law rules” (U.S. 2d Juris. Mem. at 13), as though the text of NAFTA were merely a distraction. And even when the United States does discuss the actual text of NAFTA, it focuses not on Articles 1116 and 1117, but on Article 1136, which governs post-award enforcement, etc., not the proceedings underlying them. (*See id.* at 10 & nn.16-17; *see also id.* at 17-18.)

20. The United States' “textual” arguments, such as they are, ignore or even abuse the very text on which they purport to rely. For example, the United States' entire textual argument proceeds from the tortured proposition that the definition of “disputing investor” (notwithstanding its clear and simple Article 1139 definition as “an investor that makes a claim”) is somehow tied to nationality. Thus, the United States argues that “[t]o be a ‘disputing party’ under NAFTA Chapter Eleven, a claimant must be a ‘disputing investor’ which, in turn requires (*inter alia*) that the claimant be a national of a foreign Party or ‘an enterprise constituted or

organized under the law’ of that foreign Party.” (U.S. 2d Juris. Mem. at 10 (citing Articles 201, 1139).) That convoluted argument, of course, begs the question of *when* that nationality must be determined. Ultimately, the United States itself acknowledges the true definition of “disputing investor” (*see id.* at 17-18), which provides the answer: the time of submission — the “making of” the claim. *See pp. 7-9, supra.*

21. Turning to the United States’ other “textual” arguments: The United States contends that Article 1136(1) “makes clear that NAFTA Chapter Eleven tribunals have authority to issue awards only to ‘*disputing parties* and in respect of the particular case.’” (U.S. 2d Juris. Mem. at 10 (emphasis by the United States).) Putting aside the United States’ refusal to acknowledge the definition of “disputing party” (which is a “disputing investor” under Article 1139), this is an overt misstatement of Article 1136(1), which has nothing whatsoever to do with this Tribunal’s “authority to issue awards,” but deals only with the binding nature of a Chapter 11 tribunal’s decisions. Article 1136(1) actually reads: “An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.” By its plain terms, Article 1136(1) has nothing to do with this Tribunal’s authority or jurisdiction, or Loewen’s standing; rather, it deals with the precedential force of tribunal decisions.

22. The United States similarly tries to make too much out of Article 1136(3). It claims that this Article provides that “only a ‘disputing party’ may seek enforcement of a final award.” (U.S. 2d Juris. Mem. at 10.) *First*, the United States again ignores the simple definition of “disputing party” in Article 1139 (“disputing party means *the disputing investor* or the disputing Party [*i.e.*, the NAFTA Party]”) (bold emphasis in original; italic emphasis added). Because a “disputing party” is a “disputing investor,” and a “disputing investor” is “an investor

that makes a claim,” this argument suffers from the same basic defect as the rest of the United States’ textual arguments. *Second*, this is not what Article 1136(3) says. What it says is: “A disputing party may not seek enforcement of a final award *until*” certain amounts of time have passed. (Emphasis added.) It is a timing provision, not a jurisdictional or standing provision. The United States’ incorrect paraphrasing of Article 1136(3)’s text cannot alter this fact.

23. The United States’ reliance on Articles 1136(5) and 1136(6) is also misplaced. According to the United States, Article 1136(5) — which actually allows a NAFTA Party to bring an *independent* action against another NAFTA Party when it is not satisfied with the other Party’s compliance or acquiescence with a Chapter 11 award — is “analogous” to diplomatic espousal and therefore requires continuity of nationality until a final award; and Article 1136(6), which provides for enforcement by a “disputing investor,” extends the continuity requirements “through the enforcement stage.” (U.S. 2d Juris. Mem. at 17-18.)

24. Once again, however, the United States’ argument finds no support in the plain text of these articles. Under Article 1136(6), “[a] disputing investor may seek enforcement of an arbitration award . . . *regardless* of whether” the Party of which it is an investor has initiated proceedings under Article 1136(5) and Chapter 20. (Emphasis added.) And as demonstrated above, the only qualification for being a “disputing investor” is to have submitted a claim. Thus, Article 1136(5), like Articles 1116 and 1117, imposes no requirement of continuing nationality beyond the date of submission.

25. The fact that the investor may proceed with enforcement under Article 1136(6) “regardless of whether” a State Party initiates an action under Article 1136(5) proves two things, neither of which supports a “continuous-nationality” rule. *First*, the investor may proceed with enforcement under Article 1136(6) whether or not a State Party has “an interest in seeking

enforcement on the investor’s behalf” under Article 1136(5). (*See* U.S. 2d Juris. Mem. at 17.) *Second*, Article 1136 contemplates two separate proceedings, one in which the investor protects its interests by seeking enforcement of its award, and another in which that investor’s NAFTA Party may assert its own interest in ensuring that the other NAFTA Parties comply with their NAFTA obligations. Indeed, Article 1136(5) does not even provide for enforcement of the underlying award, but is, instead, a separate Party-to-Party arbitration under NAFTA Chapter 20 to determine whether the respondent Party’s failure to comply with a Chapter 11 award constitutes an *additional* violation of NAFTA. *See* Article 1136(5); *see also* Article 2004 (noting that Chapter 20 applies to “disputes *between the Parties* regarding the interpretation or application of this Agreement” (emphasis added)). In the end, these two subsections of Article 1136 prove only that a “disputing investor” — which is an investor that submits a claim — may enforce its award (Article 1136(6)), and that a NAFTA Party (Canada, Mexico, or the United States) may be, in certain circumstances, independently aggrieved by another NAFTA Party’s response to an arbitral award so that it institutes a Chapter 20 proceeding to air *its own* grievances (Article 1136(5)). Neither subsection states any rule of “continuous nationality.”

26. In sum: The text of NAFTA confirms that the critical date for nationality and control purposes is the date a claim is submitted to arbitration.

**B. NAFTA Incorporates The ICSID Convention, Which Also Sets The Critical Date At Submission**

27. The text of NAFTA Chapter 11 expressly provides for arbitration under the ICSID Convention and (unless modified) under the Convention’s rules. *See* Article 1120(1)(a), 1120(2). Because Article 25(2)(b) of the Convention provides that nationality and control are to be determined “on the date on which the parties consented to submit such dispute to conciliation or arbitration,” and because Chapter 11 contains no modification of those rules, the Convention

independently establishes the date of submission as the critical date, and confirms the interpretation of NAFTA’s textual provisions as establishing a date-of-submission rule.

28. Article 25(1) of the ICSID Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, *reprinted in* 1 ICSID Rep. 3 (1993)) provides that the jurisdiction of the Centre extends to any legal dispute arising out of an investment between a Contracting State and a “national of another Contracting State.” This phrase, its bears noting, parallels NAFTA Section B’s heading — “Disputes between a Party and an Investor of Another Party” — from which the United States seeks to extract a continuity requirement. (*See* U.S. 2d Juris. Mem. at 16-17.) As the ICSID Convention makes clear, however, no “continuity” mandate can be found in such a phrase.

29. Article 25(2)(b) of the ICSID Convention defines “National of another Contracting State” as follows:

(2) “National of another Contracting State” means:

. . .

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute *on the date on which the parties consented to submit such dispute to conciliation or arbitration* and any juridical person which had the nationality of the Contracting State party to the dispute *on that date* and which, because of *foreign control*, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

ICSID Conv. art. 25(2)(b) (emphasis added).

30. The first clause of Article 25(2)(b) sets the critical date for determining nationality as “the date on which the parties consented to submit such dispute to . . . arbitration.” The second clause sets the critical date for determining foreign control of the investment at the same date. For purposes of the ICSID Convention, “date of consent” is defined as “the date on



which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.” ICSID Conv., Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules) (1968) Rule 2(3), 1 ICSID Rep. 51, 53 (1993). Where the offer to arbitrate is found in a treaty — as in NAFTA — the date the claim was submitted by the investor to ICSID constitutes the “date of consent.” *See* NAFTA Article 1122(1) (“Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.”); Article 1122(2) (“The consent given by paragraph 1 *and the submission by a disputing investor of a claim to arbitration* shall satisfy the requirement of . . . Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties. . . .”) (emphasis added).

31. There is no controversy about the meaning of Article 25(2)(b) of the Convention — the critical date for determining the nationality of an investor is the date the claim is submitted. *See, e.g.,* K. Nathan, *The ICSID Convention* 91-92 (2000) (“in the case of a juridical person, the national of another contracting state must be decided by reference to the date on which the parties gave their consent to the jurisdiction of the Centre”) (footnote omitted). As Amerasinghe has written:

the relevant time for the fulfillment of the nationality requirement is that date when the consent to jurisdiction is effective for both parties. It also means that any change in the nationality of a juridical person after that date is immaterial for the purposes of ICSID’s jurisdiction, regardless of how inappropriate such an alignment would have been initially.

C.F. Amerasinghe, *The International Centre for Settlement of Investment Disputes and Development Through the Multinational Corporation*, 9 Vand. J. Transnat’l L. 793, 809-10 (1976). This is because, as Dr. Amerasinghe noted, the ICSID Convention “affords private

persons the only institutionalized international forum for litigating with states, and its jurisdictional requirements concerning nationality are *less restrictive than those of the nationality of claims rule.*” *Id.* at 802 (emphasis added).

32. In *Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic (CSOB)*, ICSID Case No. ARB/97/4, 14 ICSID Review – F.I.L.J. 250, ¶¶ 31-32 (Decision on Objections to Juris., May 24, 1999), an ICSID tribunal applied the date-of-submission rule in holding that a claimant’s post-submission assignment of the rights to the subject matter of the dispute did not affect the investor’s standing. The Respondent, the Slovak Republic, asserted that the Claimant’s subsequent assignments of rights to its majority owner (the Czech Republic) had “transformed the Czech Republic into the real party in interest to this case.” *Id.*, ¶ 10. The Slovak Republic urged that the assignments “require[d] the Tribunal to dismiss the case for lack of jurisdiction because Claimant no longer has the requisite standing under Article 25(1) and because the Czech Republic is disqualified under the same provision from stepping into CSOB’s shoes.” *Id.*, ¶ 28. Relying on Article 25(2)(b)’s date-of-submission rule, the Tribunal held:

In assessing the effect of the June 25, 1998 assignment (and of the April 24, 1998 assignment it superceded) on the Centre’s jurisdiction to hear this dispute, the Tribunal notes, in the first place, that the Request for Arbitration in the instant case was filed on April 17, 1997 and that the case was registered on April 25, 1997. Hence, at the time when these proceedings were instituted, neither of these assignments had been concluded. Second, *it is generally recognized that the determination whether a party has standing in an international judicial forum for purposes of jurisdiction to institute proceedings is made by reference to the date on which such proceedings are deemed to have been instituted.* Since the Claimant instituted these proceedings prior to the time when the two assignments were concluded, it follows that the Tribunal has jurisdiction to hear this 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.*

*Id.*, ¶ 31 (emphasis added). See also *Case Concerning the Arrest Warrant of 11 April 2000* (Congo v. Belg.), ¶ 26 found at [http://www.icj-cij.org/icjwww/idocket/iCOBE/icobe\\_ijjudgment\\_20020214.pdf](http://www.icj-cij.org/icjwww/idocket/iCOBE/icobe_ijjudgment_20020214.pdf). (“according to . . . settled jurisprudence, [the ICJ’s] jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.”); *id.*, ¶ 40 (“Under settled jurisprudence, the critical date for determining the admissibility of an application is the date on which it is filed.” (citations omitted)),

33. Likewise, ICSID tribunals addressing the “critical date” for foreign control have repeatedly held that the date-of-submission rule controls that inquiry as well. Those tribunals have concluded that the agreement to treat the local company as a national of another Contracting State must be “because of foreign control,” which means that foreign control must have existed at the time of consent or submission. For example, in *Amco v. Republic of Indonesia*, 1 ICSID Rep. 389, ¶ 14 (Decision on Juris., Sept. 25, 1983), the tribunal held that the requirements for foreign control “were fulfilled in the instan[t] case, at the date on which the parties consented to submit possible future disputes to arbitration (which date is relevant, according to Article 25(2)(b)).” Similarly, the tribunal in *LETCO v. Liberia*, 2 ICSID Rep. 343 (Award of Mar. 31, 1986), looked to the “date the parties consented to arbitration” in determining the question of “foreign control” of a Liberian corporation, and sustained jurisdiction where “[t]he evidence provided by LETCO clearly indicate[d] that it was under French control at the time the Concession Agreement was signed.” *Id.*, ¶ 3(a).

34. The ICSID tribunal’s decision in *SOABI v. Senegal* is particularly exemplary of this approach. There, the tribunal first noted that “paragraph 25(2)(b) of the Convention

grants . . . a juridical person access to . . . the Centre where the State in question has agreed to treat it as a national of another Contracting State by reason of it being controlled by foreign interests.” 2 ICSID Rep. 175, ¶ 29 (Decision on Juris., Aug. 1, 1984). It then observed that the juridical person’s “status as a ‘national of another Contracting State’ is to be established . . . with reference to the date on which the parties agreed to submit the dispute to the Centre.” *Id.* “Changes or modifications after this date thus have no effect on whether the condition is satisfied.” *Id.*, ¶ 41 (emphasis added).

35. Dr. K.V.S.K. Nathan’s recent treatise on the ICSID Convention confirms the effect of the date-of-submission rule: “After this date, the control of the company presumably can change hands without affecting its foreign status because there is no requirement that the company should continue to be under foreign control . . .” Nathan, *supra*, at 91. And in a passage most applicable to this case, Nathan writes: “[S]ince the critical moment in time when the question of nationality will be determined is the date of consent of the parties to submit to ICSID, changes in control of a foreign company or a local company under foreign control after that date will not affect the competence of the ICSID tribunal to hear the case. Indeed, control of the company may have passed to local nationals or nationals of a state that is not a party to the ICSID Convention.” *Id.* at 97 (emphasis added).

36. The ICSID Convention’s date-of-submission rule is important for understanding the meaning of NAFTA’s text, for Article 1120 of NAFTA expressly incorporates the Convention into Chapter 11. The fact that the Convention applies the same date-of-submission rule mandated by Chapter 11’s text is a powerful confirmation that Loewen’s interpretation of Chapter 11 is correct, and that the United States’ interpretation is not.

37. Moreover, there is no credible argument available that the scope of NAFTA Chapter 11 jurisdiction should depend on *which* procedural rules happen to govern the particular arbitration. The standing requirements of NAFTA Chapter 11 should, as a matter of both text and equity, be the same for all claimants, regardless of the arbitral forum in which their claims proceed. Therefore, it cannot be the case that a NAFTA investor claiming under the ICSID Convention faces no requirement of “continuity of nationality and control” following the submission of his claim, but an investor claiming under the ICSID Additional Facility must maintain such continuity over the entire course of the arbitration. Indeed, neither the Additional Facility nor the UNCITRAL Rules contains *any* sort of provision that would support the United States’ present argument.

38. In sum: The ICSID Convention, which has been incorporated into NAFTA through Article 1120, explicitly confirms the date-of-submission rule under NAFTA Chapter 11.

**C. The Customary International Law Of Investment Rejects The United States’ Continuity Principle**

39. The United States’ claimed continuous-nationality “rule” has been crafted out of a patchwork of diplomatic-espousal precedents, but these cases are not the proper universe of authorities from which to divine a rule of customary international law of investment arbitrations. The proper source of customary international law for purposes of NAFTA Chapter 11 is the customary international law of investment protection. Beginning in the 1950’s, and escalating rapidly over the past two decades, a global network of bilateral and multilateral investment treaties has emerged to create a new legal order governing the settlement of investment disputes between States and private investors. *See International Law Commission, 1998 Report - Chapter V: Diplomatic Protection*, ¶ 66, available at <http://www.un.org/law/ilc/reports/1998/chp5.htm>. “[I]nternational conventions,” such as this mesh of investment treaties, are the primary indicator

of “international law” under Article 38 of the Statute of the International Court of Justice. Stat. I.C.J. art. 38(1)(a). The BITs reflect the “real practice” of states pertaining to international investment: “States have shown their real practice by establishing a network of international treaties. . . . Of more recent significance is the emergence of a new type of treaty, the bilateral investment treaty (BIT). . . . They reflect actual state practice . . . .” D. Robinson, *Expropriation in the Restatement (Revised)*, 78 Am. J. Int’l L. 176, 177-78 (1984). See also F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, [1981] 52 Brit. Y.B. Int’l L. 241, 249 (“The importance of the [BITs and their predecessor Friendship, Commerce and Navigation (“FCN”) treaties] lies in the contribution they make to the development of customary international law, in their being a source of law. . . . [T]hese treaties establish and accept and thus enlarge the force of traditional conceptions.”); see generally *Restatement (Third) of Foreign Relations Law*, Introductory Note, at 18 (1987) (treaties are an important source of “international law” because they “have become the principal vehicle for making law for the international system”).

40. There are two basic reasons why the investment-protection treaties must provide the applicable rule of customary international law. *First*, the international law of investment, as reflected in the BITs (as well as NAFTA), gives individuals and corporations enforceable rights, and makes them the proper subjects of international law. This is quite different from the practices of diplomatic espousal and mixed-claims commissions, which treated individuals as nonexistent on the international plane and allowed states to “espouse” claims on the individuals’ and corporations’ behalf, as a matter not of right but of grace. As Sir Robert notes, the inherent discretion of states to “espouse” their nationals’ claims begat a set of *ad hoc* “rules” that were driven not by any concerns for investment protection, but by considerations of political and

diplomatic expediency. (*See* Fifth Jennings Op., at 6.) By contrast, the BITs — like NAFTA — were designed to keep international investment free of the often inscrutable demands of diplomatic practice by giving claimants direct, apolitical access to arbitration panels.

41. *Second*, the BITs — unlike the diplomatic-espousal and mixed-claims cases on which the United States relies — are remarkably consistent in their nationality requirements. In that consistency, the BITs have created a customary international law of investment that, like NAFTA, rejects any requirement of continuing nationality or control beyond the date an investment dispute is submitted to arbitration. These BITs in no way support the United States’ “continuous-nationality” and “continuous-control” rules.

42. Loewen has reviewed approximately one hundred English-language BITs, including *every* U.S. and Canadian BIT, as well as the most recent BITs signed by nearly every European country and Japan. *Not one of those treaties requires continuous nationality through the time of a final award.* (*See* Treaty Appendix (Tab F).)

43. The overwhelming majority of these BITs place the critical date for determining the nationality of a claimant no later than the date the claim is submitted to arbitration. All but two of the U.S. BITs adopt the date-of-submission rule of the ICSID Convention by adopting the Convention without variance. This uniformity is not surprising, since the U.S. Model BIT in effect when NAFTA was negotiated — much like the more recent 1994 U.S. Model BIT — provided that a “national or company” could, at its option, elect to submit an investment dispute to binding arbitration under the ICSID Convention, and did not modify Article 25(2)(b) of the Convention. *See* 1992 United States Model Agreement, art. VI (3)(a) (Feb. 1992), *reprinted in* R. Dolzer & M. Stevens, *Bilateral Investment Treaties* 240, 247-49 (1995); *see also* 1994 United States Model Agreement, art. IX(2) & (3) (1994), 1997 BDIEL AD Lexis 6. It is

similarly no surprise that NAFTA Chapter 11 is to the same effect, since its dispute-settlement “mechanism is patterned after the investor-State dispute settlement mechanism of the *standard U.S. bilateral investment treaty*.” U.S. Statement of Administrative Action, *reprinted in North American Free Trade Agreements*, Booklet 8, 133 (J. Holbein & D. Musch eds., 1994) (emphasis added).<sup>2</sup> And of the two U.S. exceptions to the date-of-submission rule, the U.S.-Egypt BIT moves the critical date for determining nationality *back in time*, to the date of injury. *Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments*, Sept. 29, 1982, art. VII(5) (“For the purpose of any proceedings initiated before the Centre in accordance with this Article, any company that, *immediately prior to the occurrence of the event or events giving rise to a dispute* was a company of the other Party, shall be treated as a national or company of such other Party.” (emphasis added).) The other, the U.S.-Haiti treaty, does not provide for dispute settlement under the ICSID Convention because Haiti was not a party to the ICSID Convention when the BIT was signed. *Treaty Between the United States of America and the Republic of Haiti Concerning the Reciprocal Encouragement and Protection of Investment*, Dec. 13, 1983, Letter of Transmittal, Modification (4)(i), 1983 U.S.T. Lexis 434.

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<sup>2</sup> See also North American Free Trade Agreement, U.S. Dep’t of State Dispatch, Feb. 17, 1992, Vol. 3, n.7, 110(8), *available in* WESTLAW, MAGAZINE database, at \*10 (stating with regard to NAFTA Chapter 11: “The United States seeks to establish principles customarily included in bilateral investment treaties, such as . . . access to arbitration for the settlement of disputes.”); *Metalclad v. Mexico* (Mexico’s Outline of Argument, Feb. 5, 2001), ¶ 243 (generally same); see generally D. Price & P. Christy, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *NAFTA: A New Frontier in International Trade and Investment in the Americas* 163, 169 (J. Bello *et al.* eds., 1994) (“NAFTA draws more from the [U.S.] BIT than the USCF TA”). *Accord Pope & Talbot v. Canada* (Phase 2 Award, Apr. 10, 2001), ¶ 110 (“As Canada points out, [the BITs] are a ‘principal source’ of the general obligations of states with respect to their treatment of foreign investments.”).



44. Similarly, the overwhelming majority of the approximately 100 BITs examined look no later than the date of submission for determining ownership or control of the investment. In fact, all of the U.S. BITs — except the U.S.-Egypt BIT<sup>3</sup> — adopt an even more liberal standard than the ICSID Convention, expressly modifying the Convention’s rules by making *the date of injury* the critical date for determining ownership or control.<sup>4</sup> Again, this is not surprising, because under Article VI(8) of the 1992 U.S. Model BIT, “any company legally constituted under the applicable laws and regulations of [the Respondent] Party” nevertheless may prosecute a claim against that Party if, “*immediately before the occurrence of the event or events giving rise to the dispute*, [it] was an investment of nationals or companies of the other Party.” 1992 U.S. Model Agreement, *supra*, art. VI (8) (emphasis added); *see also* 1994 U.S. Model BIT, *supra*, art. IX(8) (containing similar language).

45. This practice is not limited to United States BITs. Many other countries’ treaties, like the United States’ BITs, preserve the ICSID Convention’s date-of-submission rule for determining an investor’s nationality, but move the critical date backward when determining the

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<sup>3</sup> The U.S.-Egypt BIT implicitly preserves the ICSID Convention’s date-of-submission rule by providing that “differences as to the existence of control ‘shall be resolved’ in accordance with the binding dispute settlement provisions.” U.S.-Egypt BIT, Letter of Transmittal, Modification (1), 1982 U.S.T. Lexis 228, at \*16 (internal quotations omitted); *see also id.* art. VII(3)(c) (providing for arbitration of disputes “in accordance with the provisions of the [ICSID] Convention”).

<sup>4</sup> *E.g.*, *Treaty Between the Government of the United States of America and the Government of the Republic of Albania Concerning the Encouragement and Reciprocal Protection of Investment*, Jan. 11, 1995, art. IX(8), 6 ICSID Inv. T. 2001 (so long as “a company of a Party that, immediately before the occurrence of the event or events giving rise to an investment dispute, was a covered investment, [it] shall be treated as a company of the other Party”); *Treaty Between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment*, Aug. 27, 1993, art. VI(8) (“any company legally constituted under the applicable laws and regulations of a Party or a political subdivision thereof that, immediately before the occurrence of the event or events giving rise to the dispute, was an investment of nationals or companies of the other Party, shall be treated as a

ownership or control of an investment. (*See, e.g.*, Tab F, treaty nos. 6, 29, 30, 33, 35, 39, 44, 45, 47, and 48.) For example, the Netherlands' Model BIT provides arbitration under the ICSID

Convention and states:

A legal person which is a national of one Contracting Party and which *before such a dispute arises is controlled by nationals of the other Contracting Party* shall in accordance with Article 25(2)(b) of the Convention for the purpose of the Convention be treated as a national of the other Contracting Party.

Netherlands Model Agreement, art. 9 (May 1993), *reprinted in Dolzer & Stevens, supra*, at 209, 214 (emphasis added).

46. Similarly, the Swiss Model BIT also provides for arbitration under the ICSID

Convention, and states:

A company which has been incorporated or constituted according to the laws in force on the territory of the Contracting Party and which, *prior to the origin of the dispute*, was under the control of the nationals or companies of the other Contracting Party, is considered, in the sense of the Convention of Washington and according to its Article 25(2)(b), as a company of the latter.

Swiss Confederation Model Agreement, art. 9(3) (June 1, 1986), *reprinted in Dolzer & Stevens, supra*, at 218, 224-25 (emphasis added).

47. So, too, Great Britain's Model BIT places the critical date for control at the time of the events giving rise to the dispute, while maintaining the ICSID Convention's general rule for determining nationality:

A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which *before such a dispute arises* the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance

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(continued...)

national or company of such other Party in accordance with Article 25(2)(b) of the ICSID Convention.”).

with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.

Great Britain Model Agreement, art. 8(2) (undated), *reprinted in Dolzer & Stevens, supra*, at 228, 234 (emphasis added). Like the United States, the Netherlands,<sup>5</sup> Switzerland,<sup>6</sup> and the United Kingdom<sup>7</sup> have all entered into actual treaties employing the language of their respective model BITs, thereby excluding any requirement of continuing ownership or control.

48. Numerous other countries have placed similar language in their BITs, rejecting any nationality requirement beyond the date of submission, and any foreign ownership or control requirement beyond the date of injury. (*See, e.g.*, Tab F, treaty nos. 6, 29, 30, 39, 45.) As noted above, most of the remaining treaties Loewen has reviewed include no deviation from the ICSID Convention rules, thus preserving the date of submission as the critical date for determining both nationality *and* control. (*See* Tab F, treaty nos. 1-5, 7-22, 26, 27, 31, 34, 36-38, 40-43, 46, 50, 51.)

49. In all, ninety-two percent of *all* the BITs surveyed *reject* any requirement of ongoing nationality or control once a claim has been submitted to international arbitration. The remaining eight percent are simply silent on the issue. Yet in this proceeding, the United States urges upon this Tribunal a continuous-nationality-and-control test that would, at best, be a lonely exception to the customary international law of investment. The United States itself has uniformly declined to adopt that exception in any of its own BITs, and it offers no valid basis for concluding that the NAFTA Parties intended to adopt such an exception through the use of text that plainly contradicts it.

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<sup>5</sup> *See, e.g.*, Tab F, treaty nos. 47, 48.

<sup>6</sup> *See, e.g.*, Tab F, treaty no. 44.

<sup>7</sup> *See, e.g.*, Tab F, treaty nos. 33, 35.

50. In sum: Ninety-two percent of the surveyed BITs apply the date-of-submission rule for determining nationality. Ninety-two percent of these BITs likewise look *no later than* the date of submission for determining control (fifty-six percent, including all but one of the U.S. BITs, look all the way back to the date of injury). None of them expressly adopts the United States' proposed rule. Since a treaty practice, "*even if it is not universally followed,*" can create a rule of customary international law so long as it "reflect[s] *wide acceptance among the states particularly involved in the relevant activity,*" *Restatement (Third) of Foreign Relations Law*, § 102, cmt. b (emphasis added), this almost-universal practice makes clear that the customary law of investment protection, like the text of NAFTA, rejects the United States' contention that continuous nationality and control is required up to and including the date of a tribunal's final award.

**D. Loewen Is Entitled To The More Favorable Standing Treatment Provided In The U.S. BITs Under NAFTA's Most-Favored-Nation Clause**

51. The network of U.S. BITs is important not just because it provided the model for Chapter 11, and not just because it is evidence of the nearly universal practice regarding the nationality of investment claims. It is also important because among NAFTA's other promises, Article 1103 provides that Loewen is entitled to the most favorable treatment the United States affords to investors from countries other than Canada and Mexico. Thus, even if Chapter 11 did not reject the United States' proposed continuity requirements — which it does — Loewen would still be entitled to the more favorable treatment afforded to other countries' investors by these United States BITs. Because the U.S. BITs make nationality irrelevant once the claim is submitted to arbitration, Loewen is entitled to the same treatment, even if Chapter 11 required complete continuity (which it does not).

52. Professor Schwarzenberger has explained the central purpose of most-favored-nation (MFN) status:

[the MFN principle] establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third State. . . . It is clear that m.f.n. clauses serve as an insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties . . . . The use of the m.f.n. standard leads to the constant self-adaptation of such treaties and greatly contributes to the rationalization of international affairs.

G. Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, [1948] 22 Brit. Y.B. Int'l L. 96, 99-100. MFN clauses have been broadly construed, since “[l]iterally and historically, the m.f.n. standard means what it says:” beneficiaries of an MFN clause are entitled to the most preferential treatment the host state grants to others. G. Schwarzenberger, *Principles and Standards of International Economic Law*, 117 R.C.A.D.I. 1, 71 (1966). Consequently, jurisdictional advantages enjoyed by third-party states have been routinely granted to states with MFN status because those procedural advantages are inextricably intertwined with the practical implementation of equality for investors.

53. For example, in the *Morocco Case*, the United States itself benefited from MFN clauses in a treaty of commerce. The International Court of Justice determined that these MFN clauses imported the provisions of a treaty exempting British citizens in Morocco from local law, and granting jurisdiction over them to the British government: “the United States acquired by virtue of the most-favoured-nation clauses, civil and criminal consular jurisdiction in all cases in which United States nationals were defendants.” *Case Concerning Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. Reports 176, 190.

54. In *Maffezini v. Spain*, an ICSID tribunal held that the MFN provision in the Argentina-Spain BIT entitled Argentine investors to the more relaxed procedural requirements of

the Chile-Spain BIT. *Maffezini v. Spain*, ICSID Case No. ARB/97/7, 16 ICSID Review – F.I.L.J. 212, 226 (2001) (Decision of the Trib. on Objections to Juris., Jan. 25, 2000). Under the Argentina-Spain BIT, Argentinean investors had to pursue their claims in Spanish courts for 18 months before they were allowed to initiate arbitration against Spain. *Id.* By contrast, the Chile-Spain BIT imposed no such condition, instead allowing investors to opt for arbitration after expiration of a six-month negotiation period. *Id.* Spain argued that only substantive protections could be “imported” by operation of the MFN clause, but the tribunal disagreed, applying a simple rule to determine the scope of an MFN clause: “[I]f . . . matters are more favorably treated in a third-party treaty then, by operation of the clause, that treatment is extended to the beneficiary under the basic treaty. If the third-party treaty refers to a matter not dealt with in the basic treaty, that matter is *res inter alios acta* in respect of the beneficiary of the clause.” *Id.* at 227-28. Applying that rule, the tribunal went on to find that procedural provisions on dispute settlement were sufficiently related to the subject matter of the Argentina-Spain BIT to fall within the MFN clause: “[T]oday dispute settlement arrangements are inextricably related to the protection of foreign investors.” *Id.* at 231.

55. The same analysis and result should apply here. NAFTA’s MFN clause, Article 1103, is more than broad enough to encompass dispute resolution procedures. It provides: “Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Article 1103(1). Importantly, the express objectives of NAFTA generally, and of the Article 1103 MFN provision in particular, confirm that “procedures for the resolution of disputes” are inextricably related to the MFN guarantee. Article 102 of NAFTA

provides: “The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, *most-favored-nation treatment* and transparency, are to: . . . (e) create effective procedures . . . for the resolution of disputes. . . .” Article 102(1)(e) (emphasis added). Such an interpretation is required by the interpretive rule of Article 102(2), previously recognized by this Tribunal (Decision on Juris. (Jan. 5, 2000), ¶ 50), which provides that “the Agreement must be interpreted in the light of its stated objectives.”

56. Dispute resolution procedures in general, and the assurance of access to arbitration specifically, form an integral and essential part of the establishment, management, conduct, and operation of investment. Without the predictability and stability that investor-state arbitration provides, investors would be less able to select investment locales and spheres of activity, obtain financing and insurance, and maintain a free flow of capital for the efficient and profitable functioning of their investment. As the *Maffezini* Tribunal explained:

International arbitration and other dispute settlement arrangements . . . are essential . . . to the protection of the rights envisaged under the pertinent treaties; they are also closely linked to the material aspects of the treatment accorded. Traders and investors, like their States of nationality, have traditionally felt that their rights and interests are better protected by recourse to international arbitration than by submission of disputes to domestic courts.

*Maffezini*, 16 ICSID Review – F.I.L.J. at 231.

57. In sum: Even if no other provision of NAFTA or principle of international law compelled the result, Loewen would still be entitled — by operation of the Article 1103 MFN clause — to have all considerations of nationality determined as of the date of injury, as provided in the U.S.-Egypt BIT, and to have considerations of control over the investment determined as of the same date as provided in, *inter alia*, the U.S.-Albania BIT. See Section II(C), *supra*.

**E. The Date Of Submission Is Consistent With NAFTA Chapter 11’s Protective Purposes**

58. As this Tribunal ruled at the jurisdictional phase (Decision on Juris. (Jan. 5, 2001), ¶¶ 50, 53), and as Article 102(2) provides, the text of NAFTA must be interpreted “in the light of its objectives set out in paragraph 1” of Article 102. The date-of-submission rule that is compelled by the text of NAFTA, the ICSID Convention, and the customary international law of investment protection, has the virtue of being consistent with these stated objectives. The United States’ rule of continuous nationality and control does not.

59. “The objectives of this Agreement,” NAFTA, include —

- “eliminat[ing] barriers to trade in, and facilitat[ing] the cross-border movement of goods and services between the territories of the Parties” (Article 102(1)(a));
- “increas[ing] substantially investment opportunities in the territories of the Parties” (Article 102(1)(c)); and
- “creat[ing] effective procedures . . . for the resolution of disputes” (Article 102(1)(e)).

Daniel Price, the United States’ own lead negotiator for Chapter 11, has noted that, as applied to Chapter 11, NAFTA’s objectives are: “(1) to establish a secure investment environment through the elaboration of clear rules of fair treatment of foreign investment and investors; (2) to remove barriers to investment by eliminating or liberalizing existing restrictions; and (3) to provide an effective means for the resolution of disputes between an investor and the host government.” D. Price & P. Christy, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *NAFTA: A New Frontier In International Trade and Investment in the Americas* 165, 172 (J. Bello, et al. eds., 1994). The United States’ proposed rule is contrary to each of these objectives.

60. *First*, the United States’ proposed rule would not “increase substantially investment opportunities in the territories of the Parties” as the objective of Article 102(1)(c)



requires, nor would it provide “fair treatment of foreign investment and investors.” *See* Price & Christy, *supra*, at 172. Any interpretation of NAFTA that would allow a state to escape the consequences of injuries it inflicts on a foreign investment, or which restricts the remedies available to such investors, is, by definition, inconsistent with the investment-protection objectives of NAFTA.

61. *Second*, the United States’ proposed rule of continuous nationality and control is contrary to the border-eliminating, free-trade objective of Article 102(1)(a) and the goal of Chapter 11 to remove and liberalize barriers to investment. By forcing a Chapter 11 claimant to maintain its nationality, and its ownership or control of its investment, throughout the course of a lengthy arbitration proceeding (this one is now approaching its fourth anniversary), the United States endorses a rule that prevents investors from moving across borders, and from disposing of investments across those same borders. That is fundamentally at odds with the very first stated objective of NAFTA — the North American *Free Trade* Agreement — and the objectives for Chapter 11 as set out by the United States’ primary negotiator of that chapter. As Sir Robert explains, “[A]fter all, the encouragement of such movement of investment from one Party to another Party is the whole purpose of the Agreement.” (Fifth Jennings Op., at 13.) The date-of-submission rule, by contrast, allows investors and investments to pass freely across borders after a claim is filed, and to engage in “trade in, and . . . cross-border movement of” its business operations and investments. Indeed, the United States’ proposed rule would also seemingly violate the basic precept of Article 1109: “Each Party shall permit all transfers relating to an investment of an investor of another Party . . . to be made freely and without delay.” Article 1109(1). The United States’ argument would yield at least an unreasonable result, if not a

manifestly absurd one, so it cannot be the correct interpretation. *See, e.g.*, Vienna Convention on the Law of Treaties, U.N. Doc A/Conf. 39/27 (May 23, 1969), art. 31(1) and 32(b).

62. *Third*, the United States’ proposed continuity rules would run afoul of the objective of “creat[ing] effective procedures . . . for the resolution of disputes.” Article 102(1)(e). The United States’ proposal would create a dispute-settlement regime by which the disputing Party could use any means at its disposal (*e.g.*, multiple jurisdictional objections, motions to disqualify tribunal members, etc.) to delay the ultimate award, thereby putting the disputing investor to the Hobson’s choice of either locking up his investment for the course of the arbitration, or surrendering a meritorious Chapter 11 claim. Such a rule would allow a class of NAFTA breaches — like Loewen’s NAFTA claims here — to escape remedy. The “dispute” here was fully formed in 1996 when Loewen was forced into settling the *O’Keefe* case for an outrageous \$175 million; if that wrong were to go without a remedy here, it could not possibly be said that the result was an “effective” dispute-resolution procedure.

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63. For all of these reasons, NAFTA Chapter 11 imposes a date-of-submission rule for evaluating both nationality and control. NAFTA cannot be interpreted as requiring continuous nationality or control, as urged by the United States.

### **III. DIPLOMATIC-ESPOUSAL PRACTICES CANNOT BE FORCED ONTO THE INTERNATIONAL LAW OF INVESTMENT**

64. The United States’ central argument is that a principle of continuous nationality through the date of the award — a principle admittedly derived from diplomatic-espousal cases of another era — should be engrafted upon Chapter 11. Not only is that argument completely divorced from the text and the purposes of NAFTA Chapter 11, but as we show below, the United States is incorrect for three additional reasons: *First*, the principle of “continuous

nationality” on which the United States rests its jurisdictional objection is a principle limited to the very different context of diplomatic-espousal cases and is a “glaring anachronism” (Fifth Jennings Op., at 4) as applied to Chapter 11 of NAFTA; *second*, it is at best unclear that “continuous nationality” was *ever* a “rule,” even in the diplomatic-espousal context; *third*, to the extent that a customary “rule” *can* be gleaned from the inconsistent diplomatic-espousal authorities, the rule would require nationality to be determined as of the date of “presentment” (*i.e.*, the functional equivalent of submission), and no later. In short, even if the United States succeeded in transferring the inapplicable practices of diplomatic protection into a Chapter 11 arbitration, it would fare no better than it does under NAFTA’s plain text.

**A. The Principle Of Continuous Nationality Is Limited To Diplomatic-Espousal Cases; It Has No Application To Investment-Protection Cases**

65. Because they rely almost exclusively on diplomatic espousal authorities, both the United States (*e.g.*, U.S. 2d Juris. Mem. at 13-15 & n.23) and Professor Greenwood (Third Greenwood Op., ¶¶ 22, 24) recognize that the continuous-nationality principle is a vestige of those diplomatic-espousal regimes. Indeed, Professor Greenwood’s latest opinion explicitly accepts that the United States’ proffered claim-nationality rules were “elaborated in the context of diplomatic protection claims” (Third Greenwood Op., ¶ 11), which are not claims pressed by individuals for violations of their own rights, but claims pressed by States for wrongs done to the States themselves through their nationals. Sir Robert notes this “surprisingly regressive tendency of the United States’ argument,” which relies on cases “stem[ming] from the period between the two world wars when solely States were the ‘subjects’ of international law and there was no possibility for individuals or corporations to have direct rights in international law or to be parties to international litigation.” (Fifth Jennings Op., at 2.)

66. But NAFTA Chapter 11 focuses not on wrongs done to States or claims of the State, but instead gives individual investors the absolute right to bring claims on their own behalf, without having to seek the intercession of their home States as a matter of diplomatic grace. This is a critical difference — and one that explains why principles of continuous nationality developed in diplomatic-protection contexts have no bearing on investor-State arbitration mechanisms like those created by NAFTA Chapter 11. The United States itself, as well as several international tribunals, have recognized this important, dispositive difference.

67. Two decisions by the Iran-U.S. Claims Tribunal, and the arguments of the United States that tribunal adopted, provide striking examples. In *Sedco, Inc. v. NIOC*, 9 Iran-U.S. Cl. Trib. Rep. 248 (1985), Iran urged that the tribunal had no jurisdiction over a claim being prosecuted by a United States corporation on behalf of a wholly-owned foreign subsidiary on the ground that “the United States may not diplomatically espouse claims for non-U.S. corporations.” *Id.* at 255. The tribunal rejected Iran’s argument, noting that the tribunal’s work, “at least in the jurisdictional category of claim involved in this case, does not involve diplomatic espousal.” *Id.* at 256 (citation omitted). In an earlier case, the United States itself had successfully urged this distinction between State-to-State claims and investor-to-State claims, arguing that:

the general character of the Tribunal does not support Iran’s position that the Tribunal’s function is the exercise by States of diplomatic protection. As with the Mixed Arbitral Tribunals established under the Treaty of Versailles, the Claims Settlement Declaration [a/k/a the Algiers Accord] grants certain nationals — United States and Iranian citizens — rights that are directly enforceable before an international tribunal.

*Iran-United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. 251, 258 (1984) (summarizing the United States’ arguments).

68. The Iran-U.S. Claims Tribunal also expressed a wariness of relying upon older authorities, such as the 1930 Hague Convention, which “must be interpreted very cautiously” in light of the “great changes [that] have occurred since then in the concept of diplomatic protection.” *Id.* at 260-61. The tribunal observed that the modern trend away from the rigid practices of the past “is consistent with the contemporaneous development of international law to accord legal protections to individuals, *even against the State of which they are nationals.*” *Id.* at 265 (emphasis added). That is why, in the context of modern agreements like NAFTA Chapter 11 and the ICSID Convention, which provide investors with direct rights of access to international arbitration, “the role of nationality is different” than it is in diplomatic espousal. Amerasinghe, *supra*, 9 Vand. J. Transnat’l L. at 807. Nationality thus “can be dealt with by a tribunal or commission in extremely flexible terms, particularly since it is *not bound by the law of diplomatic protection.*” *Id.* at 808 (emphasis added).

69. Even the authorities cited by the United States and Professor Greenwood recognize that the principles of diplomatic protection are inapplicable by their terms to cases where individuals have rights to prosecute claims on their own behalf. On the contrary, as Sir Robert explains, “the rule of the nationality of claims was never a free-standing general rule of international law; it was a concomitant, and of the very essence, of diplomatic protection.” (Fifth Jennings Op., at 3.) Borchard (*see* U.S. 2d Juris. Mem. at 22), who was such a supporter of the continuous-nationality principle in espousal cases that he tried (ultimately unsuccessfully) to persuade the Institute of International Law to adopt an express continuous-nationality rule, was also a vigorous proponent of “enabling individuals to sue foreign states in an international forum” in order to make “nationality immaterial.” E. Borchard, *The Protection of Citizens Abroad and Change of Original Nationality*, 43 Yale L.J. 359, 383 (1934); *see also id.* (the only

way to “cure” the injustice of a continuous-nationality principle is to give individuals “recourse to an international tribunal”); *id.* at 390 (similar). Schwarzenberger (cited favorably by Professor Greenwood in ¶ 15 of his Third Opinion) similarly observed that “[i]f international law had ever made its own the fashion of the apotheosis of the individual, there would be little to be said in favour of the nationality test.” 1 G. Schwarzenberger, *International Law* 600 (3d ed. 1957).

70. The work of the International Law Commission (“ILC”) — previously recognized by this Tribunal as “a highly persuasive statement of the law on State Responsibility as it presently stands” (Decision on Juris. (Jan. 5, 2001), ¶ 70) — confirms the inapplicability of the United States’ continuous-nationality principle to investor-State arbitrations. As the Tribunal may be aware, the ILC has recently been engaged in drafting articles both on the law of Diplomatic Protection and on the law of State Responsibility. The ILC’s draft articles on Diplomatic Protection do incorporate a nationality requirement (though, tellingly, not a requirement of continuous nationality through award). *See* J. Dugard, *First Report on Diplomatic Protection*, U.N. Doc. No. A/CN.4/506/Add.1., 2 (art. 9) (2000).

71. In contrast, the draft articles on State Responsibility — the work of the ILC most relevant to this dispute — *do not* incorporate a nationality requirement. The only mention of “nationality” in the draft articles on State Responsibility comes in Article 44(a), under the heading “Admissibility of claims,” and provides only that admissibility is subject to “*any* applicable rule relating to the nationality of claims.” *See* International Law Comm’n, *Draft Articles on State Responsibility*, U.N. Doc. No. A/CN.4/L.602/Rev.1 (art. 44(a)) (July 26, 2001) (emphasis added). This confirms, *first*, that there is no *one* continuous-nationality rule (as the United States contends); and *second*, that there is no presumption that *some* such rule applies to *every* international claim. That the United States ignores this most recent draft — this “highly

persuasive statement of the law on State Responsibility as it presently stands” (Decision on Juris. (Jan. 5, 2001), ¶ 70) — in favor of the twenty-five-year-old draft articles on State Responsibility proposed by the former Special Rapporteur and rejected by the ILC, is compelling evidence of the weakness of the United States’ position. (See U.S. 2d Juris. Mem. at 16, 28.)

72. The reasons that might conceivably support a continuous-nationality principle in diplomatic-espousal cases are simply absent when investors are given a direct right to hold a State responsible for its international wrongs. Continuous nationality, to the extent it was applied, was a reaction to two concerns unique to diplomatic-espousal cases. *First*, continuous nationality was thought necessary to prevent individuals from “shopping” their nationality to obtain the diplomatic protection of more powerful states, or having states “buying up or acquiring old claims” to exert political pressure on other States for ulterior purposes. Borchard, *supra*, 43 Yale L.J. at 379. See also I. Brownlie, *Principles of Public International Law* 483 (5th ed. 1998); Dugard, *supra*, Add. 1, ¶ 3; German-U.S. Mixed Claims Comm’n, *Administrative Decision V*, 7 R.I.A.A. 119, 141 (1924). The United States itself, in briefing before the Supreme Court of the United States, has recognized that “the principle of continuity of nationality . . . is intended to prevent *abuses of the espousal process* that could result from the assignment of claims to persons who are nationals of another, perhaps stronger, nation.” Br. in Opp. to Certiorari, *People of Enewetak v. United States* (No. 88-1466), at \*14-15 (1988), *found at* <http://www.usdoj.gov/osg/briefs/1988/sg880055.txt> (emphasis added).

73. Of course, this concern is inapplicable to arbitration under Chapter 11 of NAFTA. Because the rights and duties of prosecution under Chapter 11 are possessed by the claimant alone, States need not ever be involved, and so there is no advantage to “shopping” one’s nationality to another State. Indeed, NAFTA Chapter 11 was specifically designed to be an

apolitical, investor-initiated, dispute-resolution procedure, unburdened by the vagaries of global politics. Creating direct rights for individuals was Borchard's solution to the inadequacies of diplomatic-espousal practices, *see* Borchard, *supra*, 43 Yale L.J. at 392, and it is the reason that the United States' own policy toward foreign investment depends on giving investors an "assured" right of "access to international arbitration" — it "provides a mechanism for depoliticizing disputes and preventing disputes from escalating into diplomatic issues."

*Memorandum Outlining U.S. Concerns Relating to the Legal Framework for the Treatment of Foreign Investment*, dated May 28, 1992, reprinted in I. Shihata, *Legal Treatment of Foreign Investment: "The World Bank Guidelines"* 413, 418 (1993).

74. *Second*, continuous nationality was thought necessary to preserve harmony in international relations by avoiding the inevitable frictions that would be caused in the diplomatic sphere by transferring the right of diplomatic protection from one State to another. *See, e.g.*, Borchard, *supra*, 43 Yale L. J. at 371, 376; 1 Schwarzenberger, *International Law* at 600-01. This, too, has no application to direct investor-State arbitrations under NAFTA Chapter 11, since the right of protection is initially, and forevermore, vested in the "disputing investor" who "makes a claim." Indeed, unlike the discretionary, politicized regime of diplomatic-espousal claims, which Borchard noted "falls far short of an ideal system" (Borchard, *supra*, 43 Yale L.J. at 390), the very idea of "state responsibility" is founded on the rule of law that a "responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." *Draft Articles on State Responsibility, supra*, art. 31(1). But the United States' proposal for a continuous-nationality principle would leave investors who suffer egregious, completed international wrongs — such as the *O'Keefe* litigation — without *any* remedy, much less "full" reparation.



75. In sum: The “continuous nationality” principle is a vestige of diplomatic-espousal practice. It has no place in the law of investor-to-State arbitration.

**B. It Is Unclear That There Ever Was A “Rule” of “Continuous Nationality,” Even In Diplomatic-Espousal Cases**

76. The United States contends that there is a “well-established principle of ‘continuous nationality’” among the “rules” of customary international law. (U.S. 2d Juris. Mem. at 13.) To the contrary, this “principle” was never “well-established,” leaving it unclear, at best, that it was ever a customary “rule.” Rather, numerous tribunals and commentators, as well as the United States’ own past practices, have demonstrated that the principle of “continuous nationality” was a discretionary *practice*, adopted by various states in the process of diplomatic espousal and rejected as often as it was applied.

77. As early as 1924, Judge Parker, Umpire of the German-U.S. Mixed Claims Commission, rejected Germany’s argument that “continuous nationality” was a “rule” of customary international law. After conducting an extensive survey of the authorities, Umpire Parker observed:

Those decisions which have adopted [continuous nationality] as a whole have recognized it as a mere rule of practice. Usually they have been rendered by divided commissions, with one member vigorously dissenting. When the majority decisions in these cases come to be analyzed, it is clear that they were in each case controlled by the language of the particular protocol governing the tribunal deciding them.

*Administrative Decision V*, 7 R.I.A.A. at 143. When Lithuania, fifteen years later, tried to resuscitate Germany’s discredited argument before the Permanent Court of International Justice, the court declined to decide the case on that ground. *See Panevezys-Saldutiskis Railway Case*, P.C.I.J. Series A/B, No. 76, 16-18 (1939). Dissenting from the court’s refusal to decide the “continuous-nationality” point, Judge van Eysinga — like Umpire Parker before him —

explained that arguments in favor of a customary “rule” of continuous nationality were unsupported by the authorities on which they purported to be based. *See id.* at 33-35 (van Eysinga, J., dissenting).

78. More recently, O’Connell’s treatise observed that dicta in the *Panevezys-Saldutiskis Railway* majority opinion had “confused a discretionary practice [of diplomatic espousal] with a substantive rule of law.” D. O’Connell, *International Law* 1035 (1970). The work of other scholars, too, has highlighted the dubious support for continuous nationality as a “rule” of international law. Ian Sinclair (as he was then) viewed continuous nationality as “far from sacrosanct,” and a practice motivated by “expediency, rather than principle.” I. Sinclair, *Nationality of Claims: British Practice*, [1950] 27 Brit. Y.B. Int’l L. 125, 130. Weston called the French practice of continuous nationality “less an expression of principle than it is a recognition of the demands of practicality and the limitations of power.” B. Weston, *International Claims: Postwar French Practice* 83 (1971). And Verzijl, in his historical treatise on international law, concluded that the diplomatic practice of conditioning espousal on continued nationality “can hardly be called a generally recognized customary rule of international law.” J. Verzijl, *International Law in Historical Perspective, Part VI: Juridical Facts as Sources of International Rights and Obligations* 723 (1973).

79. Even the United States’ own past practices contradict the argument it now makes to this Tribunal, and show continuous nationality to be a discretionary practice, not a customary “rule” binding on an international tribunal. In the *Landreau Claim* (U.S. v. Peru), the United States espoused a claim on behalf of a former French subject who had been naturalized as a U.S. citizen only after his claim had accrued. The commission rejected Peru’s challenge to the United States’ standing, holding:

The fact that any claim had accrued before naturalisation might form one element *to be considered by the United States before deciding to take up the case*, but it is quite impossible to say that it would on such a ground be *ultra vires* of the United States to take it up.

5 Hackworth, *Digest of International Law* 807-08 (1943) (emphasis added).

80. But perhaps the most telling expression of the United States' past diplomatic practices is seen in *Administrative Decision V* of the German-U.S. Mixed Claims Commission. There, as noted, the German Commissioner attempted to show that continuous nationality was a "rule" by pointing to a standardized U.S. State Department form instructing putative claimants that "the Government of the United States, as a rule, declines to support claims that have not belonged to [U.S. nationals] from the date the claim arose to the date of its settlement."

*Administrative Decision V*, 7 R.I.A.A. at 136 (emphasis and internal quotation marks omitted)

(quoting Department of State, *Application for the Support of Claims Against Foreign*

*Governments*, ¶ 6 (Oct. 1, 1924)). The American Commissioner explained that those instructions merely stated a principle of administrative discretion, not a "rule" of power or jurisdiction:

[Those instructions] were not intended to be, or understood as, a statement of a settled rule of international law, but merely as a statement of the policy which 'as a rule' the Department would follow in dealing with international claims. *The expression 'as a rule' does not mean as a rule of international law but as the usual practice of the Department of State, which was subject to changes and exceptions in its discretion.*

*Administrative Decision V*, 7 R.I.A.A. at 128 (emphasis added). The American Commissioner

added this observation: A government's reluctance to espouse a claim after a change in nationality "arise[s] from considerations of policy or practical expediency, rather than from lack of legitimate authority." *Id.* at 124 (opinion of Mr. Anderson). Umpire Parker endorsed the United States' view (at least as it was then), and rejected Germany's efforts to import a continuous-nationality requirement not found in the treaty itself, observing that whether the

United States would espouse a former U.S. national's claim was a matter of "discretion," which "involves a question of political policy rather than the exercise of a legal right." *Id.* at 150.

81. Given the questionable pedigree of "continuous nationality," it is not at all surprising that the ILC's Special Rapporteur on Diplomatic Protection has concluded that the status of continuous nationality as a "rule" of customary international law of diplomatic protection is "dubious" at best, and even within the limited realm of espousal cases, it has "outlived its usefulness." Dugard, *supra*, Add.1, ¶¶ 12, 24. The most the Special Rapporteur could say of continuous nationality is that it has "some" support: "The continuity of nationality rule is supported by *some* judicial decisions, *some* State practice, *some* codification attempts and *some* academic writers. On the other hand, there is strong opposition to it." *Id.*, ¶ 9 (emphasis in original). It scarcely bears mentioning that "some" support for a "dubious" proposition comes nowhere close to the "widespread acceptance" required to establish a "rule" of customary international law. *See Restatement (Third) of Foreign Relations Law* § 102, cmt. b.

82. Finally, even if the United States were correct that the rule did exist in the past, there is persuasive evidence that it no longer does. The ILC's *current* work on the law of diplomatic protection — its present draft articles on Diplomatic Protection — contains no continuous-nationality requirement whatsoever. To the contrary, the ILC's present draft Article 9: (i) allows the State of original nationality to continue espousal even *after* the claimant changes his nationality to that of a new State; (ii) allows the new State to espouse a claimant's claim even where the injury was suffered while he was a national of a previous State; and (iii) allows the right of diplomatic protection to be transferred to another State via transfer (e.g., assignment) of the claim, even where that State has *no* national connection to the original claimant. Dugard, *supra*, Add.1 at 2 (art. 9). The *only* restriction on changes in nationality bars

the new State of nationality from espousing a claim against the previous State of nationality for an injury the latter inflicted on the claimant while still its national. *See id.*

83. In sum: Although it is unclear whether a continuous-nationality “rule” of customary international law ever existed, it is clear that the “rule” is not accepted today.

**C. Even Were There A “Rule” Of Continuous Nationality, The Critical Date Would Be No Later Than The Date Of Presentment**

84. Even if the United States could carry its burden of showing that “continuous nationality” is not just a discretionary practice of the espousing State, but a “rule” of customary international law, it would still bear the burden of proving its claim that such a “rule” required that nationality be maintained continuously through the date of the ultimate award. The United States has not carried that burden, nor can it.

85. As Sir Robert explains in his attached opinion, even those authorities who argued in favor of a continuous nationality “rule” were sharply divided over its content, yielding “a rich variety of different versions and meanings of it to choose from.” (Fifth Jennings Op., at 9.) According to American authorities, continuous nationality was required only up to the date the claim was presented on the international plane. (*See id.* at 7.) Sir Cecil Hurst, however, argued that the “American” view was too “narrow” (*id.*); writing shortly after the first World War, he favored adopting a policy of requiring continuous nationality up to the date of the award. C. Hurst, *Nationality of Claims*, [1926] 7 Brit. Y.B. Int’l L. 163, 180. By the early 1980s, however, the official British view underwent a “tactful abandonment” of Sir Cecil’s position, and “[t]hus, did the British official view and the former United States official view come together” on the date of presentation. (Fifth Jennings Op., at 8.)

86. Moreover, a review of the authorities demonstrates that, of those who believed continuous nationality was a rule of customary international law, the majority view was always

that continuous nationality was required *only* until the date of presentation. Indeed, as has happened so many times now during the course of this arbitration, the United States' present litigating position contradicts its own past position. As the Department of State said in 1960:

Under generally accepted principles of international law and practice, a claim may properly be espoused by one government against another government only on behalf of a national of the government espousing a claim, who had that status at the time the claim arose and continuously thereafter *to the date of the presentation of the claim.*

Letter from Assistant Legal Adviser English to Albert Dib (Dec. 21, 1960), *reprinted in* 8 Whiteman, *Digest of International Law* 1243 (emphasis added).

87. The majority of international authorities agree. “With extremely rare exceptions, and such exceptions based upon the particular language of treaties . . . the language of commissions has been . . . that the title to such claim must have remained continuously in the hands of citizens of such government until the time of its presentation for filing before the commission.” J. Ralston, *The Law and Procedures of International Tribunals* § 293, at 161 (1926). Brownlie, similarly, discusses “the principle of diplomatic protection, which rests primarily on the existence of the nationality of the claimant state attaching to the individual or corporation concerned both at the time of the alleged breach of duty *and at the time when the claim is presented.*” Brownlie, *supra*, at 403 (footnotes omitted; emphasis added).

88. Here it bears noting that the United States quotes a different portion of Brownlie’s treatise for the proposition that “the majority of governments and of writers take the date of the award or judgment as the critical date” (U.S. 2d Juris. Mem. at 16 (quoting Brownlie, *supra*, at 484)), but selectively elides the language both before and after that sliver of a quotation. The full quotation is as follows:

The first part of the rule of continuity does not give rise to too much difficulty: the relevant nationality must exist at the time

of injury. The second part of the rule is variously stated in terms of nationality continuing until the “presentation of the award”, or the filing of a claim before a tribunal, or the formal presentation of a diplomatic claim in the absence of submission to a tribunal. However, the majority of governments and of writers take the date of the award of judgment as the critical date. In any case *much depends on the terms of the agreement creating the machinery for the settlement of claims.*

Brownlie, *supra*, at 483-84 (footnotes omitted; emphasis added). The full quotation from Brownlie does not help the United States. For one, the fact that “[t]he second part of the rule is variously stated” as date of filing, formal presentation, etc. shows that there is no single principle that could constitute customary law. For another, the fact that “much depends on the terms of the agreement” simply highlights the fact that this Tribunal’s jurisdiction is controlled by the plain text of Chapter 11, not dubious principles of diplomatic espousal. Finally, in light of the above showings — and the paucity (and age) of the authorities cited for the proposition (including the outdated 1930 Hague Convention that was questioned in *Iran-United States*, Case No. A/18, 5 Iran-U.S. Cl. Trib. Rep. at 260-61) — it is difficult to glean much support for the United States’ position from Brownlie, particularly where Brownlie himself appears to adopt the “date of presentation” view. *See* Brownlie, *supra*, at 403.

89. The United States engages in less-than-straightforward quotations from other international authorities as well. It quotes from a decision of the U.S. Foreign Claims Commission, in turn quoting *Administrative Decision V*, for the proposition that “there is ‘a long list of authorities who have expressed’ the view that, ‘up to the last moment of its activities, [a Tribunal] remains concerned with the question on whose behalf the claim is prosecuted and to whom the proceeds of an award will flow. . . .’” (U.S. 2d Juris. Mem. at 15, quoting *Am. Sec. & Trust Co. v. Hungary* (U.S. For. Cl. Settlement Comm’n), in turn quoting *Administrative Decision V*, 7 R.I.A.A. at 133.) Whatever it may mean for a tribunal to “remain concerned”

about the claimant, the quoted material is not nearly as telling as what was omitted. The United States fails to disclose that the portion of *Administrative Decision V* that is quoted comes from the separate, rejected opinion of the German Commissioner (the Umpire, of course, concluded that there is no such “rule”). Nor does the United States mention that the U.S. Foreign Claims Commission has repeatedly held that — absent an express jurisdictional requirement to the contrary — “the nationality requirement is satisfied by United States ownership *until the filing date, and is not affected by changes in ownership or nationality occurring thereafter.*” *Foreign Claims Settlement Commission of the United States: Decisions and Annotations, 1950-1967* 168-69 (1968) (emphasis added). *See also id.* at 268 (holding same); *id.* at 320 (same).

90. Similarly, there is more to Feller’s study of the Mexican Claims Commissions than the United States’ submission discloses. (*See* U.S. 2d Juris. Mem. at 15 n.24.) Feller observed that “[u]ntil recently, there was little doubt that an award could not be rendered on a claim which had not remained a national one from the time of origin *to the time of presentation,*” and that “[w]hile there is general agreement on the requirement of continuity of nationality until the filing of the claim, there is considerable disagreement as to whether this nationality must continue beyond filing.” A. Feller, *The Mexican Claims Commissions: 1923-1934* 96 (1935) (emphasis added; citations omitted). Feller then noted two decisions departing from that general rule and requiring continuity of nationality through the date of the award (*id.* at 97); not surprisingly, both of those decisions — *Eschauzier* and *Guadalupe* — found their way into the United States’ submission. (*See* U.S. 2d Juris. Mem. at 15 n.24.) But, Feller’s notation of the “considerable disagreement as to whether this nationality must continue beyond filing” suggests that the only consensus that could possibly shape a rule of customary international law is the consensus that nationality must exist at the date of filing.



91. The United States finds no more support in its recounting of the *Chopin* case, for which it erroneously cites to a discussion in *Moore's International Arbitrations* that does not even mention *Chopin* at all. (See U.S. 2d Juris. Mem. at 15 n.24, citing 2 *Moore's International Arbitrations* at 1150.) *Moore's* actual discussion of *Chopin* reports the case as follows:

“An award was made by the united action of the commission in the sum of \$2,111. There was, however, no order as to the distribution of the sum so awarded, nor any indication of opinion on the part of the Commission as to the citizenship of the children of Oscar Chopin. It may, however, be assumed fairly that the commission were of opinion that the children of Jean Baptiste Chopin, although born in this country, were citizens of France, and that inasmuch as the death of Oscar Chopin [one of those children] occurred after the ratification of the treaty *and after the presentation of the memorial*, his right to reclamation had become *so vested that it descended to his children independently of the question of their citizenship in France.*”

3 *Moore's International Arbitrations* 2506-07 (1906) (emphasis added). The commission in *Chopin* thus considered a change in nationality after presentation but before award to be irrelevant, because the claim was already “vested.” See also Borchard, *Diplomatic Protection of Citizens Abroad* 665-66, 666 n.1 (1916) (concluding that in *Chopin*, “[t]he death of a claimant after the presentation of his claim” was held “not to bar the claim but to vest his interest in his legal representatives.” (emphasis in original; citation omitted)). *Chopin*, too, supports a date-of-presentation rule.

92. Nor does the *Gribble* case (see U.S. 2d Juris. Mem. at 15 n.24) help the United States. The United States claims that in *Gribble*, the “commission was unanimous that the claimant’s naturalization as a U.S. citizen after the filing of his memorial deprived him of standing.” (*Id.*) *Hale's Report* of the *Gribble* case tells a much different tale. *Hale's* makes clear that Gribble “had filed his declaration of intention [to become a U.S. citizen], under the naturalization act, *before* the presentation of his memorial, had subsequently, and pending his

claim before the commission, completed his naturalization, and was *at the time of the submission of his cause a citizen of the United States.*” *Report of Robert S. Hale, Esq.* (Gr. Brit.-U.S. Mixed Cl. Comm’n) [1873 Pt. II, vol. III] U.S. Foreign Relations 14 (1874) (emphasis added). As Ralston explains, “the view of the commission in the Gribble case” was that “the right to appear as a claimant would be lost by transfer of citizenship from the defendant to the defendant nation *after the claim arose and before its submission.*” Ralston, *supra*, § 343, at 188. *Gribble* is therefore perfectly consistent with a date-of-presentation rule.

93. Even Professor Greenwood recognizes the validity of a date-of-presentation rule when he acknowledges that “[i]t is true that some governmental formulations of the principle state only that the government in question will not espouse a claim unless it has been continuously owned by one of its nationals up until the date of presentation of the claim.” (Third Greenwood Op., ¶ 16.) After recognizing this principle, however, Professor Greenwood cautions that these formulations “have to be seen in their proper context,” because this rule deals with when the governments will “*take up* a claim,” not with the jurisdiction of tribunals. (*Id.* (emphasis in original).) This caution proves too much. First, it proves that there is no continuity “rule” at all (and certainly not one of continuous nationality through the date of an award), but rather that States feel free to espouse a claim or not as matter of sovereign discretion. Second, it proves that to the extent State practice supports any “rule,” it would require continuous nationality only “up until the date of presentation of the claim.”

94. To the extent Professor Greenwood is suggesting that the Tribunal should ignore examples of State practice that contradict his preferred date-of-award “rule” because they “cannot be relevant to. . . whether the tribunal may render an award” (Third Greenwood Op., ¶ 16), the suggestion is visibly lacking in any supporting authority whatsoever. (*Id.*) Indeed, the

United States itself “has in the past asserted and received payment for American claims which had passed into alien ownership.” *Administrative Decision V*, 7 R.I.A.A. at 150; *see also id.* at n.26 (citing cases).

95. Finally, previous proposals to codify a continuous-nationality rule give much credence to the notion that, if there was a customary rule at all, it looked to the date of presentation. Article VIII of the American Institute of International Law’s Project on Diplomatic Protection provided:

In order that a diplomatic claim may be admissible, the individual in whose behalf it is presented must have been a national of the country making the claim at the time of the occurrence of the act or event giving rise to the claim, and he must be so at the time the claim is presented.

American Institute of International Law, Project No. 16 on Diplomatic Protection, art. VIII (1925), *quoted in* Dugard, *supra*, Add.1, ¶ 7.

96. In 1965, the Institute of International Law adopted a resolution to the same effect:

An international claim brought by a State for injury suffered by an individual may be rejected by the State to which it is presented unless it possessed the national character of the claimant State *both at the date of its presentation and at the date of the injury*. Before a court (*jurisdiction*) seized of such a claim, absence of such national character is a ground for inadmissibility. . . .

When the beneficiary of an international claim is a person other than the individual originally injured, the claim may be rejected by the State to which it is presented and is inadmissible before the court seized of it unless it possessed the national character of the claimant State *both at the date of injury and at the date of its presentation*.

Institute of International Law, *1965 Resolution on the National Character of an International Claim Presented by a State for Injury Suffered by an Individual*, arts. 1(a) & 2, Warsaw Session, 1965, Resolutions de l’Institut de Droit International, 1957-91 (1992), at 57, 59 (1965 II) *Annuaire de l’Institut de Droit International*, vol. 51, at 260-62 (emphasis added); *see also id.*

art. 3 (“[D]ate of presentation” means, “in case of a claim presented through diplomatic channels, the date of the formal presentation of the claim by a State and, in case of resort to an international court (*jurisdiction*), the date of filing of the claim before it.”)

97. And the International Law Commission is, as already noted, presently considering a proposal to eliminate any continuing confusion over the status of continuous-nationality requirements by rejecting, once and for all, any requirement to maintain any particular nationality as a precondition to diplomatic protection. *See* Dugard, *supra*, Add.1 at 2 (Draft art. 9).

98. In sum: To the extent there is support for a continuous-nationality “rule” of customary international law in the diplomatic-protection context, it requires continuity of nationality only up to the date a claim is presented.

#### **IV. EVEN UNDER THE UNITED STATES’ DUBIOUS “CONTINUOUS-NATIONALITY” PRINCIPLE, LOEWEN’S CLAIMS CONTINUE**

99. What has already been said in the preceding sections is enough to warrant dismissal of the United States’ latest jurisdictional objection — simply put, the law is not with the United States. The facts, as it turns out, are not with the United States, either. As a result, even under any “continuous-nationality” principle that could possibly apply in this case, Loewen may continue to prosecute its claims.

##### **A. Once Again, The United States Has Tried To Reinvent The Facts**

100. As in the past, the United States has taken license with the facts. Its perceived need to take such liberties speaks volumes about the merit of its latest jurisdictional objection. We will try to correct these misunderstandings in short order.

101. *First*, contrary to the United States’ repeated assertions (U.S. 2d Juris. Mem. at 2, 4, 14 n.22, 21, 35; Third Greenwood Op., ¶¶ 17, 20, 21), Loewen’s reorganization was not in any

sense “voluntary.” Rather, the restructuring of the Loewen companies was driven not by Loewen’s management or shareholders, but by the creditors of those companies, which — under the United States bankruptcy laws — had all the leverage and, effectively, all control over the future of those companies. *See, e.g.*, 11 U.S.C. § 1129(b)(2)(B)(i) & (ii) (providing that where there are not sufficient assets in the bankruptcy estate to repay all of the unsecured creditors in full, each such “impaired” creditor must approve the company’s reorganization plan; otherwise, junior creditors and shareholders will be prohibited from receiving anything under the plan pursuant to the “absolute priority rule”). A corporation only acts “voluntarily” through the will of its shareholders, but Loewen’s shareholders had no effective say in the bankruptcy reorganization. (The International Court of Justice itself recognized this inevitable consequence of bankruptcy in *Case Concerning Elettronica Sicula S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, ¶¶ 56, 86-87.) As explained in the Affidavit of Jonathan B. Cleveland, who served as financial advisor to the Loewen creditors, the restructuring of the Loewen companies was driven by the creditors’ desire to maximize their recovery and by their perceived needs concerning their own security and convenience; indeed, the restructuring was “dictated” by the creditors under the authority given to them by the U.S. Bankruptcy Code:

The assertion that Loewen’s actions in this regard were “voluntary” is not true in my opinion. In the Loewen reorganization, the creditors dictated from the outset many critical aspects of the reorganization process, including virtually all of the substantive aspects that would affect their economic recovery and the corporate structure best suited for the creditors’ needs. In particular, the severance of the ownership link between TLGI and LGII was not voluntary in any sense — TLGI’s shareholders had no vote on the reorganization plan and TLGI’s shares in LGII were necessarily canceled as part of the plan structured by the creditors.

(Cleveland Aff., ¶ 13; *see generally id.*, ¶¶ 12-16.) In short, Loewen’s corporate restructuring was not the “voluntary” choice of Loewen or its shareholders.

102. *Second*, the United States’ assertion that Loewen “warn[ed] its creditors and investors that [the] reorganization could result in the loss of the Tribunal’s jurisdiction over TLGI’s NAFTA claims” (U.S. 2d Juris. Mem. at 1; *see also id.* at 9) is typically incomplete. The full passage conveys a much different message:

*Although TLGI and LGII believe that the [reorganization] actions should not affect the NAFTA Claims, the U.S. government, respondent in the NAFTA proceeding, will likely argue that these actions, if taken before an award is issued, would divest the Arbitration Tribunal of jurisdiction over some or all of the claims.*

(U.S. App. at 1521 (emphasis added to indicate portion omitted by the United States).) As required by United States bankruptcy (11 U.S.C. § 1125) and securities laws, Loewen notified the public — accurately so, as it has turned out — that the United States would “likely” put forth the argument that it now has. Loewen also notified the public (in the portion left out by the United States) that it viewed such an objection to be meritless.

103. *Third*, the United States suggests that the steps taken in the Loewen reorganization were “an elaborate corporate shell-game” (U.S. 2d Juris. Mem. at 1), “concocted” (*id.* at 2), a “sham” (*id.*), and an “effort to camouflage” (*id.* at 9) and “disguise the reality.” (*Id.* at 21.) This is simply not true: Loewen fully disclosed every reorganization-related step in the company’s bankruptcy filings and on the company’s Internet website, and the courts of the United States and Canada fully approved each of those steps. Given such complete disclosure and approval by the relevant authorities, the United States’ rhetorical excess and inaccurate namecalling cannot manufacture the inequities it seeks to attribute to Loewen. In truth, the equities lie with Loewen, not the United States. *See* Section V, *infra*.

104. *Fourth*, the United States says that TLGI is now “defunct” (U.S. 2d Juris. Mem. at 7) and “dissolv[ed]” (*id.* at 20). That, too, is false. The British Columbia Registrar of Companies on March 11, 2002 issued a Certificate of Status, stating that TLGI continues to be a

“valid and existing company” which is “duly incorporated under the laws of the Province of British Columbia.” (App. at A3908.) This point is confirmed as a matter of Canadian law by former Canada Supreme Court Justice Peter deC. Cory and longtime British Columbia corporate solicitor Patrick Furlong. (*See* Cory Stmt., ¶ 53 (“TLGI is, indeed, a validly existing corporation”); Furlong Stmt., ¶ 6 (“TLGI continues to be a valid and existing company which was incorporated under the [British Columbia Company] Act.”).)

105. *Fifth*, the United States and its expert contend that Canadian courts would “pierce the corporate veil” between Nafcanco (the Nova Scotia company now charged with directing the NAFTA claims) and AGI (the former LGII), so that Nafcanco would be considered a United States entity. (*See* U.S. 2d Juris. Mem. at 26; La Forest Stmt., ¶¶ 32-35.) Again, not so. Nafcanco is a legally distinct and independent Canadian company, and as former Justice Cory explains (Cory Stmt., ¶ 83), Canadian courts would not pierce the veil between the two companies unless AGI completely dominated Nafcanco (which is not the case). And even then, the veil would not be pierced unless it would also be equitable, in all the circumstances, to do so. As Justice Cory explains (Cory Stmt., ¶¶ 88-92), and as we show in Section V, *infra*, that, too, is most assuredly not the case: it is extremely unlikely that a Canadian court would pierce the corporate veil on the plaintiff’s side in order to allow a defendant to escape liability for its own wrongful acts.

**B. The Facts Of The Reorganization Demonstrate That The Same Nationalities Continue**

106. At the same time that Loewen’s creditors imposed substantial changes in the structure of the Loewen companies as a condition of Loewen’s emergence from bankruptcy, the creditors and the company worked together — within the constraints of the creditors’ prescribed reorganization — to protect and preserve the integrity of the NAFTA claims, which all parties

recognized to be substantial (albeit contingent) assets of the companies. This required in some cases the establishment of new entities to succeed to the rights and duties of entities that would be affected by the reorganization. Because the United States' diagrams (U.S. 2d Juris. Mem. at 8-9) so compressed the steps taken to protect and preserve the integrity of the NAFTA claims to the point of being misleading, Loewen has supplied at Tab G a set of diagrams accurately illustrating the NAFTA-related steps of the reorganization. As these diagrams illustrate, these transactions were designed (despite the inevitable effects of the "cramdown" procedures and "absolute priority rule" of the U.S. Bankruptcy Code) to conform to NAFTA Chapter 11 and avoid even a colorable objection based on any inapplicable diplomatic-espousal rule of continuous nationality. The various steps of these transactions demonstrate that, even if the United States' "continuous-nationality" principle supplied the rule of decision — which it does not — Loewen's claims would still continue.

107. Initially, LGII (the original U.S. investment) formed Loewen (NAFTA) LLC (referred to in the Reorganization Plan, (*see* U.S. App. at 1619), as "Delco," which is the name we will use hereinafter) as a wholly-owned U.S. limited liability company. LGII then assigned all of its rights to receive any proceeds from Loewen's Article 1117 claim to Delco. LGII then assigned all of its ownership interests in Delco to TLGI, in a permissible and court-approved effort to mitigate the "cramdown" effects of the U.S. bankruptcy laws on TLGI's ownership link to LGII. Delco then transferred its right to receive any Article 1117 proceeds back to LGII. (*See* Tab G, at 2-5; *see also* U.S. App. at 1816-19, 1828-37.) The result of this first series of transactions was that the right to the proceeds of Loewen's Article 1117 claim remained in LGII (the U.S. investment), a U.S. corporation, and TLGI (the original Canadian investor) owned both Delco and LGII, as well as the Article 1116 and Article 1117 claims.



108. Next, TLGI (the Canadian investor) assigned its right to receive any proceeds from its Article 1116 claim to Nafcanco ULC, a Canadian company. TLGI retained the legal title to both the Article 1116 and Article 1117 claims themselves, however. TLGI also irrevocably delegated its powers and duties concerning the NAFTA claims to Nafcanco and granted Nafcanco an irrevocable power of attorney to prosecute those claims on TLGI's behalf. (*See* Tab G, at 6-7; *see also* U.S. App. at 1825-27.) The result of this second series of transactions was that Loewen's Article 1116 and Article 1117 claims remained vested in TLGI (the Canadian investor), and the proceeds of any award on the Article 1116 claim also remained vested in a Canadian company, as the right to those proceeds was assigned to Nafcanco. Moreover, Nafcanco — a Canadian company — was authorized to direct the prosecution of both claims.

109. Next — as part of the reorganization process demanded by the creditors — TLGI transferred all of its Canadian operating assets, *with the exception of title to the NAFTA claims*, to Alderwoods Group Services Inc. (“Alderwoods Services”), a Canadian holding company. TLGI then transferred most of its other assets and liabilities — including TLGI's 100% ownership interests in Alderwoods Services and in the NAFTA Contingency Fee and Arbitration Agreements (*see* U.S. App. at 1862-66, 1867-68) — to LGII. (*See* Tab G, at 8-9; *see also* U.S. App. at 1838-48.) At this point, TLGI retained title to the NAFTA claims, retained its ownership interests in LGII and Delco, and had assigned the proceeds of the Article 1116 claim, and transferred the duties and powers of prosecuting both NAFTA claims on TLGI's behalf, to Nafcanco.

110. Then, because all of LGII's shares were worthless, in accordance with the “absolute priority rule” of the United States Bankruptcy Code, 11 U.S.C. § 1129(b)(2)(B)(ii) (*see*

Cleveland Aff., ¶¶ 8-9), LGII cancelled its old common stock, most or all of which had been owned by TLGI. LGII also assigned to Alderwoods (Delaware), Inc. (a wholly-owned U.S. subsidiary of LGII) substantially all of its U.S. operating assets. But LGII retained the Contingency Fee and Arbitration Agreements, as well as the right to receive any proceeds from Loewen’s Article 1117 claims. (*See* Tab G, at 10-11; *see also* U.S. App. at 1849-54.)

111. Finally — to meet the demands of Loewen’s creditors — LGII was renamed “Alderwoods Group, Inc.” (AGI) and became a stand-alone U.S. company. AGI then assigned to Wells Fargo Bank Minnesota, N.A. (a U.S. bank, and trustee under the Loewen Creditor Liquidating Trust Agreement) twenty-five percent of its right to any net proceeds from the Article 1117 claim, which Wells Fargo holds in trust for the benefit of Loewen’s creditors. On the Canadian side, Nafcanco similarly assigned twenty-five percent of its right to any net proceeds from the Article 1116 claim to Trans Canada Credit Corporation (a Canadian company), to be held in trust for the benefit of Loewen’s creditors. (*See* Tab G, at 12; *see also* U.S. App. at 1855-61.)

112. Thus, on the U.S. side, after reorganization, AGI (formerly LGII, the U.S. investment) now holds —

- All of TLGI’s Canadian operating assets (through its ownership of Alderwoods Services, a Canadian company);
- All of the former LGII’s U.S. operating assets (through its ownership of Alderwoods (Delaware), Inc., a U.S. company);
- The Contingency Fee and Arbitration Agreements; and
- The right to receive seventy-five percent of any net proceeds that might be received from Loewen’s Article 1117 claim. (The right to receive the remaining twenty-five percent of those net Article 1117 proceeds is being held in trust by Wells Fargo, a U.S. bank for the benefit of Loewen’s creditors.)

113. On the Canadian side, after reorganization —

- TLGI (the Canadian investor) continues to own the legal title to Loewen’s Article 1116 and Article 1117 claims;
- Nafcanco, another Canadian company, holds the rights and responsibilities attendant to prosecuting TLGI’s claims on TLGI’s behalf; and
- Nafcanco also holds the right to receive seventy-five percent of any net proceeds that might be received from Loewen’s Article 1116 claim. (The right to receive the remaining twenty-five percent of those net Article 1116 proceeds is being held in trust by Trans Canada, a Canadian company, for the benefit of Loewen’s creditors.)

114. In sum, as a result of the organization, TLGI (the injured Canadian investor) continues to hold title to Loewen’s Article 1116 and Article 1117 claims, while Nafcanco (a Canadian company) directs their prosecution. Canadian entities (Nafcanco and Trans Canada) will receive the proceeds of any Article 1116 recovery, and U.S. entities (AGI (former LGII, the injured enterprise) and Wells Fargo) will receive the proceeds of any Article 1117 recovery. This fully complies with NAFTA Chapter 11, even assuming the applicability of the United States’ misguided “continuous-nationality” rule.

**C. TLGI, A Valid And Existing Canadian Corporation, Continues To Own The NAFTA Claims**

115. Undoubtedly in recognition of all of these facts, the United States is reduced to urging that TLGI can no longer own any NAFTA claim for relief because it is “a defunct corporation” (U.S. 2d Juris. Mem. at 7) which has now been “dissol[ved]” (*id.* at 20), and that as a result, TLGI “is no longer a ‘disputing party.’” (*Id.* at 10.) This is false. On March 11, 2002 — well after the filing of the United States’ latest jurisdictional objection — Loewen obtained from the Registrar of Companies for British Columbia a Certificate of Status, signed by that Registrar, which states as follows:

*I Hereby Certify that THE LOEWEN GROUP INC., a company duly incorporated under the laws of the Province of British Columbia on October 30, 1985 is, according to the records of this office, a valid and existing company.*

(App. at A3908 (*italics and bolded language in original*)). As former Justice Cory explains, this Certificate, confirms that TLGI’s Certificate of Incorporation continues in effect; that latter Certificate, in turn, constitutes “conclusive evidence” that the company exists in accord with the *Company Act* of the Province of British Columbia, and is thus “a validly existing corporation under the laws of British Columbia.” (Cory Stmt., ¶ 55.) Patrick Furlong, a British Columbia corporate solicitor of 33 years’ experience, similarly confirms that the Certificate of Status means that “TLGI continues to be a valid and existing company which was incorporated under the Act.” (Furlong Stmt., ¶ 6.) Against this indisputable showing, the United States’ submission that TLGI “is not properly constituted or organized” (U.S. 2d Juris. Mem. at 11) cannot possibly be sustained.

116. Likewise, the stated concerns of the United States (U.S. 2d Juris. Mem. at 12 & n.20) and its expert (La Forest Stmt., ¶¶ 13, 17) regarding TLGI’s ability to meet a costs award under Section 205 of the *Company Act* are unwarranted. Even assuming that a British Columbia costs provision has any relevance here — a doubtful assumption in any event (*see* Taylor Stmt., ¶ 6; Cory Stmt., ¶¶ 75-76) — there is no basis to believe that a British Columbia court would, in fact, issue a stay under Section 205 of the *Company Act* even if an analogous action were proceeding in the courts of British Columbia. As former Justices Cory and Taylor (the latter himself a former British Columbia judge) opine, a British Columbia court would not likely stay Loewen’s prosecution of such an action. Former Justice Taylor states: “Were it apparent from a consideration of all relevant factors that the making of such an order would result in the plaintiff being unable to obtain relief which might otherwise reasonably be granted in respect of such a gross miscarriage, it is in my respectful opinion *unlikely* that any order for security for costs would be made.” (Taylor Stmt., ¶ 9 (*emphasis in original*); *see also* Cory Stmt., ¶¶ 76-77.) In all

events, the better test of TLGI's ability to meet a costs award comes from its continuing ability to meet and advance the substantial costs of this proceeding required by ICSID, not from the United States' questionable speculations of what a British Columbia court might do in a case that is not even pending.

117. In the same vein, the United States contends (U.S. 2d Juris. Mem. at 11) that as a "moribund" company, TLGI "lack[s] the capacity to prosecute claims in litigation." First, the United States ignores the proper role of Nafcanco, the Canadian company to which TLGI irrevocably granted a power of attorney to prosecute these claims. (*See* U.S. App. at 1825-27.) Further, all of the Canadian authorities cited by the United States and its expert (*see* U.S. 2d Juris. Mem. at 11-12; La Forest Stmt., ¶ 15) for this proposition involve companies that had already been struck from the Register of Companies or dissolved. Simply put, a company that might (or might not) be struck sometime in the future cannot be treated as though it has already been struck or otherwise dissolved. (*See* Cory Stmt., ¶ 62 ("TLGI has not been struck from the register. Accordingly, there is no basis for saying that TLGI has been dissolved and ceases to exist."); *see also* Furlong Stmt., ¶ 11 ("In point of law, TLGI continues to exist as a valid company [under British Columbia law] until it is dissolved in accordance with the provisions of the Act.").)

118. Indeed, this points up what the United States is *truly* arguing (although not in so many words) — that because of perceived deficiencies in form, TLGI risks the *possibility* of being struck from the Register of Companies at some unspecified future date. That is about as far as the United States' expert will go. (*See* La Forest Stmt., ¶ 10 (opining that TLGI "is exposed to being struck," sometime in the future).) But the deficiencies supposedly identified by the United States and its expert (*See* U.S. 2d Juris. Mem. at 11; La Forest Stmt., ¶ 11), even

assuming they exist, do not of themselves cause a company to be “defunct” under the *Company Act*. (See Cory Stmt., ¶ 57; Furlong Stmt., ¶ 11.) This conclusion accords with the essential nature of the corporation: As a leading treatise on Canadian corporate law explains, “[t]he corporation, being an intangible and incorporeal thing, exists only in virtue of the fiat of some sovereign authority and *continues to exist until that authority withholds its recognition.*” F.W. Wegenast, *The Law of Canadian Companies* 71 (1979) (emphasis added).

119. As British Columbia corporate solicitor Furlong explains, a company incorporated under the British Columbia *Company Act* remains a valid and existing company until it is either (1) struck from the Register of Companies by the Registrar and dissolved; (2) voluntarily dissolved; or (3) otherwise dissolved in a wind-up of the company. (See Furlong Stmt., ¶ 4.) A voluntary dissolution or wind-up “must be initiated by the company itself” (*id.*, ¶ 7), but TLGI has neither taken nor contemplated such proceedings. A wind-up by court order may be initiated by the company, the company’s creditors, other interested parties, or by the British Columbia provincial minister responsible for the implementation of the *Company Act* (*see id.*), but *no* such proceedings have been taken by any of these parties. And TLGI has not been struck from the Register or dissolved by the Registrar. (*See id.*, ¶ 11.)

120. Moreover, as Furlong further explains, even if all of the United States’ factual claims were taken at face value, the British Columbia Registrar could not even commence dissolution proceedings under Section 257(a) of the *Company Act* until at least November 30, 2004. (Furlong Stmt., ¶ 8(a).) Therefore, dissolution under the Act “will not occur, if ever, until sometime after November 2004 at the earliest.” (*Id.*, ¶ 11.) And even if TLGI were at some date after November 2004 struck from the Register of Companies, Section 262 of the *Company Act* would still allow a company to be restored to the Register if the circumstances made it “just” for

the Registrar to do so. (*See* Furlong Stmt., ¶ 10 (citing authorities allowing a “limited restoration” to the register “so as to permit legal proceedings to be taken or completed by or against the company”).)

121. And even if TLGI were struck from the Register, all of the equities attendant to Loewen’s vested claim, and the circumstances of this arbitration, would make this exactly the “just” case for restoration. (*See, e.g.*, Cory Stmt., ¶ 68.) For more than three years since the submission of its claims, Loewen has arbitrated its NAFTA claims before this Tribunal vigorously — and at great expense. Loewen defended the Tribunal’s jurisdiction over the claims against the United States’ first round of objections in 1999 and 2000, arguing its case in multiple pleadings and at the jurisdictional hearing of September 2000. Loewen then turned to its case on the merits, again submitting several extensive briefs before arguing its case before this Tribunal in October 2001. By the time the United States formally lodged the present objection to Loewen’s standing in January 2002, the merits proceedings had closed.

122. With that factual background in mind, it is worth returning to the text of NAFTA Chapter 11. TLGI is of course a “disputing investor,” and by extension, a “disputing party,” because in 1998 it submitted a claim under Chapter 11. *See* Article 1139; *see generally* Section II, *supra*. TLGI also remains a Canadian “investor,” because “investor” is defined as “an enterprise of such Party, that seeks to make, is making, *or has made* an investment.” Article 1139 (emphasis added). And TLGI is an “enterprise of a Party” because that term includes “an enterprise constituted or organized under the law of a Party.” Article 1139; *see also* Article 201. TLGI thus continues to be an “investor” (as well as a “disputing investor”) because it is an enterprise, “constituted or organized under the law of” Canada, that “has made” an investment (the former LGII).

123. Finally, TLGI retains ownership of the Article 1116 and 1117 claims. While it has assigned the *proceeds* from those claims, it retains ownership of the cause of action itself. This is a well-recognized right under both Canadian law (*see* Cory Stmt., ¶ 69 (citing cases)), and United States law. *See, e.g., In re Independent Pier Co.*, 209 B.R. 333 (Bankr. E.D. Pa. 1997); *Matter of Carroll*, 89 B.R. 1007 (Bankr. N.D. Ga. 1988); *In re Musser*, 24 B.R. 913 (W.D. Va. 1982); *In re Mucelli*, 21 B.R. 601 (Bankr. S.D.N.Y. 1982); Uniform Commercial Code § 9-109(d)(12), cmt. 15. Indeed, this conclusion is consistent with the United States’ concession, earlier in this case, that a NAFTA claim itself (not merely the proceeds therefrom) can be assigned. (U.S. Juris. Mem. at 91 n.59 (“This is not to suggest that [an Article 1117] claim may never be assigned or transferred to another entity during the course of the proceedings . . . .”)) If a claim itself may be assigned, it follows that the proceeds may be assigned as well.

124. In sum: TLGI, a valid and existing British Columbia corporation, continues to hold the Chapter 11 claims at issue here, and continues to meet the standing requirements of Chapter 11.

**D. There Is No Basis For “Piercing The Corporate Veil” Between Nafanco And AGI**

125. The United States’ continuous-nationality argument does not depend merely on treating TLGI as though it no longer exists under Canadian law. It would also require this Tribunal to conclude that the separate legal entities of Nafanco (a Canadian company) and AGI (a U.S. corporation) should be disregarded — in essence, that the “corporate veil” between the two should be “pierced” — to yield the conclusion that Nafanco should be treated as a United States entity rather than the Canadian entity that it actually is. Neither the law of Canada nor equitable principles (which are themselves the basis for the “piercing the corporate veil” doctrine) support the United States.



126. There is no dispute that Nafcanco is a validly organized and existing unlimited liability company under the law of Nova Scotia. (App. at A3907.) Nor is there dispute that Nafcanco has “all the powers, capacity, rights, and privileges of a natural person” under Canadian law (U.S. App. at 1763, quoting Nafcanco’s Memorandum of Association), or that TLGI granted Nafcanco an irrevocable power of attorney to prosecute the Chapter 11 claims on TLGI’s behalf. Even the United States’ expert agrees that Nafcanco is “a distinct legal entity.” (La Forest Stmt., ¶ 20.)

127. Even so, the United States urges (U.S. 2d Juris. Mem. at 26) that Nafcanco “is nothing more than a proxy for [AGI]” and “would not be recognized as separate and independent from [AGI] under either international or municipal (Canadian) law.” That, too, is not so. As former Justice Cory has explained, the United States’ analysis of the relationships among the companies rests on far too superficial a view of the proper role of an “attorney” having fiduciary obligations, such as Nafcanco: “Unless a Canadian court were to pierce the corporate veil of Nafcanco, Nafcanco is the authorized attorney of TLGI, a Canadian corporation, rather than the puppet or agent of restructured LGII [*i.e.*, AGI], its U.S. shareholder.” (Cory Stmt., ¶ 82.) This in turn requires an analysis of Canadian veil-piercing precedents, which in no way support the United States’ submission that Nafcanco’s separate legal identity should be disregarded.

128. Under Canadian law, the “veil” between a corporation and its shareholder will not be disregarded — “pierced” — unless at least two conditions are met. First, there must be “complete domination and control of a corporation by the shareholder” (Cory Stmt., ¶ 83), which is not present here in view of the differences among the two companies’ directors and purposes (*compare* App. at A4046-47 *with* App. at A4049), as well as the special duties to TLGI assumed by Nafcanco under the terms of the delegation and the power of attorney. Second, the case must

present one of “those rare circumstances in which justice demands that the corporate veil be pierced.” (Cory Stmt., ¶ 83.) *See also, e.g., Gregorio v. Instrans-Corp.*, (1994) 18 O.R. (3d) 527, 536 (“Generally, a subsidiary, even a wholly owned subsidiary, will not be found to be the alter ego of its parent unless the subsidiary is under the complete control of the parent *and* is nothing more than a conduit used by the parent to avoid liability. The alter ego principle is applied to prevent conduct akin to fraud that would otherwise unjustly deprive claimants of their rights.”) (emphasis added). Under Canadian law, separate entities are only disregarded where it would be inequitable to respect them. *See, e.g., Kosmopoulos v. Constitution Ins. Co.*, [1987] 1 S.C.R. 2, 10 (noting that the “separate entities” principle should not be applied where it would be “too flagrantly opposed to justice, convenience or the interests of the Revenue.”) (opinion of the court joined by La Forest, J.; citation omitted).

129. Here, however, no Canadian court would pierce the veil between Nafcanco and AGI, because it would be inequitable to *ignore* the formalities. As former Justice Cory concludes in his statement:

The miscarriage of justice alleged in the NAFTA Claims was a significant factor in the bankruptcy of the Loewen Debtors. The Loewen Debtors subsequently structured their affairs in a manner which the U.S. Bankruptcy Court specifically found to be in the best interests of creditors. A court should not be quick to find fault in such a structure. It is only by respecting the insolvency reorganization and permitting Nafcanco to prosecute the NAFTA Claims as attorney for TLGI that a very serious allegation of a miscarriage of justice can be heard and resolved on its merits. If the allegations of the Loewen Debtors are correct, and there was a miscarriage of justice in the *O’Keefe* litigation, the failure to deal with the issue could have serious ramifications for all arbitration proceedings taken pursuant to the NAFTA Treaty.

(Cory Stmt., ¶ 92.)

130. The United States asserts that because Nafcanco “would not be considered an independent corporate entity by a Canadian court,” “[n]either should it be treated any differently

by an international tribunal.” (U.S. 2d Juris. Mem. at 33.) Its only authority for this proposition is Article 21, subparagraph 3(d) of Sohn & Baxter’s *Harvard Draft Convention*, which it selectively quotes as follows: “A juristic person . . . cannot be considered in isolation from the law which breathes life into it.” (*See id.*) But Article 21(3)(d) has nothing to do with corporate veil-piercing; rather, it establishes only that a “national” includes “a juristic person which is established under the law of [a] State.” Sohn & Baxter, *supra*, at 177. And the Explanatory Note for subparagraph 3(d), quoted by the United States, simply clarifies that because a “juristic person . . . requires the operation of some legal system to endow it with existence . . . [t]his circumstance would in itself be sufficient to justify reference to the law under which a juristic person, such as a corporation, is created” in determining nationality. *Id.* at 181. All that Article 21(3)(d) says is that since Nafcanco was properly created under Nova Scotia law, that fact is sufficient to demonstrate that it is a Canadian company for this Tribunal’s purposes. And, as we have shown, Canadian law would not disregard Nafcanco’s corporate identity. So in the end, the United States’ sole international “veil-piercing” authority provides it no support.

131. The simple and undisputed facts are that this structure was driven by Loewen’s creditors, adopted “legitimately and transparently,” and “with the approval of courts which found that the structure is in the best interests of the creditors of the Loewen Debtors.” (Cory Stmt., ¶ 88.) This factor alone makes it “highly unlikely” that a Canadian court would “disregard the structure” and “pierce the veil” between Nafcanco and AGI (*id.*), and impossible for the United States to carry its burden. Notwithstanding the United States’ unjustified attempts to tar Loewen’s corporate reorganization with terms like “sham” and “sleight of hand” (*e.g.*, U.S. 2d Juris. Mem. at 2, 34), there is no conduct even remotely “akin to fraud” here.

132. In sum: Not only are Loewen’s claims still owned by TLGI, a Canadian company; they are also being prosecuted by a Canadian company (Nafcanco), under a legitimate power of attorney.

**E. The Rights To Recover Any Proceeds From Loewen’s Article 1117 Claim Remain With LGII (Now AGI)**

133. Article 1135(2)(b) requires that the proceeds of a successful Article 1117 claim be paid to the injured enterprise. The steps taken during the Loewen reorganization assured that this will remain the case. Under the terms of that reorganization, LGII — now called AGI — will receive any proceeds from Loewen’s Article 1117 claim. (U.S. App. at 1835.)

134. Despite this fact, the United States urges that Loewen’s Article 1117 claim should be dismissed because “TLGI no longer ‘owns or controls’ [LGII, the] enterprise.” (U.S. 2d Juris. Mem. at 34 (quoting Article 1117(1)).) An Article 1117 claim, so the argument goes, “is asserted on behalf of an enterprise” (U.S. Juris. Resp. at 94 (emphasis omitted) (incorporated by reference in U.S. 2d Juris. Mem. at 34 n.47)); the “recovery must inure to the enterprise’s benefit” (*id.*); and so “[r]equiring that a claimant control the enterprise during the prosecution of the claim also protects the interests of the enterprise.” (U.S. Juris. Mem. at 91 (incorporated by reference in U.S. 2d Juris. Mem. at 34 n.47).) The United States also asserts that, without continuous ownership or control, “a claimant has no authority to speak on behalf of the enterprise” (for settlement or other purposes), and cannot consult with, or obtain documents from, the enterprise. (U.S. 2d Juris. Mem. at 34-35.)

135. The United States’ arguments do not follow. Its proffered concern about the continued cooperation between the claimant investor and the injured enterprise are utterly contradictory to reality. Under NAFTA Article 1121(2), both the investor *and* the enterprise must — as a condition of submitting the Article 1117 claim to arbitration — *wave* their rights to

seek damages relief in *any* other forum. Even if the investor and the enterprise are later separated in terms of ownership or control, this consent and waiver will continue to bind them both. The claim will remain that of the investor, but the rights to any proceeds of the claim belong to the injured enterprise, *see* Article 1135(2), on whose behalf the claim was brought. Thus, there is strong incentive for both the investment (which has waived all other damage remedies) and the investor (which has also waived all other damage remedies) to continue to cooperate fully in the prosecution of the claim. Otherwise, there may be no remedy at all.

136. Similarly, the United States' proffered concern that continuous control is necessary to protect the interests of the injured enterprise loses sight of reality. A simple example proves the point: Suppose that TLGI had decided to sell LGII (its U.S.-based investment) to a U.S. competitor during the pendency of this arbitration, as is its right under Article 1109(1) (providing that transfers relating to investments must be allowed "freely and without delay"). The future of LGII's valuable rights in TLGI's vested but not-yet-reduced-to-judgment claim under Chapter 11 would certainly be addressed in the corporate sales transaction; if LGII's purchaser had desired continued prosecution of the Article 1117 claim on behalf of LGII, the corporate transaction would certainly include a power-of-attorney provision allowing the new owner, or someone at his direction, to prosecute the Article 1117 claim in TLGI's name. (This is effectively what the TLGI-Nafanco power-of-attorney accomplished (*see* U.S. App. at 1825-27).) That, and not the United States' "continuous-nationality" principle that is both trade-restrictive and contrary to the text and purposes of Chapter 11, is the way for investments to retain their "protection" after divestiture but before award. Indeed, the United States' through-the-looking-glass logic reduces to this: to protect the rights of investments, we must destroy

their vested rights entirely. While this is not the first time this observation has applied to the United States' logic (*see, e.g.*, TLGI Juris. Subm. at 31), the logic has not improved with age.

137. Indeed, it is entirely illogical for the United States to argue that TLGI can no longer adequately act in former LGII's interests (*see* U.S. 2d Juris. Mem. at 34-35), while simultaneously seeking dismissal on the ground that former LGII now beneficially owns and controls the claims. (*Id.* at 34.) In fact, the former argument is also inconsistent with the United States' second argument for dismissal of Loewen's Article 1117 claim. The United States asserts (*id.* at 35) that Loewen's Article 1117 claim must be dismissed on the ground that "Alderwoods is now the beneficial owner of the [Article 1117] claim," and that "Article 1117, paragraph 4, explicitly prohibits an investment from claiming against its own State." But that is just more disingenuous paraphrasing of NAFTA's text on the part of the United States: Article 1117(4) does not prohibit an investment from later acquiring indirect ownership of a claim; rather, it provides that "[a]n investment may not *make a claim* under this Section." And the United States itself (as well as the Chapter 11 tribunal in *Feldman Karpa*) says that "mak[ing] . . . a claim" means the act of submitting a claim to arbitration. *See Feldman Karpa*, ¶ 44; *id.*, U.S. Subm., ¶ 14. Like all of Chapter 11's other jurisdictional requirements, Article 1117(4) looks only to the date of submission.

138. Finally, we wish to remind the Tribunal that, if Loewen's Article 1117 claim were rejected at this late stage of the arbitration, it would leave the injured enterprise without any remedy whatsoever for the injuries it unquestionably suffered at the hands of the Mississippi judicial system in 1995 and 1996. *See* Article 1121(2) (requiring waiver of all other damage remedies). This alone suggests that the proper interpretation of Article 1117 looks to the time of submission and no later. Moreover, even if Loewen's Article 1117 claim were dismissed for

lack of continuing ownership or control, it must be recognized that TLGI's loss of its investment was largely a result of the NAFTA violations now complained of and may therefore be considered an indirect expropriation; at a minimum, it will add to Loewen's Article 1116 damages claim. Under the reasoning of the International Court of Justice in *ELSI*, TLGI should, under Article 1116, be able to recover for injuries TLGI incurred as a shareholder resulting from damages inflicted by the United States upon the former LGII and TLGI's ultimate loss thereof. *See generally ELSI, supra* (espousal claim of United States on behalf of two U.S. corporations involving their loss of their wholly-owned Italian subsidiary that had been forced into bankruptcy by alleged illegal acts of the Italian government, and was eventually dissolved).

139. In sum: Loewen's Article 1117 claim continues despite TLGI's involuntary loss of ownership and control over the former LGII, which, in accordance with Article 1135(2), still maintains the right to receive the proceeds of any Article 1117 award.

#### **F. "Beneficial Ownership" Is Irrelevant**

140. Faced with the burden of sponsoring arguments that are unsupported by the text of NAFTA Chapter 11, unsupported by international law generally, and unsupported by the facts, the United States finally seeks to hoist its jurisdictional objection on the shoulders of "beneficial ownership." According to the United States, "TLGI cannot disguise the fact that the true ownership of its NAFTA claims, along with all of its other assets, has devolved to the Alderwoods Group, a U.S. national with no rights to assert any NAFTA claims against the United States." (U.S. 2d Juris. Mem. at 13.) This argument suffers from the same familiar triad of defects: NAFTA's text rejects it, the United States' own international-law authorities do not support it, and the facts refute it.

141. *First*, NAFTA's text rejects the United States' "true ownership" argument. NAFTA's text allows a claimant to bring claims under Articles 1116(1) and 1117(1) where the

injured claimant is an “investor of a Party.” Consistent with NAFTA’s trade-encouraging and investment-liberalizing policies, the definition of “investor of a Party” is defined broadly: “a national or an enterprise of [a] Party, that seeks to make, is making or has made an investment.” Article 1139. In turn, “enterprise of a Party” is also defined broadly for purposes of Chapter 11 as “an enterprise constituted or organized under the law of a Party, *and* a branch located in the territory of a Party and carrying out business activities there.” *Id.* (emphasis added). In other words, the definitions of NAFTA are so broad and inclusive that the “investor” which may bring a claim under Articles 1116 and 1117 includes any company “constituted or organized under the law of a Party,” without further qualification. It can also include even a mere “branch” of a company — an arm with no separate legal identity or independent corporate personality — that is not “constituted or organized” under the law of Party, but is completely dominated by the parent company, whose own nationality is not a relevant consideration under the Article 1139 definition. (The United States omits this further language of the definition (*see* U.S. 2d Juris. Mem. at 10 & n.18), by citing to Articles 201 and 1139, but failing to note that Article 201’s general definition does not include the broadening “branch” language of Article 1139, which provides the definition of “enterprise of a Party” specific to Chapter 11.) Thus, NAFTA Chapter 11 makes clear that “beneficial” ownership is simply not a consideration.

142. The United States’ own implementing statement regarding Chapter 11 contradicts its present litigating position and further confirms that NAFTA is unconcerned with “beneficial” ownership. The U.S. Statement of Administrative Action notes that the Chapter 11 definition of “Investor of a Party” is defined to encompass both firms (including branches) established in a NAFTA country, *without distinction as to nationality of ownership*, and NAFTA-country nationals.” U.S. Statement of Administrative Action, *reprinted in North American Free Trade*



*Agreement*: Treaty Materials, Booklet 8 at 128 (emphasis added). So, too, Canada’s implementing statement confirms that “NAFTA coverage extends to investments made by any company incorporated in a NAFTA country, *regardless of the country of origin*” — an approach that “will help ensure that Canada remains an attractive site as a ‘home base’ in North America for Japanese and European Investors.” *Id.*, Canadian Statement on Implementation, Booklet 12A at 68 (emphasis added).

143. The United States’ litigation arguments also contradict its own negotiators’ words. Daniel Price, the United States’ lead Chapter 11 negotiator, has written that “while the [U.S.-Canada Free Trade Agreement] definition of investor seeks to exclude investments by subsidiaries of foreign-owned enterprises, the NAFTA protections apply to *all entities* located in NAFTA territories *regardless of foreign ownership*.” Price & Christy, *supra*, at 173 (emphasis added).

144. Had the NAFTA Parties meant to include a “beneficial ownership” provision — which they did not — they could easily have done so, as the signatories did in Article 3(1)(b) of the 1973 U.S.-Hungary Claims Settlement Agreement. That agreement defines “national of the United States” with reference to whether “natural persons who are nationals of the United States own, directly or indirectly, more than 50 per centum of the outstanding capital stock or other beneficial interest.” See R. Lillich & B. Weston, *International Claims: Their Settlement by Lump Sum Agreements* 324, 325 (1975) (reprinting treaty). And, as we have noted, had the NAFTA negotiators wanted a “beneficial ownership” clause in the Agreement, they had a model in Article 1611 of the U.S.-Canada Free Trade Agreement, which defines “ownership” as “beneficial ownership and with respect to assets also includes the beneficial ownership of a

leasehold interest in such assets.” The fact that the NAFTA negotiators included no such clause must be conclusive here.

145. *Second*, given that NAFTA rejects the notion of “beneficial ownership,” the United States’ non-NAFTA authorities are inapposite. As one of the United States’ own authorities explains, “Treaties . . . may allow trustees to claim irrespective of the nationality of the beneficiaries.” Brownlie, *supra*, at 485 (footnote omitted). Given NAFTA’s language, the United States’ non-NAFTA authorities are irrelevant.

146. Moreover, as it turns out, those authorities are either inapposite or support a *broad* construction of jurisdiction. Most of the United States’ beneficial-ownership cases are diplomatic-espousal cases, which stand for the unremarkable proposition that in cases of diplomatic protection, considerations of beneficial ownership might prevent a claimant from *manufacturing* jurisdiction in the first instance. Certainly, none of the cases address the situation present here — where the claimant undisputedly holds the legal and equitable interest in a vested claim at the time of injury, the time of submission, the time of the jurisdictional award, and the time of the merits hearing — indeed, for more than three years after submission.

147. A good example of the inapposite nature of the United States’ cases is the *I’m Alone* case (espoused by Canada), a focal point of the United States’ submission (U.S. 2d Juris. Mem. at 29), which is echoed by Professor Greenwood. (Third Greenwood Op., ¶ 7.) According to the United States’ own brief in *I’m Alone*, the equitable interest in the ship had *never* been vested in Canadian nationals; rather, the ship’s owners “abused the privilege of both Canadian registry and Canadian incorporation *for the sole purpose* of committing a fraud against the United States” by smuggling illegal liquors into its territory. Answer of the Government of the United States of America to the claim of His Majesty’s Government in Canada in respect of the

Ship “I’m Alone,” *Publications of the Department of State*, Arbitration Series No. 2(3), at 1-2 (1931) (emphasis added). The Canadian registry and incorporation that had been, according to the U.S., intended for this illegal purpose were then used to initiate an international claim — *i.e.*, to *create* jurisdiction — a situation obviously distinguishable from the present case. Moreover, the commission did not “den[y] the claim,” as the United States says (U.S. 2d Juris. Mem. at 29); rather, it found the U.S. Coast Guard’s sinking of the ship to be “an unlawful act,” recommended a “material amend” of \$25,000 to the Canadian Government, but awarded “no compensation” to the U.S. owners of the ship “in view of the facts,” which included that the ship had been used in an “illegal conspiracy.” *S.S. I’m Alone* (Can. v. U.S.), 3 R.I.A.A. 1610, 1618 (1935) (Convention of Jan. 23, 1924). So instead of supporting the United States’ argument opposing jurisdiction, the *I’m Alone* tribunal actually exercised jurisdiction to decide the merits of the case, regardless of any concerns about beneficial ownership.

148. Other cases cited by the United States likewise involved the situation — also irrelevant for purposes of this case — where nominal ownership was manufactured in an attempt to *create* jurisdiction in the first instance. For example, *Monte Blanco Real Estate Corp.*, Dec. No. 37-B (Am.-Mex. Cl. Comm’n of 1942), *reprinted in Report to the Secretary of State* 191 (1948), which is cited by the United States here (U.S. 2d Juris. Mem. at 29), involved Mexican nationals who created a sham New York corporation in an effort to secure diplomatic protection against their Mexican political rivals for injuries that were anticipated. Similarly, *Charles Coleman v. United States* (Am.-Brit. Mixed Cl. Comm’n 1872), *reprinted in Report of Robert S. Hale, supra*, 98-100, also relied upon by the United States (U.S. 2d Juris. Mem. at 23 & n.36), involved a claim brought in the name of a British national, but concerning property owned at the time of the injury by “enemies of the United States” (a company of the Confederate States of

America), and therefore “not such a bona-fide controversy” between a British subject and the United States that would be “covered by the spirit or equity of the treaty.” *Coleman, supra*, at 99-100.

149. Yet other of the United States’ cases involved claimants who were trustees, administrators, etc., who served as the nominal owners of the claim but never had any equitable interest in the claim at any time — again, unlike the situation here. *See, e.g., Binder-Haas v. Yugoslavia* (U.S. Int’l Cl. Comm’n 1953), *reprinted in* [1953] I.L.R. 236-38 (1957); *American Sec. & Tr. Co. v. Hungary* (U.S. For. Cl. Settlement Comm’n 1957), *reprinted in* 26 [1958-II] I.L.R. 322-23 (1963).

150. Still other of the United States’ authorities have no application here because they deal with the special circumstances that arise out of war, where “a state may treat a corporation having . . . ties to the enemy state as an enemy national even though it was incorporated in a non-belligerent state.” *Restatement (Third) of the Foreign Relations Law* § 213, cmt. d. These cases cannot serve as precedent here. *See, e.g., Daimler Motors v. Continental Tyre & Rubber Co. (Great Britain)*, [1916] 2 A.C. 307 (cited in U.S. 2d Juris. Mem. at 33, where the United States concedes that the nationality determination there was based on “‘enemy’ company” status); *cf. Exors. of F. Lederer v. German Government* (Interlocutory Decision & Decision on Application under the Provisions of Rule 40) (Gr. Brit.-Germ. Mixed Arbitral Tribunal 1923), *reprinted in* *Recueil des Decisions des Tribunaux Arbitraux Mixtes* 762, 765, 766, 770 (1924) (cited in U.S. 2d Juris. Mem. at 23-24 & n.39).

151. Nor can Canadian municipal cases involving tax assessment (*see* U.S. 2d Juris. Mem. at 33) control (or even inform) the question of standing under NAFTA and international law. *See, e.g., Palmolive Mfg. Co. v. Canada*, [1933] S.C.R. 131, 139 (“the character and

substance of the real transaction must, *for taxation purposes*, be ascertained and the tax levied on that basis”) (emphasis added); *Aluminum Co. of Canada Ltd. v. Toronto (City)*, [1944] S.C.R. 267, 271 (“This does not mean, however, that for other purposes [not related to taxation] the subsidiary may not be the legal entity to be dealt with.”).

152. Indeed, the United States’ authorities demonstrate that where — as here — the claim has already been submitted, and substantive rights have vested, the death of the claimant will not bar the claim, even where the decedent’s vested rights pass to heirs who are nationals of another country. *See* Borchard, *Diplomatic Protection*, *supra*, § 285, at 629 (“In several cases where the claimant died *after* the presentation of his claim, and before the award, his rights were considered to have vested in his heirs, *regardless of their own nationality.*”) (bold emphasis added); *see also id.* § 308, at 665-66 (“The death of a claimant after the presentation of his claim, it having satisfied the requirements of citizenship at origin and at the time of presentation, has been held not to bar the claim but to vest his interest in his legal representative.”) Here, the United States’ argument is that TLGI has (essentially) died in the midst of arbitration. But since TLGI’s rights under its claims have already vested, even the United States’ own authorities demonstrate that its successors’ standing would still continue even if TLGI were truly “moribund” (which it is not). *See, e.g., Chopin*, at 2506-07 (discussed at pp. 46-47, *supra*); *Halley, Administrator (Great Britain) v. United States*, 3 *Moore’s International Arbitrations* 2241 (1898) (majority of Commission held that where a claim is prosecuted in the name of an intestate British national, the administrator’s nationality is irrelevant, and the beneficiaries’ dual British and American nationalities did not bar jurisdiction).

153. Finally, the United States’ few more recent authorities demonstrate that, even where beneficial ownership is invoked, modern tribunals use beneficial ownership to expand

jurisdiction, not to restrict it. In *Reza Nemazee v. Iran*, Award 575-4-3 (10 Dec. 1996), *reprinted in 9 World Trade & Arbitration Materials* 189 (1997) — which the United States says supports a finding of no jurisdiction here (U.S. 2d Juris. Mem. at 24) — the tribunal actually had this to say (citing numerous cases in support):

It is well-established in the Tribunal’s practice that under certain circumstances a claimant who is not the record owner of property nevertheless may be found to hold a beneficial interest in that property which, if taken, is *compensable* before this Tribunal. To establish such a beneficial ownership interest, however, it is incumbent on a claimant to produce strong evidence that he or she, and not the person registered as the legal owner, was in reality the true owner of the property.

*Reza Nemanee, supra*, ¶ 54 (emphasis added and citations omitted). And another Iranian case cited by the United States (U.S. 2d Juris. Mem. at 24-25 n.41), *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986), demonstrates that the Iran-U.S. Claims Tribunal conversely did *not* allow considerations of beneficial interest to destroy jurisdiction. The tribunal there upheld jurisdiction because “[l]egal title to the entire claim was vested continuously in Foremost from the date the claim arose to 19 January 1981” (the critical dates for standing under the Algiers Accord), despite the fact of later-arising beneficial ownership by claimant’s insurers, which “[could not] affect [Foremost’s] title to claim against the present Respondents.” *Id.* at 239.

154. Indeed, two recent ICSID cases — one of which the United States relies upon — have rejected beneficial ownership as a ground for denying jurisdiction. In *CSOB, supra*, the subject matter of the dispute was assigned after the claim was submitted. The tribunal held that “absence of beneficial ownership by a claimant in a claim . . . should not and has not been deemed to affect the standing of a claimant in an ICSID proceeding . . . .” *Id.*, ¶ 32. And in *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case

No. ARB/00/5 (Decision on Juris., Sept. 27, 2001), 16 ICSID Review – F.I.L.J. 5, ¶ 41, the Respondent argued that the injured, locally-incorporated subsidiary was effectively controlled not by a U.S. company with direct ownership, but rather by a Mexican parent corporation (Mexico not being a member of the ICSID Convention). The tribunal found that “the term ‘effective control’ is not found in the ICSID Convention” and the *travaux préparatoires* provide “no indication . . . that ‘effective control’ should be viewed as a threshold that has to be reached before the parties may agree to treat a local corporation as a foreign national in the meaning of Article 25(2)(b).” *Id.*, ¶ 112. Because the parties to the relevant agreement had exercised their discretion to reasonably define “‘foreign control’” in terms of majority shareholding, that was the test to be applied, and considerations of “‘effective . . . control’” were not relevant. *Id.*, ¶ 117. In short, the modern tendency of tribunals is to use “beneficial ownership” to *expand* jurisdiction to bring justice to a wider class of injured claimants, not, as the United States seeks to use it, to deprive an injured claimant of its vested claim.

155. *Third and finally*, the facts of this case demonstrate that, whatever else might be said of the “beneficial interest” in Loewen’s Article 1116 and 1117 claims, that interest continues to be substantially Canadian. Even assuming that the Tribunal were to look to AGI (the former LGII) as the “beneficial owner” of the NAFTA claims here, the Tribunal would find that AGI continues to be a substantially Canadian enterprise. AGI’s chief executive office — the control center for all the Alderwoods companies — is located in Toronto. (App. at A4048.) All of AGI’s chief executive officers are Canadian. (App. at A4046-47.) Four of AGI’s nine directors are Canadian. (*Id.*) (The remaining five directors are U.S. nationals who were selected in a creditor-controlled process, further underscoring the fact that, from the outset of the reorganization proceeding, the creditors and not Loewen dictated the corporate restructuring.

(U.S. App. at 1480.) Even beyond the executive office, AGI continues to maintain substantial operations in Canada, including approximately 140 funeral homes and cemetery properties now held by subsidiaries of Alderwoods Services, Inc. (a Canadian corporation), primarily Alderwoods Group Canada, Inc. (App. at A4050-56.)

156. Indeed, the United States' selection of AGI as the "beneficial owner" of Nafcanco and Loewen's claims is an arbitrary (though surely carefully designed) effort to destroy jurisdiction. Using the same "beneficial ownership" analysis, it could equally be urged that beneficial ownership of the NAFTA claims is held by Nafcanco, or the Wells Fargo (U.S.) trust, or the Trans Canada (Canadian) trust. But why stop there? Why not look to the nationality of each individual shareholder, or each of the Canadian or U.S. trust beneficiaries? The answer to those questions is found in the plain — and controlling — text of NAFTA, which rejects beneficial ownership. The line is not drawn, as the United States suggests, wherever it will best avoid liability for the United States.

157. To illustrate the United States' selective application of "beneficial ownership" principles: Even if the United States were correct that AGI is the "alter ego" of Nafcanco, rendering the latter a "U.S. company," it would then be appropriate to look to *AGI's* beneficial ownership. Looking behind AGI, the Tribunal would find that numerous *Canadian* creditors of the Loewen companies, who have become shareholders of AGI as a result of the reorganization, would also be beneficial owners of any Article 1116 and 1117 proceeds. More importantly, twenty-five percent of the Article 1116 claim would in any event be beneficially owned by the *Canadian* trust. Thus, even under the United States' misguided view that "beneficial ownership" has a place under NAFTA Chapter 11, Canadian beneficial ownership would still remain.



158. In sum: The issue of “beneficial ownership” is irrelevant, and does not help the United States in any event.

## **V. FUNDAMENTAL PRINCIPLES OF EQUITY AND JUSTICE PREVENT DISMISSAL**

159. Finally, and notwithstanding the utter weakness of the United States’ legal arguments, this Tribunal should reject the United States’ efforts to obtain dismissal for an additional and independent reason: The reorganization of Loewen’s affairs was caused, in significant part, by the illegal *O’Keefe* verdict and judgment, which eventually led the Loewen companies into bankruptcy, which in turn allowed Loewen’s creditors to dictate the new structure of the reorganized companies. Equity, which has a significant role to play in this case, bars the United States from taking advantage of its own wrong — the very wrong for which it must now be held responsible.

160. *First*, there is no dispute that the 1999 Loewen bankruptcy was caused in large part by the illegal *O’Keefe* verdict and judgment. As Loewen noted in 1999, it “does not claim that the *O’Keefe* verdict is the *sole* source of its current bankruptcy reorganization [but] the fact remains that the damage inflicted on Loewen by the *O’Keefe* litigation was profound, and continues to this day.” (TLGI Mem. at 119 (emphasis added).) The Loewen debtors’ disclosure statement, filed in the United States Bankruptcy Court and supplied to this Tribunal by the United States (U.S. App. at 1416), also makes this clear: “The Debtors believe that the *O’Keefe* litigation had a lasting, damaging effect on their acquisition program and their overall financial health and was a significant cause of the commencement of the Reorganization Cases.” (*See also* App. at A3812, ¶ 62.)

161. *Second*, notwithstanding the constant drumbeat of the United States and its experts suggesting that Loewen’s corporate restructuring was an entirely “voluntary” choice (*see*,

*e.g.*, U.S. 2d Juris. Mem. at 2, 4, 14 n.22, 21, 35; Third Greenwood Op., ¶ 17), that is in no way accurate. As the Affidavit of Jonathan B. Cleveland makes clear, and as Loewen has previously demonstrated to the Tribunal (*see, e.g.*, TLGI Juris. Subm. at 41-43 & n.18), the act of going into bankruptcy caused effective control of Loewen to shift from its officers, directors, and shareholders to the companies' creditors:

In the Loewen reorganization, the creditors dictated from the outset many critical aspects of the reorganization process, including virtually all of the substantive aspects that would affect their economic recovery and the corporate structure best suited for the creditors' needs. . . . The essential point is that Loewen reorganized into the United States at the direction of its creditors in order to maximize creditor recoveries.

(Cleveland Aff., ¶ 13 (emphasis added).) The fact that company-initiated bankruptcy proceedings under Chapter 11 of the U.S. Bankruptcy Code are sometimes referred to as “voluntary bankruptcy” petitions does not change these inarguable facts about the nature of bankruptcy-related restructuring generally, or Loewen’s restructuring in particular. *See ELSI*, 1989 I.C.J. 15, ¶ 35. (*ELSI* was “forced to file [a] voluntary petition for bankruptcy”); *ELSI*, Pleadings, Oral Arguments, Documents, Vol. 1, Mem. of the U.S. 41, 107 (“Having caused *ELSI* to declare bankruptcy when it would otherwise have proceeded to liquidate its assets and seek settlements with its creditors, the Italian Government is responsible for losses incurred by *ELSI*’s owners as a result of the *involuntary* change in the manner of disposing of *ELSI*’s assets.”) (emphasis added). In short, the restructuring was not the “voluntary” choice of either Loewen or its shareholders.

162. *Third*, because the illegal *O’Keefe* verdict was a contributing cause of Loewen’s bankruptcy and resultant reorganization, and because the structure of the companies that emerged from bankruptcy was made “at the direction of [Loewen’s] creditors,” not by Loewen itself, equity would look beyond any “continuity” rule that might otherwise apply in this case.

Former Justice Cory, indeed, opines that “[t]o now deny the Loewen Debtors their ‘day in court’ because of a reorganization which was brought about, to a significant degree, by the very events complained of would, in my view, constitute a failure of justice in itself.” (Cory Stmt., ¶ 68.) As Judge Sir Gerald Fitzmaurice wrote in *Barcelona Traction*, “too rigid and sweeping an application of the continuity rule can lead to situations in which important interests go unprotected, claimants unsupported and injuries unredressed, not on account of anything relating to their merits, but because purely technical considerations bring it about that no State is entitled to act.” *Barcelona Traction*, 1970 I.C.J. 3, ¶ 63 (Sep. op. of Fitzmaurice, J.). Noting that the reason for the rule — to prevent abuses arising from claim assignments to more powerful nations — “has largely lost its validity” (*id.*), Sir Gerald concluded that “a rigid application of [continuity principles], though justified where necessary to prevent abuses, should be eschewed where it would work injustice.” *Id.*, ¶ 62 (footnote omitted). Likewise, Umpire Parker in *Administrative Decision V* refused to apply the (in all events dubious) continuity principle in order “to destroy substantive rights which ha[d] vested” under the relevant treaty. *Administrative Decision V*, 7 R.I.A.A. at 150.

163. *Fourth*, as Umpire Parker also noted, the United States itself “has in the past asserted and received payment for American claims which had passed into alien ownership.” *Id.* (citing cases). This practice has been carried forward into the *Restatement (Third) of Foreign Relations Law*, which notes that “[t]he United States has provided diplomatic protection for . . . companies [incorporated elsewhere] in case of expropriation or other injury, particularly where the act was directed at the corporation because of its links with the United States.” *Restatement (Third) of Foreign Relations Law* § 213 cmt. d. Of course, Loewen was illegally punished by the Mississippi jury in part *because* it was Canadian, and because its founder and then-CEO was a

“rich, dumb Canadian politician.” (U.S. App. at 9.) Had Loewen been punished by a foreign country’s courts for being a “rich American corporation,” the United States’ practice would be to espouse that claim regardless of the company’s *actual* place of incorporation.

164. *Fifth and finally*, the fundamental principles of equity — “so generally accepted and of such fundamental character that they have become known as maxims,” C. Rossi, *Equity and International Law* 37 (1993) (internal quotations omitted) — confirm that any principle of “continuous nationality” that might possibly bar Loewen’s claims here would have to yield to equity:

- **“[N]o one can benefit from his own wrong.”** 1 H. Lauterpacht, *International Law* 257 (E. Lauterpacht ed. 1970). Because the United States is responsible for the illegal *O’Keefe* verdict, which in turn was a substantial cause of Loewen’s bankruptcy and ultimate reorganization, this equitable principle — which is also “a general principle of law recognized by civilized States” (*id.*) — bars the United States’ recourse to a “continuous nationality” rule. International law would find “offensive the idea that a party can benefit from its own illegal action.” Rossi, *supra*, at 161. *See also* 26 *Year Book of World Affairs* 1972 361 (G. Keeton & G. Schwarzenberger, eds.).
- **“Equity will not suffer a wrong to be without a remedy.”** Rossi, *supra*, at 37. The wrong done to Loewen was complete in 1996 (although the damage has continued to accrue). The United States’ efforts to now escape liability for this wrong violate this fundamental equitable maxim.
- **“Equity imputes an intent to fulfill an obligation.”** *Id.*, at 37. Under NAFTA Chapter 11, the United States had (and has) an obligation to provide Loewen with justice, fair and equitable treatment, full protection and security, and protection from expropriation, or to pay Loewen compensation for its failure to do so. *See* Articles 1102, 1105, 1110. The United States’ efforts to avoid those obligations, and their consequences, is likewise fundamentally incompatible with this equitable maxim.

165. In sum: Equity and justice do not allow the United States to rely on any rule of “continuous nationality” that might otherwise apply.

## **VI. CONCLUSION**

166. For all of these reasons, the United States' latest jurisdictional objection should be overruled. The Tribunal should rule for Loewen on the merits, and order a prompt damages phase.

Respectfully submitted,

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DATED: March 29, 2002

WA:1290154v2

## CERTIFICATE OF SERVICE

167. I, Gregory Andrew Castanias, certify by my signature below that I caused a true and correct copy of the foregoing COUNTER-MEMORIAL OF THE LOEWEN GROUP, INC. ON MATTERS OF JURISDICTION AND COMPETENCE and the accompanying VOLUME IX OF CLAIMANT'S APPENDIX to be served upon the following individuals by hand delivery or overnight courier on this 29th day of March, 2002:

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