IN THE MATTER OF:

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

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent/Party.

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

MEMORIAL OF THE UNITED STATES OF AMERICA ON MATTERS OF JURISDICTION AND COMPETENCE ARISING FROM THE RESTRUCTURING OF THE LOEWEN GROUP, INC.

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INTRODUCTION

For well more than a year, claimant The Loewen Group, Inc. ("TLGI") has been proposing to reorganize all of its business operations under the umbrella of a United States, rather than Canadian, corporate parent in order to reap certain benefits of U.S. corporate citizenship. At the same time, TLGI has been warning its creditors and investors that such a reorganization could result in the loss of the Tribunal's jurisdiction over TLGI's NAFTA claims. On January 2, 2002, TLGI's plan of reorganization became effective and, as a result, the risk of which TLGI warned has finally come to pass.

As part of its reorganization, TLGI ceased to exist as an ongoing business entity and transferred all of its business operations to its former United States subsidiary, The Loewen Group International, Inc. ("LGII"), which is now called the "Alderwoods Group, Inc." Fully aware that a complete transformation of TLGI into a United States corporation would destroy its NAFTA claims, TLGI has engaged in an elaborate corporate shell-game in an effort to create a dual illusion: (1) that Loewen remains a viable Canadian enterprise, and (2) that the NAFTA claims are still owned by a Canadian national. Neither, however, is true. As a result, this Tribunal now lacks jurisdiction over TLGI's claims.

As the United States explains in detail below, TLGI's claims should be dismissed for at least three reasons: *First*, TLGI is no longer organized in accordance with applicable Canadian law and, therefore, is no longer a "disputing party" for purposes of NAFTA Chapter Eleven. Because Chapter Eleven requires "disputing parties" to exist throughout the entirety of the arbitration proceedings, the Tribunal is without authority to hear TLGI's claims for relief in this case.

Second, even if TLGI were still a proper party to this arbitration, its claims are now owned by the Alderwoods Group, a United States company. As a matter of customary international law, a claim must be continuously owned by a foreign national from the time of injury until the time of a final award. Where, as here, the holder of the claim becomes a national of the respondent State before the final award is issued, all rights of the claimant are terminated. Although TLGI has concocted a corporate scheme in an attempt to avoid this result, TLGI's effort is readily seen to be a sham and, indeed, represents the very sort of abuse of the privileges of legal personality that international law rejects.

Finally, TLGI's claim under NAFTA Article 1117 must be dismissed for the same reason that the Article 1117 claim of its co-claimant, Raymond L. Loewen, must be dismissed; namely, because TLGI no longer "owns or controls" the enterprise on behalf of which it submitted its claim. NAFTA Article 1117 requires a claimant to maintain ownership or control of its enterprise continually through to the resolution of the claim. Having voluntarily surrendered its ownership and control of LGII/Alderwoods, TLGI has thus also surrendered its right to assert a claim on that enterprise's behalf under Article 1117.

BACKGROUND

TLGI, the primary claimant in this arbitration, was (until recently) a corporation duly organized under the laws of British Columbia, Canada.[1] TLGI formerly sat at the head of a large corporate family, the "Loewen Group," which, at its peak, included more than 1,000 subsidiaries throughout North America and the United Kingdom.[2] Chief among those subsidiaries was LGII, a United States corporation, through which TLGI derived approximately ninety percent of its overall revenues.

A. TLGI's NAFTA Claims

On October 30, 1998, TLGI and Raymond L. Loewen, a former Chief Executive Officer of TLGI, submitted claims against the United States under NAFTA Chapter Eleven. TLGI submitted a claim on its own behalf under NAFTA Article 1116, which authorizes "Claim[s] by an Investor of a Party on Its Own Behalf." TLGI also submitted a claim on behalf of LGII under NAFTA Article 1117, which authorizes "Claim[s] by an Investor of a Party on Behalf of an Enterprise." LGII could not assert any claim on its own behalf, as Article 1117 provides expressly that "[a]n investment may not make a claim under this Section."[3]

B. The Bankruptcy Reorganization and the "Reinvestment Transactions"

On June 1, 1999, TLGI, LGII and their respective subsidiaries simultaneously

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[1]Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code for the Fourth Amended Joint Plan of Reorganization of Loewen Group International, Inc., its Parent Corporation and Certain of their Debtor Subsidiaries, dated Sept. 10, 2001 (the "Disclosure Statement") at 2 (U.S. App. at 1380).

[2]Id. (U.S. App. at 1380).

[3]NAFTA Article 1117(4).

commenced bankruptcy reorganization proceedings in the United States Bankruptcy Court in Delaware (the "Delaware Bankruptcy Court") under Chapter 11 of the United States Bankruptcy Code, and insolvency proceedings in the Ontario Superior Court of Justice (the "Canadian Court") under the Canadian Companies Creditors' Arrangement Act (the "CCAA"). Disclosure Statement at 39 (U.S. App. at 1419). The Canadian Court stayed the insolvency proceedings under the CCAA and allowed the cross-border restructuring to proceed primarily in the Delaware Bankruptcy Court.

TLGI and LGII submitted their first plan of reorganization to the Delaware Bankruptcy Court on November 15, 2000, by which the company planned (inter alia) to transfer ownership of the Loewen Group's business assets and operations to LGII in the United States and for TLGI to cease functioning as an ongoing business entity.[4] Moving the business to the United States was attractive for the Loewen Group, as the company had for some time derived the vast majority of its revenues from the United States.[5]

The company apparently recognized, however, that a complete transfer of all of TLGI's assets to a United States entity would result in the loss of this Tribunal's jurisdiction over its NAFTA claims against the United States. The plan therefore proposed a complex set of

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[4] See, e.g., Disclosure Statement Pursuant to Section 1125 of the Bankruptcy Code For the Joint Plan of Reorganization of Loewen Group International, Inc., Its Parent Corporation and Their Debtor Subsidiaries, dated Nov. 14, 2000 ("First Disclosure Statement") at 2 ("The Plan provides for . . . transactions that will result in the ultimate parent company in the corporate structure being Reorganized LGII, a Delaware corporation" and "transactions resulting in the transfer of substantially all of TLGI's assets to Reorganized LGII . . . .").

[5] Alderwoods Group Shares Began to Trade: Funeral Services Firm Resurrected from Bankrupt Loewen, Nat'l Post (Jan. 4, 2002) (noting that the reorganized company "will be U.S.-based . . . as opposed to its former Vancouver base, because about 90% of its revenue come [sic] from operations in the United States").

transactions, referred to in the plan as the "Reinvestment Transactions," intended to treat the NAFTA claims separately from the direct transfer of all of TLGI's other assets to LGII and, more fundamentally, to create the illusion that the NAFTA claims were still owned by a Canadian enterprise.[6]

As contemplated in the Reinvestment Transactions, LGII would create two new corporate shells: (1) "Nafcanco" (read: "NAFTA Canadian Company"), a Nova Scotia unlimited liability company that would be a wholly-owned subsidiary of LGII, and (2) "Delco," a Delaware limited liability company, the ownership of which LGII would, under the plan, eventually transfer to TLGI.[7] According to the plan, TLGI would transfer to Nafcanco all of TLGI's rights to any proceeds of its NAFTA Article 1116 claim against the United States, as well as irrevocably delegate to Nafcanco all powers and responsibilities in respect of the prosecution of both the Article 1116 and 1117 claims.[8] The remainder of TLGI's assets and obligations would be

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[6]First Disclosure Statement at 99-100; see also Disclosure Statement at 72 (U.S. App. at 1452).

[7]LGII named the "Delco" entity "Loewen (NAFTA) LLC" when it eventually implemented the plan. See U.S. App. at 1817-19. However, because the "Delco" name appears throughout the reorganization plans, the United States will refer to the entity as "Delco" in this memorial to avoid confusion.

[8]Although the plan provided that LGII would retain its "rights" to the proceeds of TLGI's Article 1117 claim, it called for LGII to first transfer those "rights" temporarily to Delco, only to have Delco immediately transfer those "rights" back to LGII. The LGII-Delco transactions are curious for several reasons, not the least of which is that LGII had no "right" to claim proceeds that it could have assigned in the first place. Although NAFTA Article 1135(2) provides that payment of an award under Article 1117 be made to the "enterprise" rather than to the disputing investor – which is presumably why LGII mistakenly believed it had a "right" to claim such payment – the enterprise has no right to claim any relief under NAFTA Chapter Eleven; rather, only the disputing investor has the right to make a claim and enforce any award under Article 1117, even though that award is to be paid to the enterprise. See NAFTA Article 1136; see also Article 1117(4) ("An investment may not make a claim under this Section.").

transferred outright to LGII, although TLGI – which would be left as a mere shell with no officers, directors, employees, meaningful assets or business operations – would purportedly retain "bare legal title" to the NAFTA claims.[9]

The proposal for the Reinvestment Transactions remained substantially unchanged throughout each of the amended reorganization plans that the company submitted over the next ten months.[10] On December 4, 2001, the Delaware Bankruptcy Court confirmed the Debtors Fourth Amended Joint Plan of Reorganization (the "Plan"), including the Reinvestment Transactions. The Canadian Court followed suit on December 7, 2001.

Pursuant to the Plan, the Loewen Group emerged from bankruptcy protection on January 2, 2002, radically transformed. The group is now headed by a U.S. parent corporation – LGII – rather than by its longstanding Canadian parent, TLGI.[11] Accompanying this change in ownership structure, the company has discarded the Loewen name and is now known as the "Alderwoods Group, Inc."[12]

As planned, TLGI transferred to Alderwoods substantially all of its assets and ceased to function as an ongoing corporate concern. TLGI's management team left TLGI and has assumed the direction of the Alderwoods Group, thereby controlling the entire Alderwoods corporate

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[9]TLGI's only other asset would be the ownership of Delco, which itself would have no assets.

[10]The Reinvestment Transactions are summarized in an Exhibit to TLGI's final reorganization plan, captioned the "NAFTA Claim Assignment Provisions," a copy of which is appended hereto at U.S. App. 1874-75.

[11]Disclosure Statement at 1, 75 (U.S. App. at 1379, 1455).

[12]See http://www.loewengroup.com; Peter Kennedy, Loewen to Relaunch Under New Name, The Globe and Mail, Nov. 9, 2001, at B3.

family. The TLGI Chairman of the Board, John Lacey, the President and CEO, Paul Houston, and at least four other executive officers of TLGI, have assumed identical roles at the Alderwoods Group.[13] Disclosure Statement at 102-03 (U.S. App. at 1482-83). TLGI has been left as a defunct corporation, with no tangible or valuable assets and no officers, directors or employees. As Loewen itself described the result,

> TLGI [has] outstanding the same equity securities as were outstanding immediately prior to the consummation of the Restructuring Transactions, but [has]: (a) no assets other than bare legal title to its NAFTA claims . . . ; (b) no right to receive, directly or [indirectly], proceeds of the NAFTA claims; (c) no directors, officers, or employees; and (d) no relationship to Reorganized LGII or any of its subsidiaries other than as a result of the transactions relating to the NAFTA Claims.[14]

Also as planned, TLGI assigned to Nafcanco all of TLGI's rights to any proceeds of its Article 1116 claim against the United States, "irrevocably delegate[d] to [Nafcanco] all powers and responsibilities . . . in respect of the pursuit and prosecution of the NAFTA Claims" under both Articles 1116 and 1117 (U.S. App. at 1826), and granted Nafcanco "an irrevocable power of attorney . . . to take action in the name of and on behalf of TLGI in connection" with the claims. U.S. App. at 1875.

Although Nafcanco received this "irrevocable delegation" and the right to any Article 1116 proceeds, Nafcanco apparently has no other assets and conducts no business operations of its own. Moreover, Alderwoods – not Nafcanco – received (in addition to all of TLGI's other

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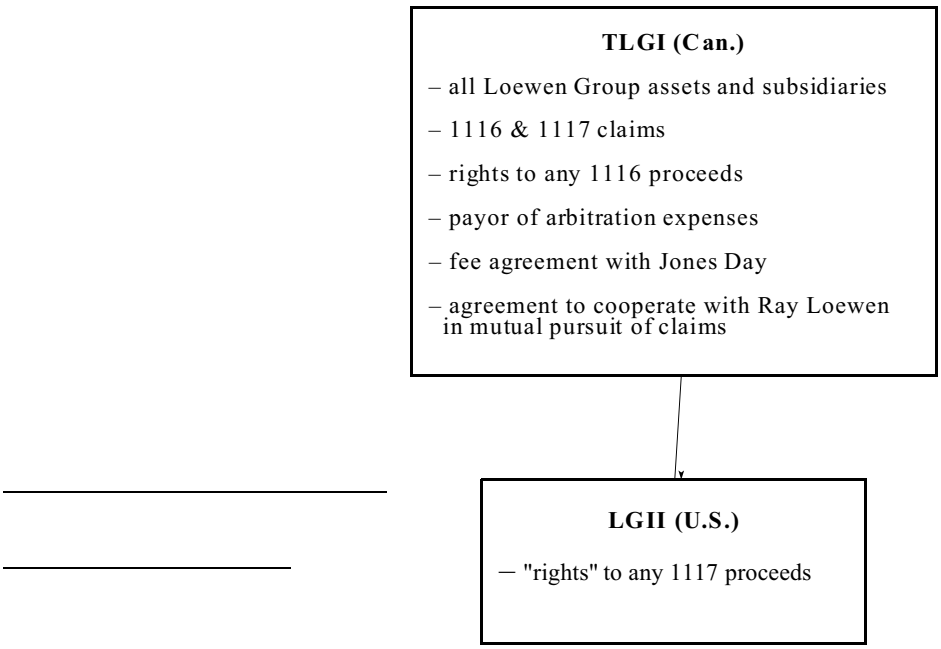
[13]TLGI's obligations under existing executive employment agreements have been assumed by a wholly-owned subsidiary of the Alderwoods Group, which will provide management services for the entire Alderwoods family of companies. See Disclosure Statement at 106 (U.S. App. at 1486).

[14]Disclosure Statement at 75-76 (U.S. App. at 1455-56).

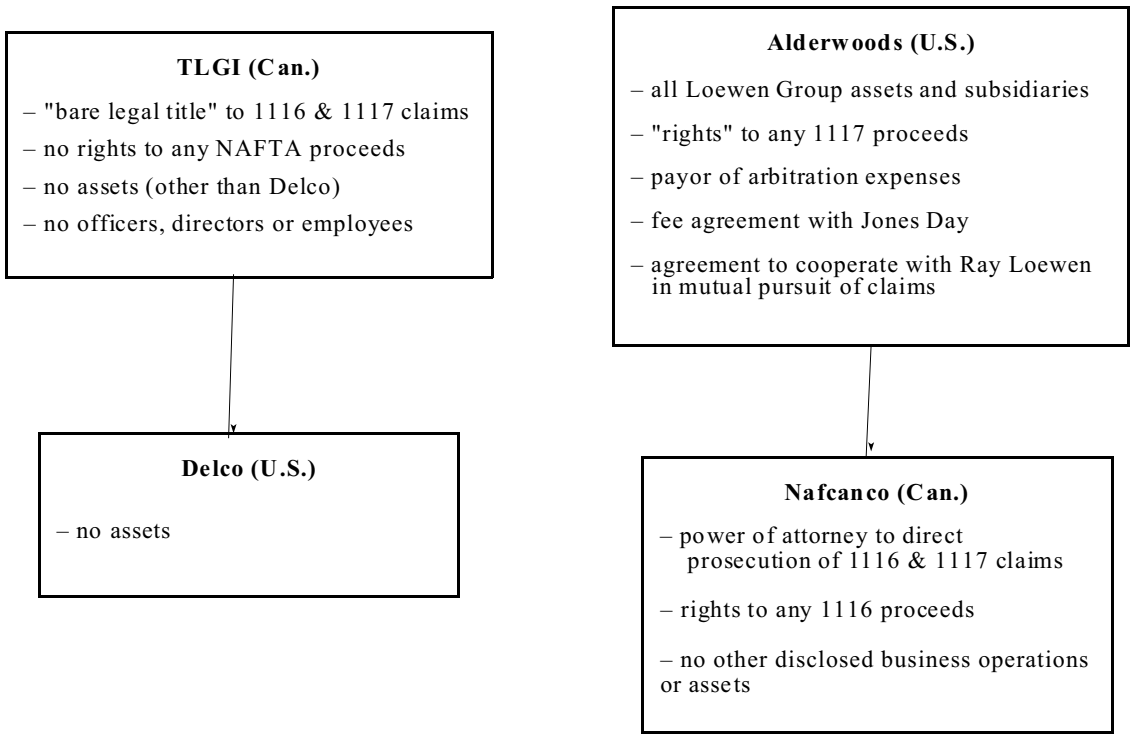
assets and obligations) two significant TLGI agreements related to the prosecution of the NAFTA claims. First, as part of the wholesale transfer of TLGI's assets to Alderwoods, Alderwoods has assumed TLGI's contingency fee agreement with TLGI's counsel (the law firm of Jones, Day, Reavis & Pogue), thus obligating Alderwoods to pay Jones Day twenty percent of any recovery in this proceeding, subject to a cap of $30 million. See U.S. App. at 1838-39, 1862. Second, Alderwoods has assumed TLGI's agreement with Raymond Loewen, thus obligating Alderwoods to cooperate with Mr. Loewen in the prosecution of the NAFTA claims to "maximize the overall recovery" for their mutual benefit. See U.S. App. at 1838-39, 1867. Alderwood's assumption of this latter agreement also obligates Alderwoods to reimburse Mr. Loewen for any costs and expenses he incurs in excess of his recovery on his NAFTA claims.

The salient changes in the structure of the Loewen Group as a result of the Reinvestment Transactions can thus be diagramed as follows:

Corporate Structure Before Reorganization:



***Corporate Structure After Reorganization**:*



Recognizing that this effort to camouflage Alderwood's ultimate ownership of the NAFTA claims behind a Canadian facade might not succeed, TLGI included the following warning to its creditors and investors in each of its reorganization plans: "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 panel of jurisdiction over some or all of the claims."[15]

[15]First Disclosure Statement at 99-100; Disclosure Statement at 141 (U.S. App. at 1521).

ARGUMENT

I. THE TRIBUNAL IS WITHOUT JURISDICTION TO AWARD ANY RELIEF TO TLGI BECAUSE TLGI IS NO LONGER A "DISPUTING PARTY" TO THIS ARBITRATION

Arbitration under NAFTA Chapter Eleven, like other forms of arbitration, requires the parties to remain in existence during the pendency of their dispute. Article 1136, for example, makes clear that NAFTA Chapter Eleven tribunals have authority to issue awards only to "*disputing parties* and in respect of the particular case."[16] Article 1136 also makes clear that the "disputing parties" must continue to exist throughout the entirety of the proceedings, for only a "disputing party" may seek enforcement of a final award.[17] TLGI, however, is no longer a disputing party for purposes of NAFTA Chapter Eleven and, therefore, can no longer maintain any claim for relief from this Tribunal.

To 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.[18] As a consequence of the Loewen Group's restructuring, TLGI has ceased to exist as an entity properly constituted or organized under the relevant Canadian law and, therefore, is no longer a "disputing party" to this arbitration.

Attached at Tab A hereto is a declaration of Gerald La Forest, Q.C., a former Justice of the Supreme Court of Canada, in which former Justice La Forest offers his expert opinion

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[16]NAFTA Article 1136(1) (emphasis added).

[17]NAFTA Article 1136(3).

[18]NAFTA Articles 201, 1139.

regarding TLGI's current legal status under British Columbia law.[19] As former Justice La Forest explains, the reorganized TLGI clearly fails to meet the requirements of the British Columbia Company Act (the "Company Act") in several significant ways and, therefore, is not properly constituted or organized under the applicable Canadian law. See La Forest Decl. at ¶11. For example:

- TLGI lacks any directors, whereas the Act requires every company to have at least three directors, one of whom must be a resident of British Columbia (Company Act §§ 108, 109);
- TLGI lacks any officers, whereas the Act requires every company to have a president and secretary (Company Act § 133);
- Without directors, officers, or employees, TLGI is unable to prepare financial statements in compliance with the Act (Company Act §§ 172, 173);
- Without directors, officers or employees, TLGI is unable to file annual reports in compliance with the Act (Company Act § 333); and
- TLGI is unable to hold annual general meetings in compliance with Act (Company Act § 139).

Furthermore, apart from the formal requirements of the Company Act, Canadian courts have routinely held that "moribund" companies, like TLGI, lack the capacity to prosecute claims in litigation. See, e.g., Butte Logging v. Sanders [1952], 5 W.W.R. (N.S.) 142 (company dissolved after commencement of claim incapable of instructing a solicitor further or continuing with the action); Floen Holdings Limited v. Ruff and Bertschi, [1978] 3 W.W.R. 172 (when

[19]TLGI bases its status as a disputing investor in this arbitration on the fact of its organization under the laws of British Columbia, Canada. See Notice of Claim at 7.

company struck from register, action in company's name cannot proceed until the company is reinstated); Vancouver Equip. Corp. v. Sun Valley Contracting Ltd. [1979] 16 B.C.L.R. 362 (action by plaintiff which sold all of its assets to another corporation, laid dormant for several years and was struck from register, could not proceed). A company without officers, directors, employees or assets cannot instruct counsel, meet a cost award if it loses the litigation,[20] or post a security for costs (as required by the Company Act). Indeed, TLGI makes no pretense regarding its complete incapacity to prosecute these claims, as TLGI irrevocably delegated to Nafcanco "all powers and responsibilities . . . in respect of the pursuit and prosecution of the NAFTA Claims . . . ." (U.S. App. at 1826). For these additional reasons, as former Justice La Forest explains, TLGI is no longer a cognizable juristic person under the law of Canada. See La Forest Decl. at ¶17.

In short, despite Loewen's efforts to maintain the illusion of TLGI's continued existence, TLGI is, in reality, completely defunct as a matter of both fact and applicable law.[21] It has divested itself of all meaningful assets, carries on no business operations and, indeed, has no officers, directors or employees who could do so. Because TLGI is thus no longer in good standing as a corporation duly organized under Canadian law, it is no longer a "disputing party"

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[20]In Canadian civil litigation, the presumptive rule is that the losing party pays some portion of the prevailing party's costs. See, e.g., B.C. Supreme Ct. Rule 57. In the present arbitration, it is within the discretion of the Tribunal (unless the parties otherwise agree) to decide whether to award costs to the prevailing party. See Article 59, ICSID (Additional Facility) Arbitration Rules.

[21]See L. Sohn & R. Baxter, Convention on the Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes, Apr. 15, 1961) ("Harvard Draft Convention"), Explanatory note to art. 21(3)(d) at 181 ("A juristic person, unlike a natural one, requires the operation of some legal system to endow it with existence.").

to this arbitration and, therefore, can assert no claim over which this Tribunal has jurisdiction.

II. TLGI'S CLAIMS SHOULD BE DISMISSED BECAUSE THEY ARE NOW OWNED BY A NATIONAL OF THE UNITED STATES

Under the terms of the NAFTA and well-established principles of international law, no person or entity can maintain an international claim against its own State. TLGI concedes as much by having gone to great lengths to conceal Alderwood's ownership of the NAFTA claims behind a Canadian facade. Despite this elaborate (albeit transparent) gamesmanship, 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.

A. The NAFTA Claims Must Be Continuously Owned by a Non-U.S. National Through the Date of the Final Award

As this Tribunal has acknowledged, Article 1131(1) of the NAFTA requires it to "decide the issues in accordance with the provisions of the NAFTA and applicable rules of international law." Decision on Jurisdiction ¶ 50. Among the applicable customary international law rules is the well-established principle of "continuous nationality," which provides that,

> from the time of the occurrence of the injury *until the making of the award*, the claim must continuously and without interruption have belonged to a person or to a series of persons . . . not having the nationality of the state against whom it is put forward.

I Oppenheim's International Law (R. Jennings & A. Watts eds., 9th ed. 1992) 512-513 (emphasis added). See also, Ian Brownlie, Principles of Public International Law 482-83 (5th ed. 1998).[22]

[22] According to these and a number of other authorities, any change in nationality, even to a State other than the respondent State, will result in the denial of the claim. See Oppenheim's International Law at 512-13 ("the claim must continuously and without interruption have belonged to a person or to a series of persons . . . having the nationality of the state by whom it is

The rule establishes a time frame for assessing a claimant's nationality starting with the date of injury (*dies a quo*) and ending with the date of the award (*dies ad quem*). To recover, a claimant cannot become a national of the respondent State, or transfer beneficial ownership of the claim to a national of that State, at any time during this period. If such a change in nationality does occur, the "right to press [that] claim is cut off completely, whether the individual has not yet acted or is actively pressing his claim." Sohn & Baxter, Harvard Draft Convention, art. 22(8) & note, at 187, 197.

Application of this rule in State practice is well-documented.[23] Consistent with this State

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put forward"); Brownlie, Principles of Public International Law at 482 (quoting same). The Tribunal need not address whether this broader principle applies to NAFTA Chapter Eleven claims, because Loewen's reorganization has resulted in a transfer of TLGI's claims to a national of the respondent State. Moreover, this is not a case of a coerced or involuntary change in nationality, such as one brought about by State succession. See Brownlie, Principles of Public International Law at 482. In the present case, Loewen voluntarily chose to become a U.S. national.

[23]See, e.g., Bases of Discussion for the Conference Drawn up by the Preparatory Committee, League of Nations Doc. C.75.M.69.1929.V. at 140-45 (1929), reprinted in 2 S. Rosenne, League of Nations Conference for the Codification of International Law [1930] 423, 562-67 (1975) (observing that many States – including Australia, Egypt, Germany, Great Britain, India, Japan, New Zealand and South Africa – agree that the injured person must retain the nationality of the claimant State through the date of the award); id. at 567 ("[a]ccording to the opinion of the majority [of States that responded to the Committee's request for information], and to international jurisprudence, the claim requires to have the national character at the moment when the damage was suffered, and to retain that character down to the moment at which it is decided"); 5 G. Hackworth, Digest of International Law 805 (1943) (where an American claimant Ebenezer Barstow died after his claim was presented to the Japanese government, the U.S. declined to continue to espouse the claim because the decedent's wife, who was the new owner of the claim, was Japanese); F. Nielsen, American and British Claims Arbitration 30 (1926) (in the Hawaiian Claims case before the American and British Claims Tribunal, the British Government voluntarily withdrew the claims of three claimants, "the claimants having acquired American nationality" during the 14 years between the date the claims were first filed and the date the memorial was filed); U.S. Dep't of State, Claims Circular: General Instructions for Claimants, reprinted in S. Doc. No. 66-67, at 8 (1919) ("the Government of the United States, as a rule, declines to support claims that have not belonged to [American

practice, the rule has also been applied repeatedly by international tribunals to deny claims that have changed nationality during the course of proceedings. See e.g., Joseph Kren v. Yugoslavia (U.S. Int'l Cl. Comm'n), [1953] I.L.R. 233, 236 (1957) ("there is ample authority under the decisions of international tribunals that a claim must have a continuous national character from the date of its origin to the date of settlement.").[24] As the U.S. Foreign Claims Settlement Commission explained in American Security and Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), reprinted in 26 [1958-II] I.L.R. 322 (1963), 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. . . .'" (quoting Administrative Decision No. V, Decisions and Opinions

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citizens] from the date the claim arose to the date of its settlement.'"); 60 French and American Claims Commission, 1880-1884, Records of Claims (Gibson Bros., Washington, D.C., undated) (reproducing arguments of the U.S. and France in Chopin case) (the French and U.S. Governments agreed that the continuous nationality requirement extends to the date of award).

[24]See also, e.g., Eschauzier, (Gr. Brit.-Mex. Cl. Comm'n of 1931) 5 R.I.A.A. 207 (dismissing a claim by a former British national who became a U.S. citizen by marriage after filing the claim); Guadalupe (unpublished) (Fr.-Mex. Reorganized Cl. Comm'n 1931), discussed in A. Feller, The Mexican Claims Commissions: 1923-1934 at 97 (1935) (denying claim where French nationality was lost "not only subsequent to the filing but also after the specific claim had been listed as receivable in the Supplementary French-Mexican Convention of 1930"); Chopin (Fr.-U.S. Mixed Cl. Comm'n of 1880), reprinted in 2 J. Moore, International Arbitrations 1150 (1898) ("The commission, holding that the treaty requirement as to the claimant's citizenship applied as well to the time when the claim was sought to be collected as to the time when it arose, uniformly decided that it had no jurisdiction to award anything against the United States in favor of a person who was not at the time of the award a citizen of France[.]"); Gribble (Brit.-Am. Mixed Cl. Comm'n, 1872), Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. Foreign Relations 14 (1874) (commission was unanimous that the claimant's naturalization as a U.S. citizen after the filing of his memorial deprived him of standing); see also Biens Britanniques au Maroc Espagnol - Benchiton (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 706 (1924) ("the claim must remain national up to the time of the judgment, or at least up to the time of the termination of the argument relating thereto").

145, 164 (U.S.-Germany Mixed Claims Commission)).

Leading commentators also agree that the continuous nationality requirement extends throughout the proceedings to the date of the final award. As Professor Brownlie observes, "the majority of governments and of writers take the date of the award or judgment as the critical date."[25] See also F.V. Garcia-Amador, et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens 82 (1974) ("[T]he predominant opinion both in diplomatic practice and in international case-law is unquestionably" that the continuous nationality rule applies through the date of the award.).[26] Professor Christopher Greenwood, whose third written opinion in this proceeding is attached hereto at Tab B, also agrees that, "from the date of the original injury to the date on which the award or judgment is given," an international claim "must be owned continuously by a national or nationals of the claimant State and must not be owned at any part of this period by a national of the respondent State." Greenwood Third Op. at ¶21.

NAFTA Chapter Eleven does not derogate from this established principle.[27] To the contrary, the requirement of continuous nationality is consistent with various of the Agreement's provisions. Indeed, the dispute resolution provisions of Chapter Eleven, on their face, pertain to "Disputes between a Party and an Investor of *Another* Party" (NAFTA Section B) (emphasis added), thus expressly incorporating the basic requirement that a claimant have a nationality

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[25]Brownlie, Principles of Public International Law at 484.

[26]See also, M. Shaw, International Law 565 (4th ed. 1997); Sohn & Baxter, Harvard Draft Convention, art. 23(7) at 200.

[27]See Greenwood Third Op. at ¶27 (observing that, while "States are, of course, free to waive or vary the [continuous nationality] doctrine by treaty should they so wish[,] [t]here is no indication that the parties to NAFTA intended to do anything of the kind").

other than that of the respondent State. See Feldman v. United Mexican States, Interim Decision on Preliminary Jurisdictional Issues, 40 I.L.M. 615, 620 at ¶ 34 (2001) ("the definition in Article 1139 of the 'investor of a Party' . . . , in the scope of application of Article 1117(1), refers to an investor of a Party *other than the one in which the investment is made*") (emphasis added). This basic requirement is similarly reflected in Article 1117(4), which specifies that an "investment" cannot assert a claim under the Chapter, but must instead rely upon an investor of *another* Party to bring a claim on its behalf.

The award enforcement provisions of Chapter Eleven also accord with a continuous nationality requirement through the time of the award. For example, Article 1136(5) provides that a "Party whose investor was a party to the arbitration" can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the "disputing Party." The procedure established by this provision, which is analogous to a traditional espousal claim, assumes a continuing connection between the investor and the non-disputing Party through the time of the award, so as to allow that Party to pursue a State-to-State arbitration on behalf of the investor. Without such a requisite connection, no Party would have an interest in seeking enforcement on the investor's behalf.[28]

Similarly, a "disputing investor" may seek enforcement of an award on its own under the ICSID Convention, the New York Convention or the Inter-American Convention. See NAFTA Article 1136(6). The term "disputing investor," however, is specifically defined in Article 1139

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[28] See also NAFTA Articles 1116 &1117 (allowing for claims only by an "investor of a Party" against "another Party."); NAFTA, Article 1115 (purpose of Section B is to establish "a mechanism for the settlement of investment disputes that assures . . . equal treatment among investors of the Parties in accordance with the principle of *international reciprocity* . . . .") (emphasis added).

to mean "an investor that makes a claim under [Chapter Eleven] Section B." As discussed above, Articles 1116 and 1117 prohibit a claimant investor from possessing the same nationality as the respondent Party. Article 1136(6) carries this requirement forward through the enforcement stage. Thus, each NAFTA Party contemplated enforcement of Chapter Eleven awards against itself only by investors of *another* NAFTA Party.

Even in the absence of these provisions, the continuous nationality rule would continue to apply to Chapter Eleven claims. As this Tribunal has recognized, "an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so." Decision on Jurisdiction ¶ 73 (citing Elettronica Sicula SpA (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 at 42); see also Sambiaggio Case (Italy-Venez. Mixed Cl. Comm'n of 1903), 10 R.I.A.A. 499, 521 ("something in derogation of the general principles of international law . . . would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation").[29] If the Parties to the NAFTA had intended to derogate from the longstanding requirement of continuous nationality through the date of award, they could easily have included language to that effect. It is significant that they did not.

Indeed, other international agreements have contained express provisions modifying the requirements of the continuous nationality rule. For example, the Claims Settlement Declaration

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[29]Likewise, the NAFTA Chapter Eleven tribunal in Feldman v. Mexico considered the effect of the claimant's dual nationality on the claim, a matter on which Chapter Eleven is silent. The tribunal not only "deem[ed] it appropriate to recall" international law principles "in matters of standing in international adjudication or arbitration or other form of diplomatic protection," 40 I.L.M. at 619 ¶30, but it also checked the result "obtained under general principles of international law . . . against the NAFTA legal framework," id. at 620 ¶33, and found that the NAFTA could be interpreted consistently with such principles. Id. at 621 ¶36.

between the United States and Iran under the Algiers Accords, which establishes the jurisdiction of the Iran-United States Claims Tribunal in disputes outstanding as of January 19, 1981, requires a claim to be "owned continuously, from the date on which the claim arose to the date on which this agreement enters into force, by nationals of that state."[30] The Claims Settlement Declaration thus specifically modifies the end point (*dies ad quem*) of the continuous nationality rule. See Development Resources Corp. v. Iran, 25 Iran-U.S. Cl. Trib. Rep. 20, 28 (1990). Similarly, the Agreement of 1964 between the United States and Yugoslavia, which resolved disputes arising between July 19, 1948 and November 5, 1964, defines "claims of nationals of the United States" as "claims which were owned by nationals of the United States on the date on which the property . . . was nationalized . . . and on the date of the Agreement."[31] Thus, in addition to specifically modifying the *dies ad quem*, the Yugoslav Agreement appears to abandon the requirement of continuity of ownership throughout the relevant period. In another example, the Agreement of 1963 between the United States and Bulgaria modified both the starting and ending dates for the continuous nationality rule. The Bulgaria Agreement contains three different definitions of the term "claims of nationals of the United States." Depending on the type of claim, the term refers to claims owned by U.S. nationals from a certain starting date "and

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[30]Article VII(2), Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran ("Claims Settlement Declaration"), entered into Jan. 19, 1981, reprinted in 20 I.L.M. 230, 233 (1981).

[31]Article I, Agreement Between the Government of the United States of American and the Government of the Socialist Federal Republic of Yugoslavia Regarding Claims of United States Nationals, dated November 5, 1964, entered into January 20, 1965, reprinted in 16 U.S.T. 1 [TIAS 5750] (1965).

continuously thereafter until filed with the Government of the United States of America."[32] The NAFTA, in contrast, contains no such provisions.

Moreover, permitting claims to proceed even after the holder of the claim has become a national of the respondent State would contravene principles of international reciprocity and the sovereignty of each of the Parties to the Agreement, which are fully recognized in the NAFTA's investor-State dispute resolution provisions.[33] It would be a significant affront to the intentions of the Parties – and, indeed, the sovereignty of each of those Parties – for a Chapter Eleven tribunal to require a NAFTA Party to pay an award to an enterprise that is owned or controlled by its own nationals. As the United States Supreme Court has explained,

> [i]ndependently of the express provisions of the treaty, it could not reasonably be urged that the award should inure to the benefit of citizens of the United States. It would be a remarkable thing, and we think without precedent in the history of diplomacy, for the government of the United States to make a treaty with another country to indemnify its own citizens for injuries received from its own officers.

Burthe v. Denis, 133 U.S. 514, 520-21 (1890) (holding that claimants claiming against the United States before the French-American Claims Commission needed to be citizens of France both at time of presentment of the claim and "of judgment thereon").

B. Alderwoods, a U.S. National, Is Now the Owner of the NAFTA Claims

The purpose and effect of Loewen's reorganization is clear: to transform Loewen into a U.S. corporate family led by the Alderwoods Group, via the dissolution of TLGI and the transfer

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[32]Article I(2), Agreement Between the Government of the United States of America and the Government of the People's Republic of Bulgaria Regarding Claims of United States Nationals and Related Financial Matters, dated July 2, 1963, entered into July 2, 1963, reprinted in 14 U.S.T. 969, 970 [TIAS 5387] (1963).

[33]See, e.g., NAFTA Articles 1101(4), 1115; 1117(4); see generally NAFTA Chapter Twenty.

of its assets to Alderwoods. Recognizing the jurisdictional consequences of this voluntary change in nationality,[34] Loewen has concocted two legal fictions in an attempt to simulate the continued nationality of TLGI's claims and to disguise the reality that TLGI transferred its NAFTA claims (as well as the rest of the Loewen Group) to a United States entity.

First, Loewen has attempted to create the impression that ownership of TLGI's claims continues as before, simply by leaving TLGI as the purported nominal owner of the claims. Second, in anticipation that the first fiction will not hold, Loewen has attempted to create the impression that Nafcanco both controls and benefits from the claims and, therefore, that the claims retain their Canadian nationality. Neither of these manipulations, however, can alter the fact that Alderwoods – which is now the directing force behind the prosecution of the NAFTA claims and will ultimately receive the proceeds of any award on *both* the 1116 and 1117 claims – is the true owner of the claims, and that the purported ownership of the claims by either TLGI or Nafcanco is a mere sham.

1. TLGI Has Assigned Away Its NAFTA Claims

Even if TLGI has retained "bare legal title" to the NAFTA claims, as it purports to do, the mere retention of such title (which is meaningless, in any event) is insufficient to establish TLGI as the real owner of the claims. Apart from the fact that TLGI no longer exists as a juristic person under Canadian law (see supra), settled principles of international law regard TLGI as having relinquished its claims entirely.

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[34] See Disclosure Statement at 141 ("Risk Factors"). Loewen concedes that each of the Reinvestment Transactions was "structured in light of the jurisdictional and substantive requirements for maintenance of, and are intended to preserve, the NAFTA claims." U.S. App. at 1825, 1828, 1831, 1835, 1838, 1849, 1855, 1858.

Although TLGI purports to retain legal title to the NAFTA claims, it is the equitable, not the nominal, owner that determines the nationality of the claim in circumstances like those present here. Indeed, it is well-established that an international claim "terminates if the *holder of the beneficial interest* in the claim becomes a national of the . . . [respondent] State", even if the allegedly "injured alien" remains a foreign national. Sohn & Baxter, Harvard Draft Convention, art. 22(8) (emphasis added).[35] For this reason, international tribunals generally determine the nationality of claims by "look[ing] to the citizenship of the real claimant and equitable owner rather than of the nominal claimant and ostensible owner." Edwin M. Borchard, Diplomatic Protection of Citizens Abroad 666 (1915).

Numerous international authorities support the principle that "the national character of a claim must be tested by the nationality of individuals holding a beneficial interest therein rather than by the nationality of the nominal or record holders of the claim." American Security and Trust Co. v. Hungary (U.S. For. Cl. Settlement Comm'n 1957), reprinted in 26 [1958-II] I.L.R. 322-23 (1963) (where the trustee presenting the claim was a U.S. citizen, but its beneficiaries were not, the commission rejected the claim, noting that "[p]recedents for the foregoing well-settled proposition are so numerous that it is not deemed necessary to document it with a long list of authorities"); Binder-Haas v. Yugoslavia (U.S. Int'l Cl. Comm'n 1953), reprinted in [1953] I.L.R. 236-38 (1957) (holding that "ostensible owner" of shares was not entitled to bring a claim on his own behalf and looking to the nationality of the beneficial owners). Contemporary commentators have confirmed the continuing validity of this proposition. See Brownlie,

[35]See also Oppenheim's International Law at 514 ("it will usually be the nationality of the holder of the beneficial interest which will be the determining factor for purposes of an international claim").

Principles of Public International Law, at 482-83 (following American Security and Trust Co.). As Professor Greenwood explains, "[t]here is a general consensus that, in determining the nationality of a claim, international law looks to the substance, not the form." Greenwood Third Op. at ¶5.

For example, in the Coleman case, the British-American Mixed Claims Commission disallowed a claim against the United States where the nominal British claimant had assigned the beneficial interests in his claim to an American company.[36] "The claim was prosecuted before the commission by [the American assignees] at their own cost and for their own benefit, though in the name of Charles Coleman."[37] The Commission accepted the United States' contention that the Commission had lost jurisdiction over the claim because "the case was in substance one between the United States and its own now citizens . . . and was not . . . a bona-fide controversy between a subject of Great Britain and the government of the United States as the treaty contemplated."[38]

In the Lederer case, the Great Britain-Germany Mixed Arbitral Tribunal refused a claim, originally notified by a British national against Germany but pursued by executors of his estate after his death, to the extent that "compensation would be ultimately awarded to a German

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[36]Charles Coleman v. United States (Am.-Brit. Mixed Cl. Comm'n 1872), reprinted in Report of Robert S. Hale, Esq., Agent and Counsel of United States, [1873, Part II, Vol. III] U.S. Foreign Relations 98-100 (1874). See also J. Ralston, The Law and Procedure of International Tribunals (1926) (1973 ed.) at 175 (explaining that the Commission "in the Coleman case refused an award to American assignees of a claim against the United States which was originally British, apparently considering with propriety that the commission lost jurisdiction, such a transfer to citizens of the respondent nation being made").

[37]Coleman at 99.

[38]Id. at 100.

beneficiary" of the decedent's estate.[39] The tribunal reasoned that to allow such relief would "be inconsistent with the meaning of the Treaty, for it would lead in effect to payments . . . by Germany to German nationals."[40]

Similarly, in Parrot's Case, 3 Moore's, International Arbitrations 3009 (1898), the U.S.-Mexico Claims Commission denied a claim brought by a U.S. citizen against Mexico based upon the action of Mexican courts in disposing of a lawsuit filed by Parrot. The Commission found that Parrot had assigned all of his property and "all his credits and claims, except such claims as he might have against the Government of Mexico" to his Mexican creditors. Despite his specific reservation of claims against Mexico, the Commission decided that Parrot had "no valid claim" relating to the lawsuit after the assignment. Id. The Iran-U.S Claims Tribunal, as well, regularly considers the beneficial owner, rather than the record owner, of property in certain matters of jurisdiction where evidence indicates that the beneficial owner is "in reality the true owner of the property." Reza Nemazee, Award 575-4-3 at ¶ 54; see also Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 111 (1998) ("Consistent with historical claims practice, the Tribunal has favored beneficial over nominal ownership for the purposes of [Article VII of the Claims Settlement Declaration].") (footnote omitted).[41]

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[39]Exors. of F. Lederer v. German Government (Interlocutory Decision) (Gr. Brit.-Germ. Mixed Arbitral Tribunal 1923) in Recueil des Décisions des Tribunaux Arbitraux Mixtes 762, 765 (1924) (the tribunal did not consider itself "empowered by the Treaty to go in [its] award further than is necessary to ensure the compensation due to the British beneficiaries").

[40]Lederer (Decision on an Application under the Provisions of Rule 40) in id. at 766, 770.

[41]Where the Iran-U.S. Claims Tribunal has found "legal title" of a claim sufficient for jurisdictional purposes, the claimant was far more than a mere title-holder. In Foremost Tehran, Inc. v. Islamic Republic of Iran, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986), Iran had argued that Foremost could not bring the claim because, by private agreement, it had assigned the "entire

Here, even a cursory glance at the Reinvestment Transactions reveals that TLGI has assigned away all of the rights it had as owner of the NAFTA claims and, therefore, is no longer the "real claimant and equitable owner" of those claims. For example, TLGI no longer has the power to direct or control the prosecution of both the 1116 and 1117 claims ("the NAFTA Claims"), having "irrevocably delegate[d]" to Nafcanco, "all powers and responsibilities . . . in respect of the pursuit of the NAFTA Claims" including the ability to "prosecute the NAFTA Claims to judgment or to compromise and settle the NAFTA Claims on terms [Nafcanco] deems proper." U.S. App. at 1826. Similarly, TLGI has assigned to Nafcanco all of "its right, title and interest in and to the Article 1116 proceeds," id., and therefore has no right to, or interest in, any proceeds from either of its claims.[42]

Moreover, TLGI no longer has any liabilities or obligations associated with the NAFTA Claims. Alderwoods has assumed TLGI's contingency fee agreement with counsel (U.S. App. at 1839), in which TLGI agreed to pay for all "expenses incurred with respect to the NAFTA proceeding, including experts' fees." U.S. App. at 1862. Alderwoods has also assumed TLGI's obligations under the joint defense agreement with Raymond Loewen, in which, in addition to agreeing to cooperate in the prosecution of the NAFTA claims and to apportion any recovery

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beneficial interest" in that claim, retaining only legal title for itself. The tribunal allowed Foremost's claim, however, because Foremost retained as well "the right and duty to institute proceedings for recovery in its own name" and it guaranteed to "use its best efforts to maintain the legal title in and to all the aforesaid items for the benefit of and in trust for OPIC[.]" Id. at 238-39. Here, TLGI can no more use its "best efforts" to recover than it can prosecute its NAFTA claims (this right having been irrevocably assigned to Nafcanco).

[42]As noted supra, NAFTA Chapter Eleven requires that payment of any proceeds on a claim under Article 1117 be made to the "enterprise" rather than the disputing investor. See NAFTA Article 1135(2).

obtained on the claims, TLGI agreed to reimburse Mr. Loewen for any "legal fees, costs and expenses . . . in excess of his recovery from the NAFTA claim." U.S. App. at 1867-68.

In short, TLGI no longer has any involvement in the pursuit of the NAFTA claims or any expectation of benefit (or loss) from their ultimate settlement, nor does TLGI have any right (or, indeed, ability) to influence the conduct of the proceedings or the pursuit of the claims by counsel. Its purported retention of "bare legal title" to the claims is thus a mere illusion that cannot support TLGI's claim to continued ownership – whether legal or equitable – of the NAFTA claims. As Professor Greenwood puts it, "the present case is one in which the reality [of ownership] and the form are far apart." Greenwood Third Op. at ¶9.

2. Alderwoods Is the Real Owner of the NAFTA Claims Because Nafcanco Is Not an Independent Entity

Loewen's second attempt to maintain the appearance of Canadian nationality is equally unavailing. As part of the Plan, Nafcanco, a wholly-owned subsidiary of Alderwoods, was created for the sole purpose of pursuing the NAFTA claims. Presumably, Loewen contends that TLGI's assignment of a certain set of rights and duties with respect to its NAFTA claims to this Canadian entity maintains the requisite Canadian ownership of the claims as a whole. The peculiar details of Nafcanco's corporate structure, however, as well as Alderwood's assumption of TLGI's NAFTA-claims-related obligations, reveals that Nafcanco is nothing more than a proxy for Alderwoods that would not be recognized as separate and independent from Alderwoods under either international or municipal (Canadian) law.

International tribunals have cast a particularly wary eye on transfers of claims to corporate entities, like Nafcanco, that appear to have been created solely for the purpose of establishing or

maintaining the requisite nationality for pursuing the claim. See 8 Marjorie M. Whiteman, Digest of International Law 1270-1272 (1967) (collecting cases). As Professor Brownlie has explained, "international law has a reserve power to guard against giving effect to ephemeral, abusive and simulated creations." Brownlie, Principles of Public International Law at 489; see also Restatement (Third) of the Foreign Relations Law of the United States § 213 n.2 (1986) ("[A] respondent state is entitled to reject representation by the state of incorporation where that state was chosen solely for legal convenience, for example as a tax haven, and the corporation has no substantial links with that state, such as property, an office or commercial or industrial establishment, substantial business activity, or residence of substantial shareholders.").

In such circumstances, customary international law recognizes a limitation to the general principle that a corporation has a legal identity separate from that of its shareholders. As the International Court of Justice acknowledged in Barcelona Traction,

> the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, *to prevent the misuse of the privileges of legal personality*, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or obligations. . . . [T]he process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.

Barcelona Traction (Belg. v. Spain), 1970 I.C.J. 39 (Judgment Feb. 5) (emphasis added); see also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, (Decision on Jurisdiction Sept. 27, 2001) at 116, 122 (where, in determining the "foreign control" required for jurisdictional purposes under the Convention, the tribunal found it

had "to review the concrete circumstances of the case without being limited by formalities" to ascertain whether "the purposes of the Convention have [ ] been abused," e.g., whether a "corporation of convenience exert[ed] a purely fictional control for jurisdictional purposes").

In addition, international authorities fully support the rejection of international claims "of foreign juristic persons in which nationals of the *respondent State* hold the controlling interest," particularly in "the case of a juristic person whose [foreign] nationality is more fictitious or nominal than real." F.V. Garcia-Amador, et al., Recent Codification of the Law of State Responsibility for Injuries to Aliens 83 (1974) (emphasis added); see also Revised Draft Articles on International Responsibility of the State for Injuries Caused in it Territory to the Person or Property of Aliens, art. 23(4), in id. at 132 ("A State may likewise not bring a claim on behalf of foreign juristic persons in which nationals of the respondent State hold the controlling interest."). While the Harvard Draft Convention on State Responsibility, like NAFTA Chapter Eleven, generally bases the nationality of a juridical entity on the law under which it is incorporated, it nevertheless would preclude a corporation from presenting a claim "if the controlling interest in that [juridical] person is in nationals of a State alleged to be responsible or in an organ or agency of that State." Sohn & Baxter, Harvard Draft Convention, art. 22(7) at 187; see also id. art. 23 (4) at 199.[43]

Consistent with this authority, the U.S.-Mexican Claims Commission in the claim of Monte Blanco Real Estate Corp. (U.S. v. Mexico) denied the claim of Monte Blanco because it found that Mexican nationals had formed the claimant corporation for the sole purpose of

[43]As an explanatory note to the Harvard Draft Convention makes clear, "[t]he test to be applied is one of control, not of ownership." Sohn & Baxter, Harvard Draft Convention, Explanatory note to art. 22 (7) at 196.

seeking diplomatic protection from the United States against Mexico. The Commission explained:

> Claimant urges that it is an American national; that a corporation is a distinct personality apart from its stockholders, and that it is recognized as a separate entity in American law. However, even if the stock of the claimant company were owned by American nationals, such ownership would not be sufficient to justify the claim's espousal by the American Government if it were merely a colorable ownership concocted for the purpose of protecting non-American interests.

Monte Blanco Real Estate Corp., Decision No. 37-B (Am.-Mex. Cl. Comm'n of 1942), reprinted in Report to the Secretary of State 191, 195 (1948).

A similar result was obtained in a case involving the sinking of the "I'm Alone" (a British Ship of Canadian registry) by the United States. S.S. "I'm Alone" (Can. v. U.S.), (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617-18 (1935). At the time of sinking, the "I'm Alone" was formally registered in Nova Scotia and owned by a Canadian company, all of whose shareholders were nominally British. However, despite the ostensible Canadian and British ownership of the "I'm Alone," the United States argued that the ultimate American owners of the shipping company "abused the privilege of both Canadian registry and Canadian incorporation."[44] The Commission agreed, finding that the ship was "*de facto* owned, controlled, and at the critical times, managed, and her movements directed and her cargo dealt with and disposed of, by a group of persons acting in concert who were entirely, or nearly so, citizens of the United States, and who employed her for the [illicit] purposes mentioned." Id. at 1617-18. Accordingly, the Commission denied the claim even though the relevant convention

[44]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).

merely required that the ship be a British flag vessel in order for a claim to be presented. See Convention of January 23, 1924 Between the United States and Great Britain to Aid in the Prevention of Smuggling of Intoxicating Liquors into the United States, art. 4, reprinted in, 3 R.I.A.A. 1611-13.

Like the purportedly Mexican corporation in Monte Blanco and the Canadian-registered I'm Alone, Nafcanco was "concocted" for the sole purpose of masking an American interest behind "colorable" foreign ownership. For all practical purposes, Nafcanco is a part of Alderwoods and Alderwoods is in *de facto* ownership and control of the NAFTA Claims. Nafcanco's lack of independence from Alderwoods is readily apparent from the following facts, among others:

- Nafcanco was created for the sole and express purpose of prosecuting TLGI's NAFTA Claims (Disclosure Statement at 72; U.S. App. at 1452) after the reorganization. Nafcanco was not a pre-existing corporation or subsidiary of LGII.

- Nafcanco has no disclosed assets other than the right to receive any proceeds from the Article 1116 claim, and Nafcanco does not appear to conduct any business operations of its own.

- Nafcanco's only listed mailing address in Nova Scotia is that of its outside counsel and registered agent. (U.S. App. at 1809). Thus, Nafcanco does not appear to have any offices or business premises of its own.

- Nafcanco has been organized as a Nova Scotia unlimited liability company ("NSULC"), which is a unique corporate form that, in many ways, is more akin to a partnership than to a corporation. In this case, Alderwoods is the sole shareholder. Because it is an NSULC, Nafcanco will be treated for U.S. tax purposes as a branch or division of Alderwoods. See 26 C.F.R.§ 301.7701-2(b)(8)(ii)(1). Indeed, it will be completely "disregarded as an entity separate from" Alderwoods. 26 C.F.R. § 301.7701-3 (a), (b)(2)(C).[45]

[45]As the name suggests, the liability of members or shareholders of a NSULC is not limited by share capital and each member remains liable for any unsatisfied indebtedness upon

- Alderwoods has unilaterally appointed all of the directors and officers of Nafcanco. (U.S. App. at 1803-04).

- Nafcanco's President, Paul A. Houston is also the President and CEO of Alderwoods. See U.S. App. at 1803, Disclosure Statement at 102 (U.S. App. at 1482).

- All of Nafcanco's other directors and officers are employees of Alderwoods, whose only registered addresses are at Alderwoods' executive offices. (U.S. App. at 1811-12).

- Because Alderwoods is Nafcanco's only shareholder, all business decisions which normally require a shareholder vote will instead be made by Alderwoods management through written resolutions. U.S. App. at 1780 ¶¶ 93-94.

- Alderwoods – and not Nafcanco – provided the consideration for TLGI's assignment of its right to any proceeds from the Article 1116 claim and TLGI's irrevocable power of attorney to Nafcanco. Disclosure Statement at 34 (U.S. App. at 1414).

- Alderwoods – and not Nafcanco – has assumed TLGI's obligations under the contingency fee agreement with claimant's counsel. Alderwoods will now pay for all "expenses incurred with respect to the NAFTA proceeding, including experts' fees." (U.S. App. at 1862).

- Alderwoods – and not Nafcanco – has assumed TLGI's obligations under the cooperation agreement with Raymond Loewen. As part of this agreement, Alderwoods will cooperate with Mr. Loewen in their mutual pursuit of their claims and will reimburse Mr. Loewen for any "legal fees, costs and expenses . . . in excess of his recovery from the NAFTA claim." (U.S. App. at 1867-68).

The last two facts, in particular, expose the fiction that Nafcanco is the entity prosecuting the NAFTA claims. First, even though Nafcanco has been "irrevocably delegate[d] . . . all powers and responsibilities . . . in respect of the pursuit of the NAFTA claims," including the

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winding up. NSULCs are often set up by U.S. companies for tax purposes as "flow-through" entities. Thus, Nafcanco has been organized in such a manner as to provide Alderwoods with the most favorable tax treatment for any proceeds it recovers on TLGI's Article 1116 claim. See Thomas W. Nelson, Proposed Check-the-Box Regulations and Use of Hybrids in Cross-Border Tax Planning, 9 Int'l Law Practicum 38, 42 (1996). This further demonstrates that the proceeds of any award will ultimately flow to Alderwoods.

authority to "employ[] counsel" (U.S. App. at 1826), it has not assumed TLGI's contingency fee agreement with counsel. Thus, counsel is now employed by Alderwoods, not Nafcanco, and Alderwoods is obligated to pay for all litigation expenses as well as the agreed-upon contingency fee. Moreover, the contingency fee is based upon a fixed percentage of the combined recoveries on the Article 1116 and 1117 claims, not merely any proceeds that Alderwoods might expect to receive from the 1117 claim. See U.S. App. at 1862. This fact further suggests that any proceeds recovered by Nafcanco on the 1116 claim will ultimately be funneled to Alderwoods and pooled with any 1117 proceeds.

Second, while Nafcanco is ostensibly in charge of the litigation, Alderwoods has now assumed TLGI's joint defense agreement with Raymond Loewen. See U.S. App. at 1839, 1867-68. In this agreement, TLGI and Mr. Loewen expressly agreed "to cooperate with each other to achieve and maximize the overall recovery in the pending NAFTA action against the United States." U.S. App. at 1867. Such cooperation in litigation strategy and effort is meaningless unless it is between the parties actually directing and controlling the litigation. Yet, Nafcanco is not a party to this agreement. Instead, Alderwoods has now undertaken to cooperate with Mr. Loewen, thus revealing that it is the real decision maker. Furthermore, as part of this agreement, Alderwoods and Mr. Loewen will "submit the question of how to apportion any recovery obtained on the NAFTA claims to binding arbitration." U.S. App. at 1868. This agreement again suggests that all of the proceeds on the Article 1116 and 1117 claims will ultimately be pooled together for Alderwoods' benefit. Thus, Alderwoods now not only controls the prosecution of both of the NAFTA claims, but expects to receive the full benefit of any recovery on them.

Even Canadian law (the law under which Nafcanco is organized) would not recognize Nafcanco as independent from its U.S. parent, Alderwoods. See Declaration of Gerard La Forest, (Tab A hereto), at ¶¶34-35. The Supreme Court of Canada has long recognized that "the business of one company can embrace the apparent or nominal business of another company where the conditions are such that it can be said that the second company is in fact the puppet of the first." Aluminum Company of Canada Ltd. v. Toronto (City), [1944] S.C.R. 267, 271; see also Palmolive Manufacturing Co. v. Canada, [1933] S.C.R. 131, 140 ("While the two companies are separate legal entities, yet in fact, and for all practical purposes, they are merged . . . .").

In particular, in assessing the true nationality of a subordinate company such as Nafcanco, the Canadian Supreme Court has approved of the English rule established in Daimler Motors v. Continental Tyre and Rubber Co. (Great Britain), [1916], 2 A.C. 307. See Palmolive Manufacturing Co. v. Canada, [1933] S.C.R. 131 (citing Daimler as a basis for holding that an Ontario company was "for all practical purposes" part of a federal company). In Daimler the House of Lords struck out a war-time action by a U.K. subsidiary of a German company, partly on the basis that the U.K. subsidiary was, despite its incorporation in the U.K., an "enemy" company because it was under the *de facto* control of German agents.

Nafcanco is as much a United States entity as Daimler's U.K. subsidiary was German. As detailed above, Nafcanco is so completely dominated and controlled by Alderwoods that it would not be considered an independent corporate entity by a Canadian court. Neither should it be treated any differently by an international tribunal. See Sohn & Baxter, Harvard Draft Convention, art. 21, para. 3 (d) notes ("A juristic person . . . cannot be considered in isolation from the law which breathes life into it.").

In sum, Loewen's legal sleight of hand cannot shield it from the consequences of its voluntary decision to change its nationality. TLGI's NAFTA claims inure to the benefit of Alderwoods alone and Alderwoods exercises total control over their prosecution. Accordingly, the claims are now (at the very least) beneficially owned by a U.S. national and must be dismissed.

III. TLGI'S ARTICLE 1117 CLAIM SHOULD BE DISMISSED BECAUSE TLGI NO LONGER "OWNS OR CONTROLS" LGII

NAFTA Article 1117 allows "[a]n investor of a Party" to make a claim "on behalf of an enterprise of another Party . . . that the investor owns or controls directly or indirectly" for damages suffered by the investment enterprise. TLGI has brought such a claim against the United States on behalf of its former subsidiary, LGII. However, as a result of the reorganization, TLGI no longer "owns or controls" that enterprise. Indeed, it has no connection at all to Alderwoods or the rest of the Alderwoods Group.[46] Therefore, TLGI cannot maintain a claim on behalf of LGII.

As the United States explained during the jurisdictional phase of this proceeding, Article 1117 makes clear the intention of the NAFTA Parties that ownership or control of an investment enterprise must be ongoing in order for an investor to maintain a claim on behalf of that enterprise.[47] Without such ongoing ownership or control, a claimant has no authority to speak on

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[46] See, e.g., Disclosure Statement at 75-76 (U.S. App. at 1455-56) ("Immediately following the consummation of the Restructuring Transactions, TLGI will have . . . no relationship to Reorganized LGII or any of its subsidiaries other than as a result of the transactions relating to the NAFTA Claims.").

[47] See U.S. Jurisdictional Mem. at 91-92; U.S. Response on Jurisdiction at 92-94; see also NAFTA Article 1117 (allowing investors to make claims on behalf of an enterprise that "the investor owns or controls directly or indirectly"); Article 1135(2) (directing payment, for Article

behalf of the enterprise (e.g., for purposes of settlement of the claim, or otherwise in the course of the proceedings), to consult with the enterprise, or obtain documents or other information from the enterprise. Indeed, it would be nothing short of absurd to allow an investor to advance an international claim on behalf of an enterprise owned or controlled by someone else. As Chapter Eleven makes clear, the NAFTA Parties contemplated claims on behalf of investments only by those investors who maintained such authority throughout the entire proceedings. Thus, by voluntarily surrendering its ownership of LGII/Alderwoods, TLGI has also surrendered its right to assert a claim on that enterprise's behalf.[48]

Given that Alderwoods is now the beneficial owner of the claim, it is clear that this claim must be dismissed. Article 1117, paragraph 4, explicitly prohibits an investment from claiming against its own State. Permitting this Article 1117 claim to proceed would fly in the face of that prohibition, even if Nafcanco were somehow considered to be the real claimant in interest. Nafcanco is a wholly-owned subsidiary of Alderwoods. It, too, is an "investment" enterprise, albeit an investment in Canada by a U.S. "investor." Thus, allowing Nafcanco to maintain a claim on behalf of LGII would turn Article 1117 on its head by allowing a foreign investment to bring a claim on behalf of a domestic investor.

1117 claims, to the enterprise); Article 1136 (providing for enforcement of any award under Article 1117 only by a disputing party, not by an investment).

[48]Indeed, TLGI's relinquishment of LGII/Alderwoods further reinforces the fact that Raymond Loewen lacks standing to claim on behalf of that enterprise under Article 1117. While Mr. Loewen previously had no direct or indirect control of LGII before the reorganization, this is even more so now that TLGI – the entity through which Mr. Loewen, as a shareholder and former officer, purported to have some measure of control over LGII – has completely severed its connection to the enterprise. Whatever Mr. Loewen's relationship to TLGI may be, there can be no question that, after the reorganization, Mr. Loewen has no connection whatsoever to LGII/Alderwoods and, therefore, has no standing to assert claims on behalf of that enterprise.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the United States' previous submissions, the claims of TLGI should be dismissed in their entirety.

Respectfully submitted,

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