

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

**REPLY OF THE UNITED STATES OF AMERICA TO THE
COUNTER-MEMORIAL OF THE LOEWEN GROUP, INC. ON
MATTERS OF JURISDICTION AND COMPETENCE**

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INTRODUCTION

In its Memorial, the United States demonstrated that the claims of The Loewen Group, Inc. ("TLGI" or "Loewen") against the United States in this arbitration are now owned by a United States national and, therefore, must be dismissed. The United States showed that TLGI is now an empty shell, a moribund corporation that has transferred away its ownership interest in the NAFTA claims along with all other assets of any value. The United States showed further that Nafcanco, the nominally-Canadian entity to which TLGI transferred its ownership of the NAFTA claims, is nothing more than the alter ego of the Alderwoods Group, Inc. ("Alderwoods"), a United States corporation that is now the parent of the entire Loewen Group. Given these facts, Alderwoods – which, in truth, controls and directs the prosecution of the NAFTA claims for its own benefit – must be regarded as the owner of the NAFTA claims as a matter of international law. Because NAFTA Chapter Eleven, consistent with rules of international law incorporated in the agreement, bars claims that are owned by nationals of the respondent State at any time before the issuance of the final award, these NAFTA claims must now be dismissed.

Despite its length and vehement rhetoric, Loewen's Counter-Memorial fails either to disprove the facts as demonstrated in the United States' Memorial or to overcome the law requiring the dismissal of TLGI's claims. Indeed, Loewen's factual rebuttal is virtually non-existent, effectively conceding the salient facts that establish Alderwoods as the true owner of the NAFTA claims. Loewen's discussion of the law, while lengthy, is ultimately misinformed and fails to refute that the requirement of continuous nationality is a rule of international law, fully applicable to NAFTA Chapter Eleven proceedings, that requires dismissal of claims that are, as here, owned by nationals of the respondent State before the issuance of a final award.

In Section I of this Reply, the United States confirms that the relevant facts are precisely as stated in the Memorial, facts which are undisputed by Loewen. In particular, the United States confirms that: (1) TLGI is indisputably moribund and owns no meaningful assets, and (2) Nafcanco is indisputably dominated and controlled by the Alderwoods Group, Inc.

In Section II, the United States responds to Loewen's various challenges to the continuous nationality rule and its role in NAFTA Chapter Eleven cases. As shown below, Loewen's challenges are unavailing for several reasons. *First*, by operation of its terms, NAFTA Chapter Eleven requires continuous nationality through the date of the final award. As Loewen concedes, NAFTA Chapter Eleven expressly incorporates rules of international law as the rules of decision in Chapter Eleven cases, subject only to an express derogation from those rules in the terms of the agreement. Contrary to Loewen's tortured reading of the agreement, however, nowhere in the text of the NAFTA is there any such derogation from the continuous nationality rule.

Second, contrary to Loewen's claim, the continuous nationality rule is an established rule of customary international law, fully applicable to Chapter Eleven arbitrations, that requires claims to be owned by nationals of States other than the respondent State through the date of the final award. Although Loewen asserts that the status of the continuous nationality rule as a rule of international law is "unclear," Loewen's assertion is based on a fundamental misunderstanding of both the relevant international authorities and the proper sources of the governing law that this Tribunal is bound to apply. Similarly, Loewen's claim that the rule does not require proper nationality after the claim is first presented finds no support in the *opinio juris*. As the United States explains below, all evidence of State practice – which defines the content of customary international law – supports a nationality requirement through to the date of the final award.

Third, the distinction that Loewen seeks to draw between rules of customary international law derived in cases of diplomatic protection and the "customary international law of investment" has no basis in fact. To the contrary, it is well-recognized that international law rules derived in the context of diplomatic espousal – including the continuous nationality rule – apply with equal strength in cases brought directly by individuals in investment agreements, absent an express derogation in the terms of the agreement. Although Loewen (and its expert Sir Robert Jennings) contend that the mere creation of procedural rights for individuals to bring direct claims against States somehow modified the substance of the applicable customary international law rules, their contention is flatly contradicted by the history of international claims law and State practice with respect to the protection of foreign investment.

Fourth, Loewen's extensive reliance on the ICSID Convention and existing bilateral investment treaties is sorely misplaced, as none of these treaties has any application to this (or any other) dispute under NAFTA Chapter Eleven. Nor has any alleged "global network" of investment treaties created a distinct "customary international law of investment" that can help Loewen here. Moreover, contrary to the apparent assumption of Sir Robert Jennings, this arbitration is not taking place under the ICSID Convention or the ICSID arbitration rules. Indeed, because neither Canada nor Mexico is a signatory to the ICSID Convention, no Chapter Eleven case can possibly proceed under the ICSID Convention. This Tribunal should decline Loewen's invitation to derive the intent of the NAFTA Parties with respect to the continuous nationality rule from a Convention that two of the three NAFTA Parties have never accepted.

Finally, Loewen cannot seek refuge from the continuous nationality rule in NAFTA Article 1103, the "most favored nation" provision of Chapter Eleven. Contrary to Loewen's

misconstruction of it, Article 1103 does not address the rules that govern arbitrations under NAFTA Chapter Eleven, but instead concerns only the treatment to be accorded by one NAFTA Party to investments of another NAFTA Party.

In Section III of this Reply, the United States confirms that, as a matter of both undisputed fact and settled international law, TLGI's NAFTA claims are now owned by a United States corporation and, as a result, can no longer be maintained against the United States. As already shown, and as confirmed below, TLGI's purported retention of "bare legal title" to the NAFTA claims is meaningless under international law, which looks to beneficial rather than nominal ownership for purposes of nationality. Moreover, although TLGI transferred the NAFTA claims to Nafcanco to create the illusion that the claims are still Canadian-owned, Nafcanco is in fact nothing more than the alter ego of Alderwoods. As a result, international law regards Alderwoods, not Nafcanco or TLGI, as the true owner of the NAFTA claims.

Loewen's efforts to exempt itself from the operation of the continuous nationality rule are unavailing. Although Loewen contends that its decision to change nationalities – which was, by Loewen's own account, a calculated business decision designed to maximize the ongoing value of the company with full regard for the possibility of losing the NAFTA claims – was somehow "involuntary," this contention is utterly baseless. As the United States explains below, and as bankruptcy expert J. Ronald Trost confirms in his declaration accompanying this Reply, Loewen's claim to have lacked freewill in the decision is fully belied by the laws governing the company's reorganization proceedings as well as the factual record of those proceedings.

Loewen's appeal to equitable considerations fares no better. Indeed, Loewen's reliance on such considerations ignores the fact that the continuous nationality rule is not a matter of

equitable discretion at all, but is instead a rule of international law requiring dismissal of claims that are owned by nationals of the respondent State. But even if a balance of equities were appropriate, that balance would clearly favor dismissal of TLGI's claims. Although Loewen and its experts reach a different conclusion, their consideration of the equities is based on factually incorrect assumptions – fed to Loewen's experts by Loewen itself – as well as an unduly myopic view of the equities at stake. As the United States demonstrates below, it would not only be inequitable but a violation of international law if this Tribunal were to credit Loewen's corporate shell-game, concocted expressly for the purpose of avoiding a rule of international law, and to order a sovereign State to pay one of its own nationals for an alleged violation of NAFTA Chapter Eleven.

Lastly, in Section IV of this Reply, the United States confirms that TLGI's claim under NAFTA Article 1117, even if it could somehow survive the continuous nationality rule, must still be dismissed because TLGI no longer owns or controls the corporate enterprise (Alderwoods) on whose behalf that claim was brought.

ARGUMENT

I. RHETORIC ASIDE, LOEWEN DOES NOT GENUINELY DISPUTE THE FACTS ESTABLISHING THAT THE NAFTA CLAIMS ARE NOW OWNED BY A UNITED STATES NATIONAL

Loewen offers scores of pages of argument, multiple diagrams, and not infrequent insults to suggest that the United States has somehow "reinvented the facts" concerning the changed nationality of the ownership of the NAFTA claims. (Counter-Mem. at 50-65). Yet, when one looks beyond the rhetoric of Loewen's submission, one can readily see that the central facts underlying the United States' argument are undisputed and that the NAFTA claims are now owned by a United States, rather than Canadian, national.

A. TLGI Is Indisputably Moribund And Owns No Meaningful Assets

Although Loewen insists at some length that TLGI is a "valid and existing Canadian corporation" that "continues to own the NAFTA claims" (Counter-Mem. at 57-62), nowhere in its submission does Loewen controvert the basic facts demonstrating precisely the opposite. In particular, Loewen does not – and cannot – dispute that: (1) TLGI has no directors, officers, or employees, (2) TLGI has no assets of any value, having transferred away all such assets (including any right to proceeds of the NAFTA claims and any other rights and responsibilities in respect of the claims), and (3) TLGI is otherwise not in compliance with the very law under which it purports to be constituted. As Loewen's own expert acknowledges, "[t]here is no dispute that TLGI currently is not in compliance with the [B.C.] *Company Act*" Expert Report of the Honourable Peter deCarteret Cory, Q.C. ("Cory Report") at ¶ 57.¹ In light of this

¹Loewen, in its Counter-Memorial, curiously refers to these conceded violations of the *Company Act* as "perceived" deficiencies in form that are "supposedly" identified by the United
(continued...)

acknowledgment, Loewen cannot be heard to argue that TLGI is properly "constituted or organized" under Canadian law, as NAFTA Chapter Eleven requires. See NAFTA art. 1139.

The entirety of Loewen's argument to the contrary rests on the fact that, as a purely administrative matter, Loewen remains for the moment on the B.C. corporate registry and that, after the company's official dissolution, a court might still restore TLGI to the corporate register *if* the company were ever to remedy its non-compliance with the Company Act. (Counter-Mem. at 58-60; Cory Report at ¶¶ 55-59). Even if technically correct, however, Loewen's argument reveals an even more fundamental flaw, which former Justice La Forest identifies succinctly in his Reply Statement:

while [Loewen] express[es] views on what could be done to prevent the dissolution of TLGI, . . . [it offers] nothing to suggest that anything will in fact be done. Indeed, while TLGI continues to exist in the limited sense [of remaining on the corporate register], it appears to be just a matter of time before its imminent demise. There is no evidence that any other party intends to, or indeed can, take the necessary steps to avoid TGLI's dissolution or revive the company if it is dissolved.

Reply Statement of Gérard La Forest, Q.C. ("La Forest Reply") ¶ 7 (Tab A hereto).

Moreover, even if TLGI could be said to still be properly "constituted or organized" under Canadian law by sole virtue of the bureaucratic inaction of the B.C. registrar, there is no genuine dispute that TLGI no longer owns the NAFTA claims. Loewen agrees, as it must, that TLGI transferred away all assets of value, including any rights to proceeds of the NAFTA claims and any rights or responsibilities with respect to the prosecution of those claims or agreements with counsel. As explained in greater detail infra, TLGI's transfer of all such rights and responsibilities other than "bare legal title" (which is meaningless in the absence of these other

¹(...continued)
States. (Counter-Mem. at 59).

rights) resulted in the loss of TLGI's ownership of the claims as a matter of international law. See infra at 57-63.

B. Nafcanco Is Indisputably Not Independent Of Alderwoods

Loewen contends that the Tribunal cannot pierce the corporate veil between Nafcanco and Alderwoods because, first, Nafcanco is not sufficiently dominated by Alderwoods and, second, even if it were so dominated, equitable considerations militate against lifting the veil in this instance. The United States demonstrates infra that Loewen's second argument is wholly unfounded, not only because Loewen misconstrues the equities in this case, but because equitable considerations are not relevant to the question of veil-piercing here. See infra at 65, 72-80.

For present purposes, however, short work can be made of Loewen's factual challenge to the United States' showing of Nafcanco's lack of a genuine independence from Alderwoods. Indeed, Loewen's own expert all but concedes this lack of independence, relying instead on equitable considerations that are both factually inaccurate and immaterial to the question. (Cory Report ¶¶ 79-91). Loewen's own factual rebuttal in this respect fares no better, consisting entirely of the alleged "differences among the two companies' directors and purposes" (Counter-Mem. at 63), and the "special duties" that Nafcanco owes to TLGI by virtue of the delegation and power of attorney. Id. These two cursory allegations, however, are obvious makeweights.

First, the alleged "differences among the two companies' directors and purposes" are meaningless. As the United States has already shown and Loewen has not disputed, Nafcanco's President is also the President and CEO of Alderwoods, while every other director and officer of Nafcanco is an employee of Alderwoods who lists Alderwoods' executive offices as his or her registered address. (Mem. at 31). In light of these facts, it is difficult to discern what meaningful

"differences" Loewen intends to signify.

Second, whether Nafcanco has a "special purpose" as "attorney" for TLGI is beside the point. Loewen itself accepts that Nafcanco, even if TLGI's "attorney," is only independent of Alderwoods "[u]nless a Canadian court were to pierce the corporate veil of Nafcanco" (Cory Report ¶ 82, cited at Counter-Mem. 63). This latter caveat is, of course, the crux of the question, which is not answered by the *non sequitur* of Nafcanco's alleged "special purpose." Instead, the question is answered by the multitude of facts already identified by the United States – and un rebutted by Loewen – exposing the fiction of Nafcanco's alleged independence from Alderwoods. (Mem. at 30-32). Indeed, other than the mere fact of Nafcanco's incorporation as a separate entity, Loewen fails to identify a single fact even suggesting (let alone proving) any independence of the two entities whatsoever.

II. THE CONTINUOUS NATIONALITY RULE IS FULLY APPLICABLE TO THIS PROCEEDING AND REQUIRES THAT THE NAFTA CLAIMS BE CONTINUOUSLY OWNED BY A NON-U.S. NATIONAL THROUGH THE DATE OF THE FINAL AWARD

Loewen does not contest (nor could it) that the NAFTA, by its express terms, incorporates rules of international law to supply the rules of decision in Chapter Eleven disputes. See NAFTA art. 1131(1) ("A Tribunal . . . shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."). At the same time, Loewen argues that *this particular* rule of international law (i.e., that of continuous nationality) was selectively and conveniently excluded from NAFTA Chapter Eleven by the Agreement's other express terms. As the United States has already shown, however, and as we confirm below, Chapter Eleven contains no such express terms that can fairly be construed to derogate from the

customary international law requirement of continuous nationality through the date of the award.

Alternatively, Loewen contends that, even if NAFTA Chapter Eleven does not derogate from international law in this respect (and it does not), it is nevertheless "unclear" whether there ever was a "rule" of continuous nationality in international law such that the rule could govern this dispute. (Counter-Mem. at 39-43). According to Loewen, the principle of continuous nationality is merely a "discretionary practice" of States rather than a rule of international law to be applied through Article 1131(1) and, moreover, that the principle is limited only to cases of diplomatic espousal. These arguments, too, are meritless.

A. The Continuous Nationality Rule Applies To This Arbitration By Operation Of The Express Terms Of NAFTA Chapter Eleven

As the United States has demonstrated, customary international law requires that a claimant maintain a nationality other than that of the respondent State from the date of injury (the *dies a quo*) through the date of the award (the *dies ad quem*). NAFTA Chapter Eleven was drafted against this legal background and explicitly incorporates "applicable rules of international law" as part of the Agreement. (NAFTA art. 1131(1); Decision on Jurisdiction ¶ 50). This Tribunal has already recognized that "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 intent to do so." (Decision on Jurisdiction ¶ 73). Therefore, in the absence of an express derogation, the rule of continuous nationality, like other rules of international law, applies to NAFTA Chapter Eleven claims.²

²In Feldman v. Mexico, 40 I.L.M. 615, 619-20 (2001), the Tribunal did not rely on the text of NAFTA Chapter Eleven to the exclusion of customary international law. After reviewing the text, the Tribunal found that NAFTA "concur[red] with the general principles of international (continued...)

Loewen's response effectively turns this anti-derogation presumption on its head. Unless a customary international law rule is expressly reiterated in the text of the NAFTA, Loewen considers it to be irrelevant. As Loewen posits, "[h]ad 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." (Counter-Mem. at 9-10). This argument, however, has it precisely backwards. A customary international law rule, which supplies the rule of decision by virtue of NAFTA Article 1131(1) unless overridden by an explicit, contrary provision of the Agreement, need not be further codified in the NAFTA in order to apply to a Chapter Eleven claim.³

In its opening Memorial, the United States identified several international agreements containing provisions that expressly modify the traditional formulation of the continuous nationality rule. (Mem. at 18-20). Those agreements contain general provisions which, like Articles 1116 and 1117, address the types of claims that may be submitted to arbitration. However, they also contain a supplemental provision which defines the relevant period for nationality. For example, Article II of the Claims Settlement Declaration between the United States and Iran under the Algiers Accords specifies which claims may be presented to the

²(...continued)
law." Id. ¶34.

³Because NAFTA Chapter Eleven expressly incorporates rules of international law, the many ICSID cases on which Loewen relies are inapposite to this proceeding. For example, in the case of Tradex Hellas S.A. (Greece) v. Republic of Albania, ICSID Case No. ARB/94/2 (1999), on which Loewen relies at page 9 of its Counter-Memorial, the issue in dispute was whether domestic Albanian legislation contained a sufficient consent to arbitration under the Convention. No question was presented concerning the applicability of customary international law, as the legislation in question did not incorporate international law as the rule of decision.

International Arbitral Tribunal. But Article VII defines "claims of nationals" to mean "claims 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" The latter, which is a clear statement in derogation of the customary international law rule, is nowhere to be found in the NAFTA.

Loewen attempts to cast doubt on the continuous nationality rule by citing to a provision of the ICSID Convention that similarly modifies the rule of continuous nationality for purposes of the ICSID's jurisdiction, and to other investment agreements that provide the option of arbitration under the Convention. (Counter-Mem. at 13-26). Rather than support Loewen's contention that the continuous nationality rule no longer exists, however, the ICSID Convention only reinforces the rule's continued vitality. If the rule no longer had any force, there would be no need for the ICSID Convention to contain such an express provision. The NAFTA's silence thus becomes all the more conspicuous by comparison.

The ICSID Convention contains a provision similar to Articles 1116 and 1117, which sets forth the type of claims that may be submitted to the Centre for arbitration:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State.

ICSID Convention art. 25(1). Like the Iran Claims Settlement Declaration, however, the ICSID Convention also contains an additional provision that is wholly lacking in the NAFTA:

"National of another Contracting State" means . . . 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 Convention art. 25(2)(b). To borrow Loewen's logic, had the Parties to the NAFTA desired to derogate from the continuous nationality rule in such a manner, they certainly could have drafted a definitional provision similar to ICSID Article 25(2)(b). Yet they chose not to do so.

Similarly, the differences between the NAFTA and the bilateral investment treaties ("BITs") relied upon by Loewen are more revealing than their purported similarities. Like the NAFTA, the U.S. BITs generally provide that, when there is a "dispute between a Party and a national or company of the other Party arising out of or relating to . . . an alleged breach of any right conferred, created or recognized by [the BIT] with respect to" an investment by the concerned company in the respondent Party, the concerned investor "may submit" a claim for arbitration. The BITs, however, generally contain an additional provision, which states:

For purposes of Article 25(2)(b) of the ICSID Convention and this Article, 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, shall be treated as a company of the other Party.

Model United States Bilateral Investment Treaty, 1994 prototype, art. IX(8). Notably, no such similar provision is included in the NAFTA – and for good reason. This BIT provision (in conjunction with the BIT's definition of "covered investment") allows "an investment of a national or company of a Party in the territory of the other Party" to bring a claim in its own name against the host State. *Id.*, art. I(e).⁴ Such BITs thus *derogate* from the continuous nationality

⁴See also Letter of Submittal from Warren Christopher, U.S. Secretary of State, to William J. Clinton, President of the United States, dated June 22, 1995 at XII (U.S.-Georgia BIT) ("This ensures that a claim may be brought by an investor's subsidiary in the host country.").

rule by allowing a claimant to be a national of the respondent State. NAFTA, by significant contrast, explicitly prohibits an investment from bringing a claim itself, thus *conforming* to the continuous nationality rule. See NAFTA art. 1117(4).

In the absence of a specific NAFTA provision defining the relevant time for assessing continuous nationality, Loewen spends considerable time deconstructing the text of Chapter Eleven. The great lengths to which Loewen must go to parse out a purported requirement of continuous nationality that stops at the time of the submission shows only that the NAFTA lacks any clear statement in derogation of the customary international law rule. Indeed, after ten pages of tortured textual exegesis and structural analysis, the most that Loewen can say is that "Articles 1116 and 1117 speak *only* to requirements which must be met at the time the claim is submitted for arbitration." (Counter-Mem. at 7) (emphasis in original). Thus, as Loewen ultimately must admit, NAFTA Articles 1116 and 1117 are silent as to nationality both before and after a claim is submitted.

Loewen's textual argument relies primarily on what it deems to be "the purposeful use of mixed verb tenses" in Articles 1116 and 1117. (Counter-Mem. at 6). Loewen's emphasis on verb tenses makes too much of these provisions. Articles 1116 and 1117 define the types of claims that an investor can present to a NAFTA tribunal. As Loewen's own expert, Sir Robert Jennings explains, Articles 1116 and 1117 are "concerned with the question of who may become a party to an arbitration." (Fifth Jennings Op. at 1). Thus, by necessity, Articles 1116 and 1117 begin with the present tense phrase "an investor of a Party may submit to arbitration" Similarly, it is unremarkable that the subsequent terms "has breached" and "has incurred losses" are in the past tense. An investor must have suffered an injury at the hands of the respondent

State for a claim to have accrued.

Loewen's proffered reading of Articles 1116 and 1117 cannot withstand scrutiny. Loewen contends that a close reading of these single-sentence provisions yields no less than five separate "standing requirements." These five "requirements," in toto, purportedly require a claimant to maintain its nationality from the time of the injury up to the time of submission, but no longer. (Counter-Mem. at 5). Loewen thus reads Articles 1116 and 1117 as incorporating a continuous nationality rule where the *dies a quo* is the time of injury and the *dies ad quem* is the time of submission.

This modified continuous nationality rule, however, is not found in the text of Articles 1116 and 1117. For example, while a *dies a quo* of time of injury or breach can be derived from other provisions of NAFTA Chapter Eleven, neither Articles 1116 nor 1117 speaks to the nationality of a claimant at the time of injury or at any time before submission. As Loewen makes a point of noting, Article 1117 "uses the present tense to provide that an investor (of another Party) 'may submit' a claim" (Counter-Mem at 6). Loewen must therefore read words into the text of Articles 1116 and 1117 to reach its desired result.

Loewen's structural argument fares no better. Loewen contends that Chapter Eleven consistently uses the term "investor of a Party" in Articles 1116 and 1117 and in provisions concerning pre-submission events, but uses the term "disputing investor" in provisions "that deal with post-submission events." (Counter Mem at 7-8). This distinction is relevant, Loewen suggests, because the term "investor of a Party" admittedly "contains a nationality element," whereas the term "disputing investor" allegedly does not. Thus, Loewen argues, Chapter Eleven is concerned only with nationality up to the time of submission. (Counter-Mem. at 7-8).

Loewen's argument based on this purported distinction between post- and pre-submission provisions is simply wrong. Article 1119, which requires a putative claimant to provide the respondent State with a notice of its intent to submit a claim, uses the term "disputing investor." Article 1119's reference to a "disputing investor" is necessarily "pre-submission" as, by definition, there can be no claim submitted at the time notice of *intent* to submit is given. Thus, there is no meaningful or principled distinction between pre- and post-submission events based on the use of the term "disputing investor" in Chapter Eleven.

Furthermore, the fact that several provisions concerned with post-submission events, such as the enforcement provisions of 1136, use the term "disputing investor" rather than the term "investor of a party" does not mean that "nationality and control are to be evaluated as of the making of the claim" and not at any point thereafter. (Counter-Mem. at 7). Loewen emphasizes that Article 1139 defines a "disputing investor" as "an investor that *makes a claim under Section B.*" But if, as Loewen argues, the drafters of the NAFTA intended the term "disputing investor" to indicate that the nationality requirements of Articles 1116 and 1117 do not need to be maintained after a claimant submits its claim, the definition of "disputing investor" would have been "an investor that *made a claim*" or "has submitted a claim" under Articles 1116 or 1117.

Loewen's reliance on the decision of the NAFTA Chapter Eleven tribunal in the case of Feldman v. United Mexican States, 40 I.L.M. 615 (Interim Decision on Preliminary Jurisdictional Issues) (2001), is similarly misplaced. (See Counter-Mem. at 8-9). The Feldman tribunal was asked to decide the point in time at which the three-year limitation period contained in Article 1117(2) is considered to be interrupted – *i.e.*, whether the running of the limitations period is stopped by the notice of intent to submit a claim to arbitration or by the submission of

the notice of arbitration. The tribunal, therefore, had to interpret the use of the phrase "make a claim" in the context of Article 1117's limitations period. It did not address the meaning of that phrase in the definition of "disputing investor" or in any other NAFTA provision. While Loewen quotes selectively from the Feldman tribunal as interpreting the phrase "making a claim" to "denote the definitive activation of the arbitration procedure," the full quote is more revealing:

[t]he Tribunal is of the opinion that Article 1117 uses the expression 'making a claim' *in a general rather than time-related or time-oriented meaning*. 'Making a claim' is used to denote the definitive activation of the arbitration procedure rather than to localize the commencement of arbitration in terms of time."

Feldman ¶ 44 (emphasis added). Thus, Feldman does not support Loewen's position that the term "disputing investor" freezes the nationality inquiry at the time a claim is submitted to arbitration. Rather, the definition of a "disputing investor" as an "investor that makes a claim" merely denotes an investor that is, in a general sense, participating in the NAFTA Chapter Eleven arbitration process.

Remarkably, despite ten pages of detailed textual analysis, Loewen completely ignores Article 1117(4). This provision states clearly that "an investment may not make a claim under this Section." NAFTA Chapter Eleven, unlike the ICSID Convention or BITs on which Loewen so heavily relies, thus contains an express provision incorporating the requirement that a claimant have a nationality other than that of the respondent State. There is nothing to suggest that this fundamental principle was meant to apply only up to the time of submission.⁵ Indeed, as the

⁵Notably, Article 1117(4) does not state that an investment may not "submit" a claim to arbitration, but rather that an investment may not "make" a claim. Thus, on its face, the prohibition of Article 1117(4) arguably extends beyond the time of submission. Cf. Feldman, 40 I.L.M. at 621 (noting that it "is not clear whether Article 1117(3) does distinguish between 'making a claim' and 'submitting a claim to arbitration'").

United States pointed out in its opening Memorial (Mem. at 16), the dispute resolution mechanisms of NAFTA Chapter Eleven are specifically entitled "Settlement of Disputes between a Party and an Investor of *Another* Party." (NAFTA Chapter Eleven, Section B) (emphasis added). The entire framework for NAFTA Chapter Eleven arbitrations thus presupposes that the claimant is not a national of the respondent State.

Loewen's critique of the United State's textual argument rests ultimately on a fundamental misunderstanding of international law. The United States does not contend that NAFTA Chapter Eleven expressly incorporates the specific requirements of the continuous nationality rule. As discussed above, it need not do so. Rather, the United States contends that, by operation of its express terms, namely those of Article 1131, the customary international law rule of continuous nationality applies – and, indeed, is reflected in Articles 1117(4) and 1135 – and no terms of the NAFTA derogate from this rule. Loewen's unnecessarily complicated analysis of Chapter Eleven cannot overcome the simple fact that NAFTA lacks any provision clearly stating that a claimant need be an "investor of another Party" only up to the time of submission.

In the end, even Loewen does not appear to believe its own argument in this respect, acknowledging that the "establishment of new entities" was "required" to "preserve the integrity of the NAFTA claims" (Counter-Mem. at 53-54). If, as Loewen contends, NAFTA Chapter Eleven were truly unconcerned with the nationality of claims after they are initially submitted to arbitration, then surely no such elaborate steps would have been "required." Loewen's actions, we respectfully submit, speak much louder than its rhetoric.

B. As A Matter Of International Law, Claims Cannot Be Owned By Nationals Of The Respondent State At Any Time Before Issuance Of The Final Award

Loewen offers not a single instance of State practice in which a claim governed by customary international law was permitted to proceed to an award despite the claim's change in nationality to that of the respondent State after its initial presentation. By contrast, in its Memorial, the United States demonstrated that State practice – as reflected in the Gribble, Chopin, Hawaiian Claims, Lederer, Benchiton, Eschauzier, Guadalupe and Barstow cases, as well as a survey conducted by the League of Nations – has consistently called for the dismissal or voluntary withdrawal of such claims. The United States further demonstrated that the majority of publicists similarly conclude that customary international law requires that a claim continuously maintain the requisite nationality from the date of injury through the date of any award. The record before this Tribunal, therefore, is quite clear: *all* of the relevant State practice of record supports a *dies ad quem* of the date of the award; *no* such State practice supports a contrary conclusion.

In an effort to obscure the clarity of the record before the Tribunal, Loewen resorts to several tactics. First, it relies on inapposite State practice – instances where there was no change in nationality after the date of presentation of the claim, and the issue before this Tribunal was not presented. Second, it relies on inapposite cases where the nationality of claims was governed not by customary international law but by the terms of special agreements derogating from such law. Third, it mischaracterizes the facts of two of the instances of State practice identified in the United States' Memorial. Finally, it cites the minority of commentators who – without considering the State practice to the contrary – opine that the rule of continuous nationality applies only through the date of presentment. As demonstrated below, Loewen's arguments are

without merit.

1. Authorities Addressing A Change In Nationality Before
Presentment Of The Claim Do Not Present The Issue That
This Tribunal Must Address

There is no support in State practice for Loewen's erroneous contention that "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." (Counter-Mem. at 43-44). In fact, Loewen identifies no case where a final award in favor of a claim's owner issued after that person became a national of the respondent State. (*Id.* at 43-50). Neither does Loewen identify clear and consistent State practice or works of commentators supporting such a result.

Instead, Loewen points to various authorities stating the rule of continuous nationality as mandating that a claim maintain the requisite nationality from the time of injury to the time of its presentation.⁶ (Counter-Mem. at 44). Such authorities, however, do not speak to the issue before this Tribunal. There is no dispute here that a change to the respondent State's nationality

⁶We note that what is meant by the date of "presentation" is not in fact clear. For example, in Benchiton, Judge Huber stated that the date of presentation is the date of the award:

It is a well-established principle of international jurisprudence that the claim must be national from the point of view of the claimant State from the date at which it arose to the date of its presentation as a claim under international law. Presentation means not only the first submission of a claim through diplomatic channels, but "the totality of acts" by which the claim is maintained on the basis of international "law." It follows that 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.

Biens Britanniques au Maroc Espagnol – Benchiton (Gr. Brit. v. Spain), 2 R.I.A.A. 615, 706 (1924) (translation from 1923-1924 I.L.R. 189).

between the date of injury and the date of presentation requires dismissal of the claim under customary international law. The issue, rather, is whether a change to the respondent State's nationality after presentation of the claim requires dismissal. As one leading commentator has observed, the awards identifying the *dies ad quem* as the date of presentation

constitute positive authority only for the fact to which they refer, namely, that if the change of nationality has occurred prior to the presentation of the claim, then the claim must be disallowed. But those awards do not constitute negative authority for a question which was not 'subjudice', namely, that if the change of nationality had taken place after presentation, but before decision, such a change would have been considered as irrelevant by the tribunal.

Eduardo Jiménez de Aréchaga, Observations Complémentaires, 51 (vol. 1) Annuaire de l'Institut de Droit Int'l 209 (1965).

Because most claims agreements provide for expeditious resolution of claims submitted to binding dispute resolution, there has been less occasion for State practice in this scenario than where the change in nationality occurs before presentment. Nonetheless, as demonstrated, all of the State practice in the context where the change in nationality occurs after presentment supports the view that a claim that acquires the nationality of the respondent State after presentment and before the award must be dismissed.

Accordingly, contrary to Loewen's assertion (Counter-Mem. at 44-45), Professor Brownlie's statement that the principle of diplomatic protection "rests primarily on the . . . nationality of the claimant state attaching . . . at the time of the alleged breach of duty and at the time when the claim is presented," I. Brownlie, Principles of Public International Law 403 (5th ed. 1998), is in no way incompatible with Professor Brownlie's equally firm view that "the majority of governments and of writers take the date of the award of judgment as the critical date." Id. at 484. Likewise unavailing for Loewen is the statement in a 1960 U.S. State

Department letter to private counsel representing a Lebanese national that, under international law, a claim's owner must be a national of the claimant State up to the date of presentation. (Counter-Mem. at 44) (quoting Letter from Assistant Legal Adviser English to Albert Dib (Dec. 21, 1960)). This is especially the case in the context of that letter, which responded to a request that the United States espouse a claim on behalf of a person who was not a U.S. national even at the time the alleged loss occurred.⁷

2. Cases Governed By Special Provisions Derogating From Customary International Law Do Not Support Loewen's Position

Neither is it relevant that a State may decide to seek recovery for an injury to a non-national by negotiating a special agreement derogating from the continuous-nationality rule. See Greenwood Third Op. ¶ 16. In such cases, the claim may proceed, not because customary international law so permits, but because the special agreement agreed to by the contracting States authorizes it to proceed independently of customary international law. State practice under such agreements cannot be viewed as rejecting the continuous nationality rule under customary

⁷The Rules regarding the Taking up of International Claims by Her Majesty's Government, on which Loewen and its expert also rely (see Counter-Mem. at 48; Fifth Jennings Op. at 7-8), are immaterial for this same reason. Those rules, issued by the Foreign and Commonwealth Office of Great Britain in July 1983, provide that the British Government will not espouse a claim “unless the claimant is a United Kingdom national and was so at the date of the injury.” 54 Brit. Y.B. Int'l L. 520 (1984). The comment to this rule states that “[i]nternational law requires that for a claim to be sustainable, the claimant must be a national of the State which is presenting the claim both at the time when the injury occurred and continuously thereafter up to the date of formal presentation of the claim. In practice, however, it has hitherto been sufficient to prove nationality at the date of the injury and of presentation of the claim” Id. Merely because the British Government will not espouse a claim not owned by a United Kingdom national on the date of the injury and the date of presentations does not mean that the British Government will continue to espouse a claim – or that a tribunal continues to have jurisdiction over the claim – where the nationality of the claim's owner changes after the date of presentation, but before the award issues.

international law – indeed, the very existence of such exceptional agreements confirms the rule.⁸

The Landreau claim cited by Loewen is a case in point. (Counter-Mem. at 40-41) (citing Landreau (Peru-U.S.), 1 R.I.A.A. 347 (1922)). Landreau first submitted his claim to the commission established under an 1892 convention, and the claim was denied on legal grounds over the dissent of the U.S. commissioner. See Landreau (U.S.-Chile Cl. Comm’n of 1892), 4 J. Moore, International Arbitrations 3571, 3584-86 (1906). The United States eventually negotiated a special agreement with Peru to *resubmit* the case to arbitration, but only with respect to two narrow issues: the effect of a certain release and "what sum if any is *equitably* due the heirs or assigns of . . . Landreau." See Protocol for Arbitration of the Landreau Claim against Peru, May 21, 1921, U.S.-Peru, art. I, reprinted in 1 R.I.A.A. 349.

Peru contended, among other things, that Landreau's claim "had accrued to him while he was still a French subject" and therefore the United States could not press his claim. Landreau, 1 R.I.A.A. at 366. The United States responded that Peru's breach of the contract at issue had not accrued until after Landreau had become a U.S. citizen but that, in any event, the question of nationality was not one that the parties had submitted for decision.⁹ The tribunal agreed with

⁸See Greenwood Third Op. ¶ 27 ("States are, of course, free to waive or vary the doctrine by treaty should they so wish. There is, however, no indication that the parties to NAFTA intended to do anything of the kind."); cf. G. Schwarzenberger, 1 International Law 594 (3d ed. 1957) ("Like any other rule of international customary law, the rule of nationality of claims may be modified or abrogated by means of treaties."); id. 601 ("*De lege ferenda*, it is possible[.] . . . on a treaty basis, to formulate legal interest more widely . . .").

⁹ See Argument on the Part of the United States, Oct. 1922, at 5, reprinted in Landreau Claim: Report of Agent on the Part of the United States (Dec. 28, 1922) ("The Protocol of May 21, 1921 . . . does not submit for investigation any question as to the nationality, native or acquired, of the deceased J. Celestin Landreau . . ."); id. at 105 ("this claim . . . was American, that is, national, both when it originated or came into being, and at the date of the instant

(continued...)

both contentions by the United States, finding: "All that the tribunal has to do is to decide the dispute in the terms of the Protocol. It may be added that although the contract of 1865 was before Célestin's naturalization in the United States, a good deal of what took place in connection with the claim was after that date." Id. at 367.

Thus, the Landreau case does not support Loewen's contentions because the disputing States had clearly agreed that the issue of compliance with the continuous nationality rule would not be before the tribunal. Nor does Loewen find support in the fact that, under similar special agreements, the United States "has in the past asserted and received payment for American claims which had passed into alien ownership." (Counter-Mem. at 43, 49) (quoting Administrative Decision V, 7 R.I.A.A. 119, 150 (1923)).

Loewen's reliance on Umpire Parker's decision in Administrative Decision V is also misplaced for this reason. (Counter-Mem. at 39-42, 45-46, 48-49). In that case, although acknowledging that "the general rule of international law is that a government in supporting claims of its citizens against a foreign government requires as a condition precedent to such presentation that the claim in its origin be a claim of a national of the presenting country," the United States argued that the specific terms of the Treaty of Berlin articulated an exception to this general rule. See Brief on Behalf of the United States on the Question of Diverse Nationality 1-2 (Germ.-U.S. Mixed Cl. Comm'n 1924). The U.S. and German commissioners disagreed on this and other questions relating to the Treaty of Berlin's requirements as to nationality, and the questions were submitted to the umpire for decision.

⁹(...continued)
Protocol and *at all times* between and *since* such epochs.") (emphasis added).

After offering views in *dicta* concerning the continuous nationality rule in customary international law, Umpire Parker found that the specific terms of the Treaty of Berlin called for application of a special, treaty-based rule. Administrative Decision No. V, 7 R.I.A.A. at 146. He determined that, for claims before the commission, jurisdiction existed if U.S. nationality attached to the claim when the loss occurred and the Treaty of Berlin became effective. See 7 R.I.A.A. at 154. He based this on what he considered to be “definite and clear” language that “clothe[d] . . . [the commission] with the jurisdiction” to determine the amount owed in satisfaction of Germany’s financial obligations, which obligations were contractually fixed at a specific point in time by the Treaty of Berlin. Id. at 146. He made clear that his opinion was based on the special provisions of the treaty at issue and not on customary international law, stating that he assumed for purposes of decision that “the rule invoked by the German Agent be conceded to exist as a rule of international practice.” Id.

In the Panevezys-Saldutiskis Railway case, the Permanent Court of International Justice considered and rejected, for the same reason, a similar attempt by Estonia to invoke Umpire Parker’s opinion in Administrative Decision No. V as representative of customary international law on continuous nationality:

The Estonian Agent both in the written pleadings and in the oral arguments has endeavored to discredit this rule of international law, if not to deny its existence. He cited a certain number of precedents, but when these precedents are examined it will be seen that they are cases where the governments concerned had agreed to waive the strict application of the rule, cases where the two governments had agreed to establish an international tribunal even if this condition as to nationality were not fulfilled.

Panevezys-Saldutiskis Railway, 1939 P.C.I.J. (ser. A/B) No. 76 (Feb. 28) (Judgment) at 16, in IV World Court Rep. 341, 357 (1943); see also id., (ser. C), No. 86, at 192-93 (reproducing

arguments of Estonia citing and quoting at length Administrative Decision No. V as reflecting state of customary international law on continuous nationality). The arguments rejected by the Permanent Court and repeated here by Loewen have not improved with age. As in Panevezys-Saldutiskis Railway, “[i]n the present case no grounds exist for holding that the Parties intended to exclude the application of the rule.” 1939 P.C.I.J. (ser. A/B) No. 76, at 16.¹⁰

Finally, relying on annotations in the Foreign Claims Settlement Commission of the United States: Decisions and Annotations, 1950-1967, Loewen asserts that the Foreign Claims Settlement Commission “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.*’” (Counter-Mem. at 46) (emphasis added by Loewen) (quoting Foreign Claims Settlement Commission 168-69, and citing id. at 268, 320). These annotations specifically identify only one case, Lustgarten v. Rumania (U.S. Foreign Cl. Settlement Comm’n) Claim No. RUM-30,575, Dec. No. RUM-434(A) (Feb. 9, 1959), reprinted in Foreign Claims Settlement Commission of the United States Tenth Semiannual Report to Congress for the Period Ending June 30, 1959 119, in which the date of filing was used as the *dies ad quem*. But, upon analysis, Lustgarten does not support Loewen's argument.

¹⁰Loewen also half-heartedly argues, based on the *dicta* at the beginning of Umpire Parker’s decision and a lone dissent in Panevezys-Saldutiskis Railway, P.C.I.J. ser. A/B, No. 76 (1939), that the continuous nationality rule is not really part of customary international law. (Counter-Mem. at 39-40). The Permanent Court of International Justice expressly found, however, that international law does require continuous nationality, see Panevezys-Saldutiskis Railway, P.C.I.J. ser. A/B, No. 76, at 16-17 (finding that Estonia “must prove” that the rule has been satisfied), as has the myriad authorities – including the League of Nations Conference for the Codification of International Law, arbitral awards and works by leading commentators – cited by the United States and, for that matter, Loewen itself. See Mem. at 13-16; see note 17 infra.

In Lustgarten, the commission vacated a proposed decision which denied a claim because before the date of settlement the “claimant ceased to be a citizen and national of the United States by . . . having a continuous residence of five years in Brazil.”¹¹ Lustgarten v. Rumania (U.S. Foreign Cl. Settlement Comm’n) Proposed Decision, Claim No. RUM-30,575, Dec. No. RUM-434, at 1 (June 12, 1958). The commission held:

In order for a claim to be compensable under Section 303(2) of the Act, in accordance with *well established principles of international law*, the property upon which the claim is based must have been owned by a national or nationals of the United States at the time of loss, and the claim which arose from such loss must have been owned by a United States national or nationals continuously thereafter until the date of settlement.

Id. at 2 (emphasis added). While noting that the claimant was a national on the date the claim was filed, the commission’s order and amended decision and final decision (unlike the proposed decision) do not evidence that the claimant ceased being a U.S. national after the date of filing; nor do they reference – much less provide any rationale for modifying – the continuous nationality rule in that case.¹² Lustgarten v. Rumania (U.S. Foreign Cl. Settlement Comm’n) Order and Amended Proposed Decision, Claim No. RUM-30,575, Dec. No. RUM-434 (Feb. 9, 1959); Lustgarten v. Rumania (U.S. Foreign Cl. Settlement Comm’n) Final Decision, Claim No.

¹¹The proposed decision in Lustgarten was consistent with a panel opinion requiring continuous nationality “until the dates of settlement.” P. L. 285 Panel Opinion No. 15 (Aug. 16, 1956).

¹²The commission had previously held that the underlying statute “was remedial legislation and ‘should be liberally construed.’” Factor v. Rumania (U.S. Foreign Cl. Settlement Comm’n) Claim No. RUM-30214, Dec. No. RUM-30 (Sept. 18, 1957), Foreign Claims Settlement Commission of the United States: Decisions and Annotations 168 (concurring op.) (quoting Siegel v. Soviet Government (U.S. Foreign Cl. Settlement Comm’n) Claim No. SOV-40017, Dec. No. SOV-230 (May 9, 1957), Foreign Claims Settlement Commission of the United States Tenth Semiannual Report to Congress for the Period Ending June 30, 1959 188).

RUM-30,575, Dec. No. RUM-434(A) (March 30, 1959). Thus, it cannot be concluded that the Lustgarten case in fact represents a departure from the customary international law requirement that the claim's owner continuously be a national of the claimant State up to the date of the award. Moreover, the Lustgarten case must be viewed in light of the commission's repeated finding that under international law the *dies ad quem* is the date of award. See Mem. at 15; see also, e.g., Bogovich v. Yugoslavia (U.S. Int'l Cl. Comm'n 1954), Foreign Claims Settlement Commission of the United States: Decisions and Annotations 13, 16 (“[T]here 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.”).

3. The Record Does Not Support Loewen's Distortion Of The State Practice Identified In The United States' Memorial

Loewen does not dispute that State practice, as manifested in the Hawaiian Claims, Lederer, Benchiton, Eschauzier, Guadalupe and Barstow cases, as well as in the survey conducted by the League of Nations, is fully consistent with a *dies ad quem* of the date of the award. It does, however, argue that the Gribble and Chopin cases support a different conclusion. Loewen's mischaracterization of the Gribble and Chopin cases cannot withstand scrutiny. Contrary to Loewen's suggestion, State practice reflected by both of these cases fully supports the United States' position.

First, Loewen misreads the relevant authority in suggesting that Gribble involved a change in nationality after "submission" of the claim, which Loewen implies means the date of presentation of the claim. (Counter-Mem. at 47-48) (citing Report of Robert S. Hale, Esq., [1873, Part II, Vol. III] U.S. Foreign Relations 14 (1874)). The Hale Report states that the commission was unanimous that the claimant in Gribble lacked standing as a British subject because he “had

filed his declaration of intention . . . 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., [1873, Part II, Vol. III] U.S. Foreign Relations 14 (1874) (emphasis added). Obviously, because the change in nationality occurred after the filing of the memorial and during the pendency of his claim, what Hale meant was that, at the time the claim had been fully briefed and submitted to the commission for decision (after the closing of evidence), the claimant was a U.S. citizen. See id. The Tribunal need not speculate as to what Hale meant, however, because the pleadings in the Gribble case conclusively establish that the change in nationality occurred *after* the filing of the claimant’s memorial.¹³ Thus, contrary to Loewen’s conclusion, Hale’s observation that the change in nationality occurred before its “submission” does not refer to the presentation of the claim to arbitration, but the submission to the tribunal for decision after the closing of arguments.

Nor does the record of proceedings in Chopin support Loewen’s suggestion, based on two

¹³See Memorial of Joseph Gribble, No. 116, reprinted in 8 British and American Mixed Claims Commission: Memorials, Briefs, Etc. (undated); Argument for the United States on Final Submission, No. 116, at 2, reprinted in id. The United States argued that the claim should be disallowed, among other reasons, on the ground that:

[S]ince the filing of his Memorial, and on the 19th September, 1872, the claimant fully completed his naturalization as a citizen of the United States, fully and finally renounced all allegiance and fidelity to the Queen of England, and stands before this Commission a full-fledged citizen of the United States. It seems impossible that Her Majesty’s Agent and Counsel can claim any standing for this man before the Commission. It is plain, that Her Majesty’s Government has neither cause for intervening nor right to intervene on his behalf, and that an award, to be paid to that Government for the benefit of this man as a British subject, would be an anomaly, indeed.

Id.

secondary sources, that certain of the claims in that case were sustained because rights had become so "vested" after the filing of the memorial that they descended to heirs irrespective of the heirs' citizenship. (Counter-Mem. at 47) (citing 3 J. Moore, International Arbitrations 2506-07 (1906) and E. Borchard, Diplomatic Protection of Citizens Abroad 665-666 & n.1 (1916)). As the United States noted in its Memorial (at 15 n.23), there was no dispute between the United States and France in that case that a change in nationality after presentation of the claim was precluded under international law: France withdrew the Chopin claim as to Eugenie Chopin because, subsequent to filing the memorial, "it appeared that said Eugenie Chopin had intermarried with a citizen of the United States" and therefore become a U.S. citizen. Motion to Dismiss Claim in Part for Want of Jurisdiction (May 24, 1883), ¶ 3 at 1, reprinted in 60 French and American Claims Commission, 1880-1884, Records of Claims (Gibson Bros., Washington, D.C., undated) (reproducing arguments of France and U.S. in Chopin case). Both States in that proceeding, therefore, accepted the date of the award as the *dies ad quem* – as did the commission as a general rule.¹⁴

There remained a dispute between France and the United States in the Chopin case as to whether, under the recently-adopted Fourteenth Amendment to the U.S. Constitution, the other claimants were U.S. citizens because they had been born in the United States, or were French

¹⁴As Loewen notes, footnote 24 (at 15) of the United States' Memorial includes a typographical error. (Counter-Mem. at 47). A citation in footnote 24 reads: "Chopin (Fr.-U.S. Mixed Cl. Comm'n of 1880), reprinted in 2 J. Moore, International Arbitration 1150 (1898) . . ." That citation should not reference Chopin; it should read: "2 J. Moore, International Arbitration 1150 (1898) . . ." As reflected in the accompanying parenthetical, which Loewen does not dispute, the citation notes generally the position of the French and American Claims Commission that the *dies ad quem* is the date of the award. The arguments of the United States and France in the Chopin case are cited in footnote 23 (at 14-15) of the Memorial.

citizens because they had been born to French parents. See 60 French and American Claims Commission, 1880-1884, Records of Claims. Neither party, however, suggested that the timing of the pleadings in the proceedings before the commission was relevant to that issue. Neither advanced the “vested rights” argument erroneously suggested by Loewen. Nor does the commission’s one-sentence award provide support for Loewen’s “vested rights” argument. Contrary to Loewen’s suggestion, the Chopin case does indeed support the date of the award as the *dies ad quem*.¹⁵

4. Loewen Misplaces Its Reliance On The Minority Of Commentators Who Would Fix The *Dies Ad Quem* Earlier Than The Date Of The Award

Finally, Loewen erroneously relies on commentators who held a minority view of the continuous nationality rule. Commentators, however, do not create international law. International tribunals may consider the "teachings of the most highly qualified publicists of the various nations" only as a "subsidiary means for the determination of rules of law." Statute of International Court of Justice, art. 38(1)(d). Academic writings may appropriately be considered for determining rules of law when they are firmly based on the practice of States – which can create international law – and are not merely a statement of personal views as to what the law might or should be.¹⁶

¹⁵Moreover, the fact that France and the United States disputed the nationality of the children of Oscar Chopin, who presented the claim, but not the nature of the continuous nationality rule, evidences that both governments agreed on the date of the award as the *dies ad quem*. See French and American Claims Commission, 1880-1884, Records of Claims.

¹⁶See North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J., 3, 38 ¶ 62 (article, in multilateral convention, proposed by International Law Commission “on an experimental basis [was] at most *de lege ferenda*, and not at all *de lege lata* or an emerging rule (continued...)

Loewen ignores the majority of international commentators who, over the past century, have agreed that, under customary international law, the date of the award is the *dies ad quem*.¹⁷ (Mem. at 13-16). These commentators include Loewen's own expert witness, Sir Robert Jennings. In his Fifth Opinion, Sir Robert stated that "there was at one time respected authority for the view of the continuity rule that the United States has in this present case espoused." (Fifth Jennings Op. at 6). However, according to the ninth edition of Oppenheim's International Law, which Sir Robert Jennings co-edited, even as recently as 1992, it could be stated "as a general principle" that the date of the award is the *dies ad quem*. 1 Oppenheim's International Law 512-13 (R. Jennings & A. Watts, eds., 9th ed. 1992). Moreover, even commentators on which Loewen relies, such as Professor John Dugard, do not reject the date of the award as the *dies ad quem* under customary international law. (Counter-Mem. at 50). Rather, they note cases in which claims were rejected because nationality changed prior to the date of presentation, and, in that context, the tribunals held that the claim must be owned by a national of the claimant State through the date of presentation. Thus, Loewen erroneously relies on the minority of

¹⁶(...continued)

of customary international law. This is clearly not the sort of foundation on which . . . [the subject article] could be said to have reflected or crystallized such a rule.”).

¹⁷See, e.g., 1 Oppenheim's International Law (R. Jennings & A. Watts eds., 9th ed. 1992) 512-13; I. Brownlie, Principles of International Law 482-83 (5th ed. 1998); M. Shaw, International Law 565 (4th ed. 1997); F.V. Garcia-Amador's Recent Codification of the Law of State Responsibility for Injuries to Aliens 82 (1974); Eduardo Jiménez de Aréchaga, Observations Complémentaires, 51 (vol. 1) Annuaire de l'Institut de Droit Int'l 208-11 (1965); L. Sohn & Baxter, Convention on the Responsibility of States for Injuries to Aliens (Draft No. 12 with Explanatory Notes, Apr. 15, 1961) (“Harvard Draft Convention”), art. 22(8) at 187; Schwarzenberger, 1 International Law at 598; E. Borchard, The Protection of Citizens Abroad and Change of Original Nationality, 43 Yale L.J. 364, 390 (1934); Cecil J.B. Hurst, Nationality of Claim, 7 Brit. Y.B. Int'l L. 163, 182 (1926).

commentators who state that the *dies ad quem* is earlier than the date of the award.

C. Notwithstanding Loewen's Effort To Create A False Distinction Between Legal Principles Derived In The Context Of Diplomatic Espousal And The "International Law Of Investment," The Continuous Nationality Rule Is Fully Applicable To NAFTA Chapter Eleven Disputes

In its Counter-Memorial, Loewen once again advances the startling suggestion that States, by the mere fact of permitting investors to assert claims under international law against them directly in arbitration, granted investors *greater* rights than States themselves have under international claims law. Loewen's assertion is that, although States remain limited by the continuous nationality rule in asserting claims based on injuries to their nationals against other States, investors are not limited by that rule or, for that matter, any other principle of international claims law. (Counter-Mem. at 33-34). The United States demonstrated in its Rejoinder that a variation of this contention concerning the local remedies rule was without merit. (Rejoinder at 91-94). Loewen's new iteration with respect to the continuous nationality rule is equally baseless, for several reasons.

First, it finds no support in the text of the NAFTA. Had the NAFTA Parties in fact intended to provide investors with rights greater than those they themselves have under international law, one would expect that intent to be clearly expressed in the text of the treaty.¹⁸ Far from supporting Loewen's suggestion that this Tribunal should ignore the requirements of international claims law, the NAFTA expressly *requires* that the issues in dispute be decided "in accordance with this Agreement *and applicable rules of international law.*" NAFTA art.

¹⁸ See, e.g., *Sambiaggio*, 10 R.I.A.A. 499, 521 (Italy-Venez. Mixed Cl. Comm'n of 1903) (if the governments intended to depart from the general principles of international law, then the "agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.").

1131(1) (emphasis added). Article 1131(1) cannot be reconciled with Loewen's suggestion that the NAFTA Parties intended to create an entirely new regime, divorced from existing rules of international law. The text of the treaty refutes, rather than supports, Loewen's contention.

Second, Loewen errs in suggesting that the continuous nationality rule does not apply in the context of direct claims by an individual against a State. For example, the Mixed Arbitral Tribunals established under the Treaty of Versailles permitted direct claims by individuals against States, as Loewen acknowledges. (Counter-Mem. at 35). As the United States noted in its Memorial (at 23-24), in the Lederer case, a British subject submitted a claim to the British-German Mixed Arbitral Tribunal. He subsequently died. Germany contended that the claim should be denied to the extent that compensation was sought for German beneficiaries under his will.¹⁹ The Mixed Arbitral Tribunal agreed, reasoning 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."²⁰ Far from supporting Loewen, State practice in the context of direct claims confirms the applicability of the continuous nationality rule.

Moreover, none of the principal projects of draft conventions providing for direct claims against States for violations of international law support Loewen's position. The Harvard Draft Convention flatly envisages, in the context of direct claims, that "[t]he right of the claimant to present or maintain a claim terminates if, at any time during the period between the original

¹⁹ 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).

²⁰ Lederer (Decision on an Application under the Provisions of Rule 40) in id. at 766, 770.

injury and the final award, the injured alien, or the holder of the beneficial interest in the claim while he holds such interest, becomes a national of the State alleged to be responsible.” See Sohn & Baxter, Harvard Draft Convention, art. 22(8) at 186-87.²¹ Rather than suggest that different rules applied to direct claims than to espoused claims, the Harvard Draft’s provisions on nationality of claims were identical for each category. Compare id., art. 22(8) at 186-87 with id., art. 23(7) at 200. Similarly, Article 7 of the O.E.C.D. Draft Convention on the Protection of Foreign Property provides an interchangeable mechanism for direct and espoused claims. See 7 I.L.M. 117, 132-33 (1968). Nothing in the approach of these draft conventions supports the view that direct claims are subject to different rules than espoused claims (or, as Loewen apparently contends, no rules at all).

Third, none of the authorities Loewen cites supports its assertion that international claims law does not apply to direct claims. For example, in SEDCO, Inc. v. NIOC, the tribunal found that the Claims Settlement Declaration expressly provided for U.S. corporations to assert claims on behalf of indirectly held foreign subsidiaries. 9 Iran-U.S. Cl. Trib. Rep. 248, 256 (1985). The tribunal’s observation that its work, “at least in the jurisdictional category of claim involved in this Case, does not involve diplomatic espousal” merely reflected its view that the express terms of the Claims Settlement Declaration controlled its decision on that issue. Id. Likewise, in Iran-United States, Case No. A/18, the point in issue was whether the express terms of the Claims

²¹The comment to Article 22(2) makes clear that Article 22 contemplates the very sort of investor-State dispute mechanism embodied in NAFTA Chapter Eleven: “Recognition is here given to the possibility that an international tribunal may be constituted in such a way that it will be open to the submission of claims by individuals. . . . There are a number of means by which a tribunal with such competence might be created – by agreement between the State of which the claimant is a national and the respondent State” Id. at 188-89.

Settlement Declaration provided for claims by dual nationals; if it did not, all parties agreed that customary international law governed the issue. 5 Iran-U.S. Cl. Trib. Rep. 251, 258 (1984). The tribunal found the text of the treaty to be ambiguous and applied "the applicable rule of international law" to decide the nationality question. *Id.* at 260. Moreover, the tribunal's approach to international law as a general matter is diametrically opposed to Loewen's view that established rules of law do not apply merely because of a difference in context.²²

Loewen's reliance on the recent work of the United Nations International Law Commission ("ILC") is equally misplaced. As a preliminary matter, the ILC does not support Loewen's attempt to find significance in the spare terms of Article 44(a) of the Draft Articles on Responsibility of State for Internationally Wrongful Acts. (Counter-Mem. at 36-37). As the commentary to the draft articles makes clear, that article was intended only to serve as a placeholder for the specific rules on nationality of claims that the ILC hopes to develop in its ongoing project on diplomatic protection.²³

As for that project, there are no ILC "draft articles on Diplomatic Protection," as Loewen erroneously posits. (Counter-Mem. at 36). The ILC has commissioned a special rapporteur to

²² See, e.g., *Oil Field of Texas, Inc. v. Iran*, 1 Iran-U.S. Cl. Trib. Rep. 347, 361 (1982) ("The controlling rules have . . . to be derived from principles of international law applicable in analogous circumstances or from general principles of law. The development of international law has always been a process of applying such established legal principles to circumstances not previously encountered.").

²³ See *Report of the International Law Commission, Fifty-Third Session* 305, U.N. Doc. No. A/56/10 (2001) (Article 44(a) "does not attempt a detailed elaboration of the nationality of claims rule or of the exceptions to it. Rather, it makes it clear that the nationality of claims rule is not only relevant to questions of jurisdiction or the admissibility of claims before judicial bodies, but is also a general condition for the invocation of responsibility in those cases where it is applicable."); *id.* at 305 n.722 ("Questions of nationality of claims will be dealt with in detail in the International Law Commission's work on diplomatic protection.").

study the issue and prepare proposals, but no articles have been adopted, even provisionally. Special Rapporteur John Dugard presented a proposal on nationality of claims to the ILC at last year's session, but his proposal was roundly criticized by members of the ILC for failing to reflect customary international law. See U.N. Int'l Law Comm'n, Report of the International Law Commission, Fifty-Third Session at 511, ¶ 171, U.N. Doc. No. A/56/10 (“[T]he Rapporteur has set himself the difficult task of challenging an established rule of customary international law. Indeed, strong support was expressed for the view that the rule of continuous nationality enjoyed the status of customary international law.”). At the conclusion of the discussion of the proposed article, Mr. Dugard observed, among other things, that in future work on the article “further consideration would have to be given to questions of the *dies a quo* and the *dies ad quem*.” Id. at 515, ¶ 184.²⁴

Finally, Loewen offers no coherent reason why application of international law on nationality of claims should depend on whether it is a State or a foreign national that asserts the claim. As Professor Greenwood observes, “[t]here is no reason of principle why the [continuous-nationality] rule here should be any different from that applicable to cases of diplomatic protection unless the parties to the relevant agreement choose to waive, or modify, that rule in

²⁴ Loewen also incorrectly attempts to enlist Borchard and Schwarzenberger in support of its view that “the principles of diplomatic protection are inapplicable by their terms” to investor-State arbitration under Chapter Eleven. (Counter-Mem. at 35-36). Borchard merely commented that disadvantages of diplomatic protection -- principally the subordination of individual claims to geopolitical concerns -- are “susceptible of remedy” by, inter alia, “affording the individual access to international tribunals *under safeguards to be worked out*.” E. Borchard, Protection of Citizens, 43 Yale L.J. 359, 390 (1934) (emphasis added). Schwarzenberger, while discussing potential treaty mechanisms for direct claims, stated that “the evidence in favour of the nationality test as the criterion-in-chief of legal interest in the affairs of objects of international law is overwhelming.” Schwarzenberger, 1 International Law at 600, 601.

some respect.” (Greenwood Third Op. ¶ 24). Loewen’s attempts to fill the void observed by Professor Greenwood come up short.

First, Loewen’s proffered distinction between “diplomatic espousal” cases and “investment protection” cases is based on a false dichotomy. The reality is that investment-protection cases – including the great majority of those cited by the parties in the written and oral proceedings on liability and competence in this case – have often been decided in the context of claims espoused by States.²⁵ “Diplomatic espousal” and “investment protection” cases are not mutually exclusive categories, just as “claims in intervention” and “claims in contract” are not mutually exclusive under municipal law. There is no reason of principle why legal rules applicable to one category should not be applicable to the other.

Second, Loewen does not fill this void by referring to reasons of policy sometimes used to justify international law’s requirement of nationality on the date of injury, the *dies a quo*. (Counter-Mem. at 37-38). Loewen, significantly, does not dispute that a NAFTA investor-State claim must have the requisite nationality on the date of the injury. What is more pertinent here are the reasons for international law’s requirement of nationality on the *dies ad quem*: the repugnance to States, absent clear treaty provisions to the contrary, of making payment to their own nationals on a claim under international law. Loewen does not, because it cannot, explain how this basis for the continuous nationality rule is served when the claim is asserted directly rather than espoused by another State. As Professor Greenwood observes, “the doctrine of

²⁵See Mem. at 14 n.23 (citing, e.g., 5 G. Hackworth, Digest of International Law 805 (1943)); 15 n.24 (citing, e.g., Gribble (Brit.-Am. Mixed Cl. Comm’n, 1872), Report of Robert S. Hale [1873, Part II, Vol. III], U.S. Foreign Relations 14 (claim for property); Biens Britanniques au Maroc Espagnol - Benchiton (Gr. Brit. V. Spain), 2 R.I.A.A. 615 (1924)).

continuous nationality exists precisely because diplomatic protection is ultimately for the benefit of the injured national and not the claimant State. Its rationale is therefore equally applicable to a case of a direct claim.” (Greenwood Third Op. ¶ 26 at 11).

In sum, the continuous-nationality rule is part of the “applicable rules of international law” governing Chapter Eleven arbitrations.

D. Neither The ICSID Convention Nor Any Bilateral Investment Treaty Is Applicable To This Case

In addition to distorting the text of Chapter Eleven, as demonstrated supra, Loewen further errs in contending that both the ICSID Convention and the array of existing bilateral investment treaties (or BITs) independently “establish” the so-called “date-of-submission” rule as the rule applicable to questions of nationality in Chapter Eleven disputes. (Counter-Mem. at 2, 13-26). Because Chapter Eleven disputes are governed exclusively by the terms of the Agreement and by “applicable rules of international law” (NAFTA art. 1131(1)), neither the ICSID Convention nor the purported “global network” of BITs is at all relevant here.

As neither Canada nor Mexico has signed or ratified the ICSID Convention, and neither has entered into a BIT with the United States (or each other), these conventional sources do not provide any “applicable” rules of international law in this case. Moreover, the indisputable variety among the BITs, as well as the significant differences between many BITs and Chapter Eleven of the NAFTA, conclusively refutes the existence of any “new legal order” concerning the nationality of investor-State claims. There is, therefore, no basis for Loewen’s suggestion that these conventional agreements between and among other States ought to inform the Tribunal’s interpretation of the NAFTA.

1. The ICSID Convention Is Entirely Irrelevant To The Question Before The Tribunal

Loewen’s attempt to bolster its argument in favor of a “date-of-submission” rule by relying on Article 25 of the ICSID Convention fails, as this set of arbitral rules is inapplicable in the instant case. The Tribunal need look no further than Articles 1120 and 1131 of the NAFTA.

Despite Loewen’s insistence to the contrary, Article 1120 of the NAFTA does not “expressly incorporate[] the [ICSID] Convention into Chapter 11.” (Counter-Mem. at 2, 18, 19). It merely offers investors the *option* – an option currently unavailable in any event because neither Canada nor Mexico is a party to the ICSID Convention – of choosing the Convention as the arbitral rules applicable in a given case. See NAFTA art. 1120(1). In this particular case, of course, Loewen selected the Additional Facility Rules. Therefore, as Article 1120(2) makes perfectly clear, only the Additional Facility Rules “shall govern the arbitration except to the extent modified by this Section.” Thus, it is the Additional Facility Rules – not the rules of the ICSID Convention or any other arbitral facility – that apply to this case, and then only to the extent not modified by Section B of the NAFTA. As the rules of the Additional Facility themselves make clear,

[s]ince the [Additional Facility] proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, *none of the provisions of the Convention shall be applicable to them* or to recommendations, awards, or reports which may be rendered therein.

ICSID Additional Facility Rules, art. 3 (“Convention Not Applicable”) (emphasis added).

More importantly, it is Article 1131 of the NAFTA – not Article 1120 – that designates the governing law in Chapter Eleven disputes. According to Article 1131, the Tribunal “shall decide the issues in dispute” between Loewen and the United States “in accordance with [the]

Agreement and applicable rules of international law.” NAFTA art. 1131(1). In contrast, a claimant’s choice under Article 1120 merely establishes the arbitral ground rules or framework that “shall govern the *arbitration*” in any given case. *Id.*, art. 1120(2) (emphasis added). As a set of ground rules, therefore, “[t]he Convention does not attempt to develop substantive rules for the protection of private international investments,” but simply offers “a procedural framework for the settlement of disputes.” C. Schreuer, The ICSID Convention: A Commentary, Preamble § 14, at 5-6 (2001).²⁶ Thus, the Convention, which is neither part of the NAFTA nor an applicable rule of international law, has no bearing whatsoever upon the determination of the “issue in dispute” currently before the Tribunal.

Furthermore, neither Canada nor Mexico has either signed or ratified the ICSID Convention. See ICSID, List of Contracting States, available at <<http://www.worldbank.org/icsid/constate/constate.htm>>. As a result, TLGI could never have submitted its claims for arbitration under the Convention in any event (nor, for that matter, could any Chapter Eleven claimant). The jurisdiction of the Centre has never extended, nor does it now extend, to Canadian nationals. See ICSID Convention art. 25(1) (“jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State”). Not surprisingly, the NAFTA Parties explicitly acknowledged that this limitation would affect investors’ choices under Chapter Eleven. See NAFTA art. 1120(1)(a) (“a disputing investor may submit the claim to arbitration under . . . the ICSID Convention, *provided that both the disputing Party and the Party of the*

²⁶See ICSID Convention Article 1 (“The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.”).

investor are parties to the Convention") (emphasis added).

Moreover, even if Canada or Mexico were ever to become a party to the ICSID Convention, the result would be no different. ICSID merely provides a framework whereby a State *may* – but need not – consent to the jurisdiction of the Centre for purposes of resolving investment disputes: “[t]he scope of such a consent is within the discretion of the parties.”²⁷ It is thus well-settled that satisfaction of the requirements of Chapter II of the ICSID Convention is limited to establishing the “jurisdiction of the Centre.”²⁸ Where consent is obtained through an agreement like the NAFTA, however, such consent is only “valid *according to its own terms*, that is to the extent that disputes are covered by its scope[.]” C. Schreuer, The ICSID Convention, Article 25 § 245, at 192; see also ICSID Convention art. 41(2) (distinguishing two types of objections: those “that dispute is not within the jurisdiction of the Centre” and those that dispute “for other reasons is not within the competence of the Tribunal”). A hypothetical claimant that meets the Convention’s requirements, therefore, must still satisfy the requirements of NAFTA Chapter Eleven, which go beyond the Convention in many significant respects.²⁹ For

²⁷C. Schreuer, The ICSID Convention, Article 25 § 243, at 192 (citing G. Delaume, “ICSID Arbitration,” in 1 J. Int’l Arb. 101, 104-05 (1984) (“In other words, the decision of a State to consent to ICSID arbitration is a matter of pure policy and it is within the sole discretion of each Contracting State to determine the type of investment disputes that it considers arbitrable in the context of ICSID.”)).

²⁸“The term ‘jurisdiction of the Centre’ is used in the Convention as a convenient expression to mean the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available for conciliation and arbitration proceedings.” Report of the Executive Directors (Mar. 18, 1965), 1 ICSID Rep. 23, 28 (1993).

²⁹Compare, e.g., ICSID Convention Art. 25(1) (providing that the Convention is available to resolve “any legal dispute arising out of an investment” such as mere contract disputes) with NAFTA arts. 1116(1) & 1117(1) (authorizing arbitration only of claims for violations of the
(continued...)

this reason as well, the ICSID Convention – even assuming it were ever available in a NAFTA Chapter Eleven case – says nothing about the conditions on nationality that apply to NAFTA Chapter Eleven claims.

It is likewise of no consequence that other investment disputes submitted to arbitration pursuant to the terms of the ICSID Convention have applied Article 25(2)(b) – which Loewen contends modifies the continuous nationality rule – pursuant to its terms. Not one of the cases Loewen cites represents an example of an investment dispute governed either by an agreement such as the NAFTA or by anything other than the Convention itself. (Counter-Mem. at 16-18). In other words, in none of the cases cited did the tribunal look beyond the consent requirements of Article 25 because, in each case, an arbitration clause in an investment agreement established consent to the jurisdiction of the Centre. See CSOB v. The Slovak Republic, 14 ICSID Rev. – F.I.L.J. 251, ¶¶ 33-35, ¶¶ 49-59 (May 24, 1999 Decision) (Article 25 satisfied where parties’ consolidation agreement designated as governing law a BIT not in force, but including an ICSID arbitration clause, and evidence showed parties agreed on international arbitration); Amco v. Indonesia, 1 ICSID Rep. 389, ¶¶ 10-15 (Sept. 25, 1983 Decision) (Article 25 satisfied where investment application included consent to submit disputes between Indonesia and PT Amco to ICSID arbitration); LETSCO v. Liberia, Interim Award on Jurisdiction, Oct. 24, 1984, excerpts in

²⁹(...continued)
specific treaty obligations); compare ICSID Convention Art. 42(1) (tribunals shall decide disputes "in accordance with such rules of law as may be agreed by the parties") with NAFTA art. 1131(1) (providing that tribunals must decide issues in dispute “in accordance with [the] Agreement and applicable rules of international law”); compare ICSID Convention Art. 25(2)(b) (allowing certain corporations located *within the host State* to submit claims against that State) with NAFTA art. 1117(4) (prohibiting investments within the host State from claim against that State).

2 ICSID Rep. at 349-54 (March 31, 1986 Award) (Article 25 satisfied where concession agreement between LETCO and Liberia included agreement that disputes be arbitrated under the Convention); SOABI v. Senegal, 2 ICSID Rep. 175, 179-80 (Aug. 1, 1984 Decision) (Article 25 satisfied where arbitration clause in establishment agreement between SOABI and Senegal included consent to ICSID arbitration).³⁰

In sum, where, as here, the parties consent to have their dispute resolved in accordance with rules of international law – a condition that all three sets of potential arbitral rules would allow – those rules shall govern regardless of the choice of arbitral rules in any given case. The United States thus agrees with Loewen that "it cannot be the case that a NAFTA investor claiming under the ICSID Convention faces no requirement of 'continuity of nationality and

³⁰Loewen also cites the International Court of Justice's decision in Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. ¶¶ 26, 40 (Feb. 14) (describing as settled ICJ jurisprudence that jurisdiction and admissibility are determined on the date a case is filed). (Counter-Mem. at 17). The decision, however, is not instructive here. First, that case did not address either the issue of continuous nationality in particular or state responsibility for injuries to aliens in general. In fact, Judge Schwebel, a former President of the International Court of Justice, made clear that the "settled jurisprudence" on which Loewen relies does not extend to the continuous nationality rule, noting "that, in customary international law, the admissibility of a claim espoused by a State, under the rule of nationality of claims, is determined not as of the date of filing but as of the date of judgment." Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), 1998 I.C.J. at 69 (Feb. 27) (Preliminary Objections) (dissenting op. of Judge Schwebel). Second, the Court's jurisprudence recognizes several grounds upon which the Court *will* hear argument based on subsequent events. See, e.g., Arrest Warrant of 11 April 2000, 2002 I.C.J. ¶ 26 (subsequent "event might lead to a finding that an application has subsequently become moot and to a decision not to proceed to judgment on the merits"); Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1996 I.C.J. ¶ 26 (July 11) (Judgment on jurisdiction) ("It is the case that the jurisdiction of the Court must *normally* be assessed on the date of the filing of the act instituting proceedings.") (emphasis added); see also Arbitration (Additional Facility) Rule 46(2) (expressly allowing an out-of-time objection that a tribunal lacks competence where "the facts on which the objection is based are unknown to the party" at the time such an objection would normally be due).

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.” (Counter-Mem. at 19). As the foregoing discussion makes clear, in all cases submitted to arbitration pursuant to Chapter Eleven, the requirement of continuous nationality applies.

2. Existing Bilateral Investment Treaties Are Similarly Inapposite Here

Loewen’s reliance on “a global network of bilateral investment treaties” is as misplaced as its reliance on the ICSID Convention. (Counter-Mem. at 19). It is undisputed (though unremarkable) that treaties, including BITs, are a form of State practice and may provide a source of international law binding between the treaty parties. *Id.* Loewen, however, fails to meet its burden of establishing that the BITs create anything approximating “customary international law of investment arbitrations” or “a new legal order governing the settlement of investment disputes” generally.³¹ *Id.* To the contrary, the BITs do not constitute a source of international law applicable to the issue before this Tribunal.

As a threshold matter, it bears emphasizing that none of the three Parties to the NAFTA has entered into a BIT with another NAFTA Party. There thus exists no BIT that, in this matter, gives rise to any “applicable rules of international law” under NAFTA Article 1131(1). *See* Vienna Convention on the Law of Treaties, art. 31(3) (“There shall be taken into account, together with the content . . . any relevant rules of international law *applicable in the relations*

³¹*See* Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 200 (Aug. 27) (“The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party.”) (quoting Asylum (Colom. v. Peru), 1950 I.C.J. 266, 276 (Nov. 20)); I. Brownlie, Principles of Public International Law at 11 (“In practice the proponent of a custom has a burden of proof the nature of which will vary according to the subject-matter and the form of the pleadings.”).

between the parties.”) (emphasis added). For BITs to be relevant to the Tribunal’s determination, therefore, Loewen must show that, cumulatively, they create a new rule of customary international law applicable to this case. Although this is what Loewen attempts to show, Loewen's effort clearly fails.

First, as the International Court of Justice explained in North Sea Continental Shelf (FRG v. Den.; FRG v. Neth.), 1969 I.C.J. 3 (Feb. 20) (Judgment), a purported new rule of customary international law should "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule." Id. ¶ 72. Here, Loewen concedes that the BITs do not include an explicit provision stating the so-called “date-of-submission rule.” Instead, Loewen argues that, simply by offering claimants the *option* of selecting arbitration under the ICSID Convention, many BITs thereby incorporate the definition of national contained in Convention Article 25 and, thus, create the new “date-of-submission rule” displacing the continuous nationality rule. See Counter-Mem. at 21-22; see also id., App. F (describing nearly every BIT listed as “[i]ncorporat[ing] ICSID Convention”).

None of the BIT provisions that Loewen cites, however (e.g., Article VI(3)(a) of the 1992 U.S. Model BIT and Article IX(2) & (3) of the 1994 Model), adopts the "date-of-submission rule" or rejects the continuous nationality rule any more than does the NAFTA.³² Indeed, the most Loewen can show is that none of the BITs it surveyed includes a treaty provision that

³²Article VI(3)(a) of the 1992 U.S. Model BIT states: “the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the [Centre]; or (ii) to the Additional Facility of the Centre, if the Centre is not available; or (iii) in accordance with the [UNCITRAL Arbitration Rules]; or (iv) to any other institution[.]”

explicitly "requires continuous nationality through the time of a final award."³³ (Counter-Mem. at 21). That the basis of Loewen's purported rule is a BIT provision that merely provides claimants the option of the Centre's facilities, therefore, "must raise . . . doubts as to the potentially norm-creating character" of the provision. North Sea Continental Shelf, 1969 I.C.J. ¶ 72. It could hardly have such a character when it does not articulate the rule propounded or even mention the date of submission.

Second, Loewen fails to establish that the BITs evidence the requisite "widespread and representative participation" in the purported new rule of customary international law by "States whose interests [are] specifically affected." *Id.* ¶ 73. Contrary to Loewen's claim of an "almost-universal practice" (Counter-Mem. at 50), the BITs are remarkably *inconsistent* on matters of access to, and the scope of, arbitrable disputes.

Again, the purported uniformity that Loewen invokes is limited to the fact that many BITs offer the Centre as one of several arbitral rules from which claimants may choose. Such choice proves little, however, given the shared view of commentators as to the overwhelming variety among BITs. For instance, Dolzer & Stevens "point[] out that there is comparatively little uniformity in this particular area of treaty practice. Thus, although the inclusion of an investor-State arbitration clause has become a common feature of BITs, the absence of similarity in the wording of such provisions make it difficult to present a range of representative clauses."

Bilateral Investment Treaties at 147. Likewise, Jan Paulsson writes, "the scope and nature of

³³See, e.g., R. Dolzer & M. Stevens, Bilateral Investment Treaties 34 (1995) ("Most BITs fail to address . . . the case where an investor changes his nationality after he has already begun to enjoy the protection of a BIT on the basis of his former nationality. In this case, it is doubtful that he would continue to be deemed a national of his former country for the purposes of the BIT.").

third-party access to international arbitration through BIT mechanisms are so different from one BIT to the next that one cannot speak of a dominant practice” J. Paulsson, Arbitration Without Privity, 10 ICSID Rev. – F.I.L.J. 232, 236 (1995).³⁴

Even when it comes to the definition of “investment” – a term defined similarly in many BITs – there is no “universally binding concept of investment for all purposes.” Dolzer & Stevens, Bilateral Investment Treaties at 26; see also Schreuer, The ICSID Convention, Article 25 § 102, at 130 (“definitions are part of the specific conditions of consent governing individual relationships,” so “[g]eneralisations drawn from [them] should be treated with caution where jurisdiction is not based on a BIT”). It is no surprise, therefore, that “where countries have faced fundamental questions of investment policy in broader arenas such as the OECD and the Uruguay Round, *they have blinked.*” D. Price & P. Christy, “An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement,” at 169, 171 (emphasis added).

More important still is that Loewen, notwithstanding its purported survey of approximately 100 BITs,³⁵ ignores those “States whose interests [are] specifically affected” here (North Sea, 1969 I.C.J. ¶ 73): namely Canada and Mexico, neither of which have ratified the

³⁴Paulsson ultimately concludes: “It cannot be said that there is today a coherent *corpus* of BITs that allow arbitration without privity.” 10 ICSID Rev. – F.I.L.J. at 240.

³⁵Of course, Loewen’s “survey” of 96 BITs – notably, a survey not endorsed by a single one of its experts – ignores over 1,800 other existing BITs. See United Nations Conference on Trade and Development, World Investment Report 2001 at 6 (2001) (“The number of bilateral investment treaties (BITs) quintupled during the 1990s and, by end-2000, had reached a total of 1,941.”). Nor does Loewen explain why it selected these particular 96 BITs, how its reasoning relates (if at all) to the factors needed to show a conventional rule has become custom, or whether the selected group is representative in relevant respects of the remaining 1,800 or more other BITs.

ICSID Convention.³⁶ Loewen would have this Tribunal apply, in the context of the NAFTA, a “date-of-submission rule” derived from a convention whose consensual framework two of the NAFTA Parties have expressly rejected. Loewen does not include any of Mexico’s BITs in its "survey," or focus at all on the 23 Canadian BITs that are listed at Appendix F.

A brief examination of Mexico’s and Canada’s BITs (and free trade agreements, in the case of Mexico) is sufficient to demonstrate the lack of uniformity among BITs in areas particularly relevant here. Like the NAFTA (but unlike the BITs invoked by Loewen), the vast majority of Mexican and Canadian BITs reviewed by the United States provide that rules of international law shall govern issues in dispute regardless of the choice of arbitral rules in any given case.³⁷ In addition, and also like the NAFTA, all of the Canadian and Mexican BITs reviewed bar enterprises located in the host State that are owned or controlled by investors in the other State from bringing claims against the host State.³⁸

³⁶Thus, arbitration under the ICSID Convention (even if an option under Mexican or Canadian BITs) is “incapable of being put into effect.” Dolzer & Stevens, Bilateral Investment Treaties at 138.

³⁷The following Canadian BITs identified by Loewen in the Treaty Appendix at Tab F of its Counter-Memorial include a provision that directs tribunals in investor-State arbitrations to decide issues in dispute in accordance with the terms of the BIT and applicable rules of international law. See Counter-Mem. Tab F, treaty nos. 1 (Art. XIII(7)), 7 (Art. XII(7)), 8 (Art. XIII(7)), 9 (Art. XIII(7)), 10 (Art. XIII(7)), 11 (Art. XIII(7)), 12 (Art. XII(7)), 13 (Art. XIII(7)), 14 (Art. XII(7)), 15 (Art. XII(7)), 16 (Art. XII(7)), 17 (Art. XIII(7)), 18 (Art. XIII(7)), 19 (Art. XIII(7)), 20 (Art. XII(7)), 22 (Art. XIII(7)), 51 (Art. XIII(7)) and 96 (Art. XIII(7)). Likewise, the Mexican BITs identified by the United States at Tab C of this Reply include an equivalent provision. See Reply Tab C, treaty nos. 1 (Art. 9(7)), 2 (Art. 10(5)), 3 (Appendix, Titulo VI(1)), 4 (Schedule, Art. 7(1)), 5 (Art. 16-33(1)), 6 (Art. 9-32(1)), 7 (Art. 15-32(1)) and 8 (Art. 13-33(1)).

³⁸See Counter-Mem. Tab F, treaty nos. 1, 7-26, 51 and 96 & Reply Tab C, agreement nos. 1-8.

Because international law provides the rule of decision under these BITs, as it does under Chapter Eleven, the practice of Canada and Mexico clearly refutes Loewen’s position. Given the lack of “a very widespread and representative participation” in a “date-of-submission rule,” the provisions of the BITs cannot give rise to a customary rule of international law. North Sea Continental Shelf, 1969 I.C.J. ¶ 73.

Third, Loewen submits no evidence of the *opinio juris* required to demonstrate that the “date-of-submission rule” has achieved the status of customary international law. It is generally accepted that a provision of conventional law, to be recognized as a “norm-creating provision,” must be one that “has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.” North Sea Continental Shelf, 1969 I.C.J. ¶ 71; see also Restatement (Third) Foreign Relations Law of the United States § 102, cmt. c (1986) (“it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*)”).

Yet Loewen relies only on the practice of State parties to BITs and nothing more. As the North Sea Court noted, what is most instructive when a purported rule of custom is based on treaty text is the practice of States that are *not* parties to the treaties. See id. at ¶ 76. Only the practice of such States can clearly evidence that the principle at issue is binding as a rule of *customary*, rather than conventional, international law. Loewen, however, offers no evidence of such State practice.

In essence, the purported rule Loewen urges upon the Tribunal is based on a *failure* of States to act. (Counter-Mem. at 21) (“Not one of [the BITs surveyed] requires continuous

nationality through the time of the award.”) (emphasis omitted). However, a failure to act, to constitute State practice relevant to the formation of a rule of custom, must also have been motivated by a sense that *not* acting was legally required.³⁹ Loewen fails in this respect too, offering no evidence that any BIT parties abstained from codifying the rule of continuous nationality because they felt obligated *not* to do so. Absent *opinio juris*, even repeated, habitual State practice cannot establish a rule of custom. North Sea, 1969 I.C.J. at ¶¶ 77-78.

Simply put, BITs are not intended to codify claims law. They are “[p]articular agreements [that] create binding obligations for the particular parties” rather than treaties that attempt to codify all of the relevant rules of international law, as does the Vienna Convention on the Law of Treaties. Restatement (Third) Foreign Relations Law, Introductory Note, at 18. While the United States does not dispute that BITs reinforce certain principles of customary international law that operate even without such agreements,⁴⁰ the reality is that access to, and the scope of, investor-State dispute resolution is still very much a matter of “grace.” (Counter-Mem. at 20). BITs do indeed give individuals and corporations enforceable rights, but States do not enter into them because they must. Customary international law simply does not require

³⁹See S.S. “Lotus”, 1927 P.C.I.J. 4 (ser. A) No. 10 (Sept. 7) (Judgment No. 9) at 28 (“for only if such abstention were based on their being conscious of having a duty to abstain would it be possible to speak of an international custom”).

⁴⁰For example, it is common ground that the familiar BIT obligation not to expropriate without compensation reaffirms the obligation recognized in customary international law. See, e.g., D. Robinson, “Expropriation in the Restatement (Revised),” 78 Am. J. Int’l L. 176, 178 (1984) (“They reflect actual state practice, and by incorporating the appropriate international standard for compensation, they reinforce the traditional customary rule.”); F. Mann, “British Treaties for the Promotion and Protection of Investments,” 1981 British Y.B. Int’l L. 241, 249 (“Is it possible for a State to reject the rule according to which alien property may be expropriated only on certain terms long believed to be required by customary international law, yet to accept it for the purpose of these treaties?”).

investor-State dispute resolution, or any particular procedural rule specific to it, nor has Loewen established that any “new standard has achieved the kind of consensus necessary for the establishment of a new norm of international law or for the displacement of the existing rule.”⁴¹

E. NAFTA’s Most-Favored-Nation Clause Does Not Entitle Loewen To More Favorable Standing Treatment Accorded Under Other Agreements

Loewen’s contention that NAFTA Article 1103 permits it to treaty-shop for the most favorable rules of procedure is without merit. (Counter-Mem. at 26-29). Loewen's position is inconsistent with the express limited terms of Article 1103, which address not the procedures to be applied in NAFTA arbitration, but the actual “treatment” to be accorded investments of another Party as compared to that of foreign-owned investments.

Under the *ejusdem generis* principle, a most-favored nation clause may operate only in regard to the subject matter of the clause.⁴² The subject matter of Article 1103 is limited to “treatment [accorded] . . . in like circumstances . . . with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” Nowhere in Article 1103 is reference made, explicitly or implicitly, to rules of nationality found

⁴¹D. Robinson, 78 Am. J. Int’l L. at 177.

⁴²See U.N. Int’l Law Comm’n, Report of the International Law Commission on the Work of Its Thirtieth Session, at 30, U.N. Doc. No. A/CN.4/SER.A/1978/Add.1 (Part 2) (1978) (Commentary on Articles 9 and 10 of the Draft Articles on Most Favored Nation Clauses) (“The essence of the rule is that the beneficiary of the most-favored nation clause cannot claim from the granting State advantages of a kind other than stipulated in the clause.”); see also G. Schwarzenberger Principles and Standards of International Economic Law, 117 R.C.A.D.I. 75 (1966) (“The personal, territorial, temporal and functional scope of m.f.n. clauses varies according to the changing needs and policies of contracting parties. . . . In the interpretation of any m.f.n. clauses it is essential to bear in mind the *ejusdem generis* rule, that is m.f.n. treatment can be claimed only regarding favors of the same kind as are stipulated in the treaty between the promisor and beneficiary.”).

in dispute resolution procedures of other treaties.

Furthermore, under the procedural mechanisms for bringing a claim found in Section B of Chapter 11, investors are limited to arguing that a Party breached a provision of Section A, where Article 1103 is found. Loewen alleges no breach of Article 1103 in its Counter-Memorial. Thus, Loewen cannot rely on NAFTA's most-favored nation provision to incorporate what it perceives to be more favorable procedural rules of establishing nationality and control.

Loewen errs in arguing that "MFN clauses have been broadly construed" (Counter-Mem. at 27), and that "Article 1103 is more than broad enough to encompass dispute resolution procedures." (Id. at 28). As Loewen's own authority recognizes, "every treaty requires independent examination." G. Schwarzenberger, International Law and Order 138 (1971) (quoting Lord McNair, The Law of Treaties 285 n.1 (1938)). The most-favored nation clauses in both cases Loewen cites are much broader in scope than NAFTA Article 1103. Whereas Article 1103 provides for most-favored nation treatment "in like circumstances . . . with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments," the clause at issue in the Morocco Case encompassed "whatever indulgence, in trade or otherwise"⁴³ and the most-favored nation clause in Maffezini v. Kingdom of Spain concerned "all matters subject to this Agreement."⁴⁴

Indeed, Loewen's contention that this tribunal should apply the Maffezini analysis to incorporate procedural rules into Article 1103 is disingenuous. (Counter-Mem. at 28). The

⁴³Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 190.

⁴⁴16 ICSID Review - F.I.L.J. at 23 ¶ 60 (Jan. 25, 2000).

Maffezini tribunal explicitly cautioned that its reasoning would not apply to treaties such as the NAFTA, where the text of the treaty at issue incorporated specific provisions reflecting an intent inconsistent with a broad application of a most-favored nation clause:

If the parties have agreed to a highly institutionalized system of arbitration that incorporates precise rules of procedure, which is the case, for example, *with regard to the North American Free Trade Agreement* and similar arrangements, *it is clear that neither of these mechanisms could be altered by the operation of the [most-favored nation] clause because these very specific provisions reflect the precise will of the contracting parties.*

16 ICSID Review – F.I.L.J. at 235 ¶ 63 (emphasis added).

The highly specific terms of Article 1103 cannot be read to permit investors to invoke the dispute resolution procedures found in treaties with third countries. Loewen may not claim otherwise.

F. The Continuous Nationality Rule Is Consistent With The Purposes Of NAFTA Chapter Eleven

In addition to misreading the NAFTA text and applicable international authorities, Loewen urges the Tribunal to ignore the international law rule of continuous nationality in favor of a "date of submission" rule on the further ground that Loewen's preferred rule is allegedly "consistent with NAFTA Chapter 11's protective purposes." (Counter-Mem. at 30). In urging such a rule, however, Loewen distorts the purposes of NAFTA Chapter Eleven.

While it is true that the NAFTA Parties sought to increase investment opportunities (see Art. 102(1)(c)), they expressly did so only to a limited extent (i.e., the objective to "increase *substantially* investment opportunities" is not to increase them *entirely*, to the exclusion of other interests) and only in accordance with the specific terms of the agreement that they drafted. The NAFTA Parties did not, contrary to Loewen's suggestion, create NAFTA Chapter Eleven to serve

as an unconditional, all-risks insurance policy to insure all North American business entities, regardless of nationality. Rather, NAFTA Chapter Eleven was intended to – and does by its plain terms – concern only the treatment of *foreign* investment and investors by *host* States. (See, e.g., NAFTA art. 1101). Where, as here, the ownership of a Chapter Eleven claim has passed to a national of the respondent State, the matter no longer involves any foreign investment or investors and, therefore, no longer implicates the NAFTA's goal of increasing "investment" opportunities. It simply cannot be said that a payment of damages by the United States to one of its own nationals, unconnected to any foreign investor, furthers any purpose of the Agreement.

Moreover, contrary to Loewen's claim, nothing in the United States' position is inconsistent with the NAFTA Parties' goal of "facilitat[ing] the cross-border movement of[] goods and services" (NAFTA art. 102(1)(a)). The continuous nationality rule in no way prohibits the movement of goods and services across borders, and the United States has never suggested that, had Loewen simply moved more of its offices or any other aspects of its business to the United States, Loewen's NAFTA claims would have been barred. Instead, it is Loewen's transfer of *ownership of the NAFTA claims* (which is neither "goods" nor "services" nor "investment"), as well as the wholesale change in the nationality of Loewen's corporate group, that bars those claims. That the NAFTA Parties sought to "eliminate barriers to trade" (Art. 102(1)) is a far cry from Loewen's misinterpretation of the NAFTA as "border-eliminating" (Counter-Mem. at 31).

Neither is the continuous nationality rule inconsistent with the NAFTA Parties' objective of "creat[ing] effective procedures . . . for the resolution of disputes." (Art. 102(1)(e)). Although Loewen complains that the rule somehow requires an investor to "lock[] up his investment for

the course of the arbitration" (Counter-Mem. at 62), that is plainly not so. The continuous nationality rule is not concerned with the nationality of the investment (although other provisions of NAFTA Chapter Eleven certainly are), but is instead concerned with the nationality of the *owner of the claim*. Even with respect to claims, the only proscription at issue in this case is the transfer of claims to a national of the respondent State before the issuance of a final award. The United States' present objection is not directed to any market for TLGI's claims that Loewen might have found in Canada or Mexico.

Finally, to the extent that Loewen argues that the continuous nationality rule somehow encourages delay in the resolution of disputes, it is difficult to see how Loewen can make such a claim in this case. If, as Loewen states, the "'dispute' here was fully formed in 1996," (Counter-Mem. at 32), then Loewen should not have waited a full three years to initiate this arbitration – which raises important and complex questions requiring careful and thoughtful consideration – if it would have preferred not to change nationalities before the Tribunal could issue a final award.⁴⁵

⁴⁵In making the frivolous suggestion that the United States has somehow unreasonably delayed this arbitration, Loewen appears to have forgotten its own multiple requests for extensions of time in this case (totaling several months), its many efforts to delay or avoid production of relevant discovery (totaling several more months), as well as the fact that the United States' "motion[] to disqualify [a] tribunal member" (Counter-Mem. at 32) worked no delay in this case whatsoever, the United States having expressly agreed that the October 2001 hearing go forward as scheduled.

III. TLGI'S CLAIMS MUST BE DISMISSED BECAUSE THEY ARE NOW OWNED BY A UNITED STATES NATIONAL

Recognizing that any direct assignment of the NAFTA claims from TLGI to Alderwoods would run afoul of the continuous nationality rule, Loewen contrived a complex series of corporate transactions intended to maintain the illusion that the claims are still Canadian-owned. Although Loewen, in its Counter-Memorial, provides a detailed step-by-step recounting of these complex transactions, the result is perfectly clear and is precisely as the United States stated in its Memorial: (1) TLGI has assigned to Nafcanco the right to receive the proceeds of the Article 1116 claim coupled with an irrevocable power of attorney to prosecute the NAFTA claims; (2) TLGI has assigned to Alderwoods (formerly LGII) all of its other assets and liabilities, including the contingency fee agreement with counsel and the joint arbitration agreement with Mr. Loewen; and (3) TLGI, a mere shell of a company, retains "bare legal title" to the NAFTA claims. (Mem. at 7-9; Counter-Mem. at 56-57 & Tab G).

In the end, no amount of corporate complexity can hide the fact that Alderwoods is now prosecuting the NAFTA claims for its own benefit. This conclusion is reached by analyzing the reorganization transactions in two parts. First, TLGI has effectively assigned its NAFTA claims to Nafcanco and is thus no longer the real claimant in this arbitration. Second, Nafcanco is wholly under the domination and control of Alderwoods and, therefore, does not have an independent corporate existence. Thus, the NAFTA claims are now owned by Alderwoods, a U.S. national, and must therefore be dismissed.

A. TLGI No Longer Owns The NAFTA Claims As Matter Of International Law, Having Assigned Such Ownership To Nafcanco

Despite Loewen's insistence, TLGI's retention of "bare legal title" to the NAFTA claims

is irrelevant as a matter of international law. (Mem at 22-24). 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. ¶ 5). In assessing the nationality of a claim, international tribunals routinely ignore the "nominal," "record" or "ostensible" claim holder in favor of the "real," "beneficial" or "equitable" claimant. See, e.g., Brownlie, Principles of Public International Law, at 484-85; Borchard, Diplomatic Protection at 666. As between TLGI and Nafcanco, only the latter could now be considered the "real" owner of the claim. TLGI has no expectation of benefit from the NAFTA claims nor any right or power to direct the prosecution or settlement of the claims, having assigned both to Nafcanco.

Loewen cites to no contrary international authority to support its contention that TLGI's nationality continues to matter. Instead, Loewen raises a straw-man argument concerning the ability of a claimant to assign proceeds from an international claim to a third party. Relying entirely on cases from municipal law, Loewen contends that a claimant may validly assign either "a claim itself" or just "the proceeds" from the claim. (Counter-Mem at 62). The United States, however, does not take issue with the ability of a NAFTA Chapter Eleven claimant to assign proceeds from its claim. To the contrary, the United States assumes for present purposes that TLGI has validly assigned the proceeds of its claim to Nafcanco. Indeed, the United States contends that TLGI has transferred not only the proceeds of its NAFTA Article 1116 claim, but full ownership of the NAFTA claims themselves.

TLGI has irrevocably transferred all of the rights and obligations attendant to the NAFTA claims to Nafcanco and Alderwoods, and thus can no longer be considered the real claimant. See (Mem. at 25-26):

Ownership is always . . . ownership of a group of rights in and to some object of these rights. The owner may accordingly transfer to others some or many of these rights but he remains owner so long as he retains the radical or reversionary right of getting the thing back when the other party's right has terminated; he ceases to be owner if he alienates the reversionary right and can no longer recover the thing.

David M. Walker, The Oxford Companion to Law 910 (1980). TLGI has assigned its right to the Article 1116 proceeds to Nafcanco and has "irrevocably delegate[d]" to Nafcanco "all powers and responsibilities . . . in respect of the pursuit of the NAFTA claims." (U.S. App. at 1826). Accordingly, it has relinquished its right to direct the litigation and has no expectation of benefit from any award or settlement. Similarly, TLGI no longer has any obligations or liabilities in connection with the claims. Alderwoods has assumed TLGI's contingency fee agreement with counsel and TLGI's obligations under the joint defense agreement with Ray Loewen. TLGI has no possibility of ever recovering these rights and duties, and thus has relinquished ownership of the claims. These facts are undisputed.

Indeed, Loewen's own expert, former Justice Cory, characterizes TLGI's assignment to Nafcanco as an assignment of a cause of action and defends it as such. (Cory Report ¶¶ 69-71). The U.S. and Canadian cases cited by Loewen and Mr. Cory recognize that an assignment of the proceeds of a claim coupled with an irrevocable power of attorney constitutes an assignment of the claim itself. (Counter-Mem. at 62).⁴⁶ As the court explained in In re Musser, 24 B.R. 913, 920 (W.D. Va. 1982) (cited by Loewen at page 62 of the Counter-Memorial), an assignment of proceeds alone can be distinguished from the assignment of a cause of action, "because the . . .

⁴⁶Under Anglo-American common law, and the laws of several U.S. states and Canadian provinces, assignments of personal injury causes of action are generally prohibited by the rules against champerty and maintenance. A plaintiff can, however, assign the proceeds of a personal injury claim. Thus, these cases distinguish between the assignment of a claim and the assignment of the proceeds alone.

assignor retain[s] exclusive control over his lawsuit and any settlement thereof." Thus, under United States law, a claimant is considered to have assigned an entire cause of action when he, like TLGI, has been "divest[ed] . . . of all control over" the action. Id. at 919. Similarly, in Frederickson v. Insurance Corp. [1986] 28 D.L.R. (4th) 414, 421 (B.C.C.A.), affirmed 49 D.L.R. (4th) 160 (S.C.C.) (cited by Loewen's expert Mr. Cory at ¶ 69 of his report), the British Columbia Court of Appeal considered the validity of an assignment of a *cause of action*. Although the Court ultimately upheld the assignment, the Court refused to characterize it as a mere conveyance of "the fruits of the action," because the assignee would be "prosecuting the action as well." Id.

The fact that TLGI is now a moribund corporation further supports the view that it is no longer the real claimant. TLGI owns no assets and has no officers, directors, or employees. Thus, as both a legal and a practical matter, it cannot play any role in the continued pursuit of the NAFTA claims.

Somewhat contradictorily, Loewen contends that TLGI's "death" preserves the Canadian nationality of the NAFTA claims, because international law purportedly ignores the nationality of a deceased claimant's heirs. (Counter-Mem. at 58). To the contrary, "the nationality of an heir must be that of the state of which the decedent on whose behalf the claim would have been made was a national: in other words *the principle of continuous nationality is applied to the beneficial interest in the property.*" Brownlie, Principles of Public International Law at 484 (emphasis added). See also Minnie Stevens Eschauzier, (Gr. Brit.-Mex Cl. Comm'n of 1931) 5 R.I.A.A. 207, 211 (quoting Basis of Discussion No 28. for the Conference Drawn up by the Preparatory Committee, League of Nations Doc. C.75.M.69.1929.V. (1929)). Thus, even if TLGI were analogized to a dead claimant (its death being more akin to a "suicide" in any event), the

Tribunal's continued jurisdiction would depend upon the nationality of TLGI's "heir," which is Alderwoods.

The authorities cited by Loewen do not support its contention that the continuous nationality rule does not apply to the heirs of a deceased claimant. (Counter-Mem. at 75). For example, In Halley, Administrator (Gr. Brit.) v. United States, 3 J. Moore, International Arbitrations 2241 (1898), the commissioners considered the nationality of both the deceased claimant and his beneficiaries. Indeed, in order to determine whether the commission retained jurisdiction over the claims, the commissioners ultimately had to address the dual nationality of the heirs. Similarly, Borchard, in a passage omitted by Loewen, notes that,

under the general form of protocol for the adjudication of claims of the citizens of one country against the other, international tribunals have generally held that not only the deceased but the actual beneficiary must come within the jurisdiction of the commission in the matter of citizenship. Heirs, therefore, have been required to establish their jurisdictional citizenship independently of their ancestor, failing which their claims have been rejected.

Borchard, Diplomatic Protection at 628.⁴⁷

Thus, in the Lederer case, the Great Britain-Germany Mixed Arbitral Tribunal refused to award compensation to the German beneficiaries of a British claimant who had died submitting his claim. Lederer in Recueil des Décisions des Tribunaux Arbitraux Mixtes at 765. The tribunal did not consider the claim to have "vested" in any way. In addition, contrary to Loewen's assertion (Counter-Mem. at 74), the Lederer case did not involve any special considerations

⁴⁷To the extent that Borchard acknowledges "several cases where . . . rights were considered to have vested in [a claimant's] heirs regardless of nationality," these cases are exceptions to the general principle quoted above. Notably, of the two sources Borchard cites for support, one is Moore's misinterpretation of Chopin. See Borchard § 285, p. 629 n. 3, § 308, p. 666 n.1. See supra at 29-31 (explaining that Chopin tribunal did not hold that the claim had "vested").

concerning trading with the enemy in wartime.

Neither is Loewen aided by the practice of the Iran-United States Claim Tribunal. "Consistent with historical claims practice, the Tribunal has favored beneficial over nominal ownership for the purposes of [Article VII of the Claims Settlement Declaration]." C. Brower & J. Brueschke, The Iran-United States Claims Tribunal 111 (1998) (footnote omitted). The Tribunal's decision in Foremost Tehran, Inc. v. Iran, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986), was not to the contrary. Foremost had split its claim into two parts – it filed one claim to recover a portion of its losses which were insured, and another claim to recover the uninsured portion. Iran argued that Foremost could not pursue the insured portion because, by private agreement, it had assigned the “entire beneficial interest” in that claim, retaining only legal title for itself. The Tribunal, however, held that Foremost could pursue both claims. First, the Tribunal noted that in addition to "legal title" to the insured portion, Foremost retained “the right and duty to institute proceedings for recovery in its own name” and 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 [the insurer]” Id. at 238-39. Second, the tribunal was guided by a general rule of common law that "an insured party who assigns a *limited* beneficial interest to its insurer is the proper party to bring a claim for compensation for the *entire* loss." Id. at 239. Thus, unlike TLGI, Foremost retained more than just "bare legal title" to the assigned portion of its claim, and ultimately expected to receive a portion of the total proceeds.

Loewen similarly misinterprets the decision in the I'm Alone case.⁴⁸ (Counter-Mem. at

⁴⁸ "I'm Alone" Case (Can. v. U.S.), (Special Agreement, Convention of Jan. 23, 1924) 3 R.I.A.A. 1610, 1617-18 (1935).

72-73). The Commissioners in I'm Alone refused to award compensation to Canadian claimants for the loss of a ship and its cargo because 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 nationals of the respondent state, the United States. The Commission, however, retained jurisdiction and issued compensation for the lives lost when the ship was sunk. Unlike the vessel they sailed, the captain and the crew were indisputably Canadian nationals, and the claim brought for their benefit could be maintained. Id. Furthermore, as the above quoted passage shows, the "facts" which the Commission found determinative concerned the ownership and control of the ship and not, as Loewen suggests, the "illegal conspiracy" for which it had been used. (Counter-Mem. at 73).

B. Alderwoods Is The True Owner Of The NAFTA Claims Because Nafcanco Is Not An Independent Entity

Article 1117(4) of the NAFTA provides that "[a]n investment may not make a claim" under Section B of Chapter Eleven. (NAFTA art. 1117(4)). It is readily apparent, however, that Loewen's NAFTA claims are, in truth, now being made by such an "investment" – the Alderwoods Group (formerly LGII).

Although, as discussed above, Nafcanco is superficially the beneficial owner of the NAFTA claims, Nafcanco is nothing more than a corporation of convenience created for the sole purpose of maintaining the appearance that TLGI's NAFTA claims still belong to a Canadian national. In reality, it is completely controlled and dominated by Alderwoods, as demonstrated by the facts identified in the United States' opening Memorial. (Mem. at 30-32). Loewen has not disputed any of those facts. Significantly, Loewen does not dispute, inter alia, that: (1) Nafcanco conducts no business operations of its own and has no assets other than the right to

receive the proceeds of the Article 1116 claim; (2) Nafcanco is merely a "flow-through" entity such that any award received by Nafcanco will ultimately pass to Alderwoods; and (3) Alderwoods, not Nafcanco, is the ultimate-decision maker and driving force behind the prosecution of the NAFTA claims. These concessions by Loewen are fatal to its case.

Under these circumstances, international law does not recognize Nafcanco as a separate and independent entity from Alderwoods. See, e.g., Barcelona Traction (Belg. v. Sp.), 1970 I.C.J. 39 (Feb. 5) (Judgment) (recognizing the "process of lifting the veil" in international law); Restatement (Third) Foreign Relations Law § 213 n.2. In general, claimants cannot avoid the requirements of the continuous nationality rule by creating corporate entities like Nafcanco. See 8 Marjorie M. Whiteman, Digest of International Law, 1270-1272 (1967); Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/00/5, (Decision on Jurisdiction Sept. 27, 2001) ¶¶ 116, 122. Such corporate gamesmanship is particularly disfavored when the incorporator, like Alderwoods, is a national of the respondent State. Cf. F.V. Garcia-Amador, Recent Codification of the Law of State Responsibility for Injuries to Aliens at 83; Sohn & Baxter, Harvard Draft Convention, art. 22(7) at 187, art. 23(4) at 199. Loewen is simply mistaken when it asserts that the only international authority cited by the United States for this proposition is the Harvard Draft Convention. (Compare Mem. at 26-30 with Counter-Mem. at 65).

Loewen, on the other hand, offers no international support for recognizing Nafcanco's independence. Its entire argument rests on its understanding of Canadian law and the opinion of its expert, Mr. Cory. (Counter-Mem. at 63-65). The tribunal, however, must apply the rule of continuous nationality in accordance with applicable principles of international, not municipal,

law. But even under Canadian law, Nafcanco would be considered the alter ego of Alderwoods. (See Statement of Gerard La Forest, Q.C. at ¶¶ 32-35; La Forest Reply at ¶ 15). Both Loewen and Mr. Cory effectively concede that Nafcanco is under the domination and control of Alderwoods. Nevertheless, they contend that it would not be fair or equitable to ignore the corporate formalities in this case. As explained in the Reply Opinion of former Justice LaForest, however, such considerations are not relevant to the inquiry under Canadian law. (La Forest Reply at ¶¶ 8-16). Moreover, as explained below, the relevant equities weigh heavily in favor of looking through the obvious facade of Alderwoods' corporate formalities in this case. See infra at 72-80.

Loewen's attempts at distinguishing the international authorities cited by the United States are equally unconvincing. Loewen contends that the tribunals in I'm Alone, Monte Blanco,⁴⁹ and Coleman⁵⁰ disregarded "sham" corporations that were used to create jurisdiction where none existed, rather than corporations, like Nafcanco, which are intended to maintain jurisdiction where it no longer exists. (Counter-Mem. at 73-74). Whether a "sham" corporation is created in anticipation of an injury, before a claim is submitted, or before an award is rendered, should not matter so long as it was created to subvert the requirements of the continuous nationality rule.

⁴⁹ 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)

⁵⁰ 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").

Furthermore, the holding in Coleman had nothing to do with the creation of jurisdiction. The Commission initially allowed the administrator of Coleman's estate to bring a claim in Coleman's name, but later refused to grant an award because the claim had been assigned to U.S. nationals who were prosecuting the claim for their own benefit. See Coleman, [1873, Part II, vol. III] U.S. Foreign Relations at 99.

Loewen's reliance on the decisions of the ICSID tribunals in CSOB and Autopista (Counter-Mem. at 76-77) is similarly misplaced. Both CSOB and Autopista were contract cases where, unlike in NAFTA Chapter Eleven disputes, international law did not supply the rule of decision. Thus, the tribunals in those cases were not bound to consider the nationality of the beneficial rather than the nominal owner of the claim in accordance with customary international law. In any event, Autopista assumed that a finding that the claimant was a "corporation of convenience" would compel dismissal but merely found that the claimant, unlike Nafcanco, was not such a creature of convenience. Autopista, ICSID Case No. ARB/00/5, ¶¶ 122-126.

Finally, Loewen misunderstands the United States' argument and international law by suggesting that the Tribunal will also have to look behind Alderwoods to examine the nationality of its shareholders. (Counter-Mem. at 78). As the International Court of Justice made clear in the Barcelona Traction case, international law respects the independent legal personality of corporations such that the place of incorporation is normally determinative of the company's nationality. Barcelona Traction, 1970 I.C.J. at 42, ¶¶ 70-71. Only under special circumstances, such as those presented by Nafcanco, is it appropriate for a tribunal to disregard the corporate form. The United States is not aware of any circumstances that would warrant lifting the corporate veil of Alderwoods. Neither is it relevant that Alderwoods continues to have

significant contacts with Canada. (Counter-Mem. at 77). Alderwoods is a Delaware corporation and is, therefore, considered to be a U.S. national both for purposes of international law and for the NAFTA in particular. See NAFTA art. 1139 (defining "enterprise of a party"); Barcelona Traction, 1970 I.C.J. at 42 , ¶¶ 70-71 (criticizing *siège social* test). Loewen elsewhere admits that "LGII was renamed 'Alderwoods Group, Inc.' (AGI) and became a stand-alone U.S. company." (Counter- Mem. at 58-59). It cannot, therefore, be heard to argue that Alderwoods is really a Canadian company.

The fact that Nafcanco has assigned twenty-five percent of its right to any net proceeds from the Article 1116 claim to Trans Canada Credit Corporation, does not alter the analysis. (See Counter-Mem. at 78). Trans Canada, like Nafcanco, is a Nova Scotia unlimited liability company and serves merely as a "flow through" for the U.S. bank, Wells Fargo. (U.S. App. at 1858). Trans Canada received the partial assignment of Article 1116 proceeds from Nafcanco solely as "*nominee* of Wells Fargo Bank . . . in its [Wells Fargo's] capacity as trustee under the Loewen Creditor Liquidating Trust Agreement." Id. (emphasis added). Even if the Tribunal were to consider the nationality of the Liquidating Trust, therefore, the same result would obtain.⁵¹

The Tribunal similarly need not consider the nationality of the Liquidating Trust's beneficiaries. (Counter-Mem. at 78). Unlike the assignment from TLGI to Nafcanco, Nafcanco

⁵¹This would also be so even if the Tribunal were to look to the nationality of Loewen's creditors, who are the ultimate beneficiaries of both of Loewen's NAFTA claims. As Loewen's witness acknowledges, "[m]ost of Loewen's creditors were U.S. investors . . ." Affidavit of Jonathan B. Cleveland ("Cleveland Aff.") at ¶14. Indeed, the United States believes that the great majority of Loewen's creditors, who are now the owners of Alderwoods, are U.S. investors. For reasons already explained, however, international law would not look beyond Alderwoods (absent grounds for lifting the corporate veil) for purposes of nationality.

and Alderwoods have transferred to the trust only a limited interest in the proceeds of the NAFTA claims. The trust has no control over the prosecution of the claims, and therefore cannot be considered the owner of even a portion of the claims for nationality purposes.

More fundamentally, because the transfers of these limited interests to the liquidating trust occurred *after* the ownership of the NAFTA claims had already devolved to Alderwoods, those transfers cannot alter the fact that the NAFTA claims have not been *continuously* held by non-U.S. nationals, as international law requires. See Borchard, *Diplomatic Protection* at 666 ("if at any time after its origin [the claim] has passed out of national hands or lost its national character, its nationality is not merely suspended but is completely destroyed, so that its reassignment to a citizen cannot revive its original nationality").

C. Loewen's Decision To Restructure Its Business In A Manner That Transferred Ownership Of The NAFTA Claims To Alderwoods Was Not "Involuntary"

Loewen implicitly acknowledges, as it must, that the decision to restructure The Loewen Group into a United States corporate family was purely a business decision that involved weighing the various commercial benefits of United States citizenship against the costs of such a restructuring, including the risk of losing Loewen's NAFTA claims. (See Counter-Mem. at 53-54). As Loewen's witness explains, the move to the United States was intended to "maximize the trading prices" of the company's stock "by avoiding the perceived disadvantages of *not* being incorporated in the U.S." (emphasis in original), by "eliminating the tax inefficiencies" that existed in Loewen's earlier corporate structure, and by obtaining other economic advantages of U.S. corporate citizenship. (Cleveland Aff. at ¶¶ 14-15). Loewen optimistically predicted (misguidedly, as it turns out) that the restructuring "should not affect the NAFTA Claims" (U.S. App. at 1521) and, on that basis, Loewen and its creditors agreed that the benefits of U.S.

citizenship were worth the risk.

Despite the fact that Loewen itself, and not its creditors, proposed the reorganization plan by which this restructuring took place, Loewen nevertheless contends that the decision to change the nationality of the NAFTA claims was somehow "involuntary" and, therefore, that Loewen is entitled to an exception to the continuous nationality rule. (Counter-Mem. at 50-51, 80).

Loewen's contention is both factually and legally unsustainable.

Loewen's claim to have lacked free will in the restructuring rests on a typically inaccurate statement (provided in the first instance by Loewen's fact witness, Mr. Cleveland, who is demonstrably not a bankruptcy lawyer) of the laws under which Loewen's reorganization proceeded. As explained in the attached declaration of bankruptcy expert J. Ronald Trost (at Tab B), Chapter 11 of the United States Bankruptcy Code allows a corporate debtor to remain in control of its business as a so-called "debtor in possession" throughout its reorganization proceedings. See Response Declaration of J. Ronald Trost ("Trost Response") at 4. This aspect of the bankruptcy laws, which is unique to the United States in its empowerment of corporate debtors, is intended to (and does in fact) "allow the debtor-in-possession to undertake the reorganization process with minimal disruption to business operations." (Trost Response at 4-5). Although Mr. Cleveland asserts on Loewen's behalf that creditors nevertheless "effectively take charge from the beginning and set the terms of the reorganization" of an insolvent debtor (Cleveland Aff. ¶ 7), Mr. Cleveland is simply wrong as a matter of both fact and law.

In fact, Loewen's status as a debtor-in-possession throughout the entire bankruptcy proceeding afforded the company substantial authority and control over the company, as well as exclusive control over the terms of the reorganization plan. As Mr. Trost explains, "[t]here is no

support in the law or in the record" for the claims of Loewen (and its expert, Mr. Cleveland) that Loewen's independent will was somehow overcome by that of the creditors and that the company had no choice but to reorganize as a United States entity. (Trost Response at 13). At all times, Loewen was the legal actor that initiated, negotiated, settled and pursued the actions that determined its restructuring to become a U.S. entity, and it was Loewen's management – not the creditors – that petitioned the court to approve the restructuring. Indeed, as Mr. Trost points out, Loewen's successful use of the "cram down" provisions of the bankruptcy laws – by which Loewen managed to force the approval of its reorganization plan over the objections of some creditors – only confirms that Loewen could, and did, act independently of its creditors' will. (Trost Response at 9) ("In light of the circumstances under which Loewen's Plan was confirmed, it strains credulity to suggest that creditors were in control of the reorganization.").

The mere fact that, upon insolvency or even near-insolvency, a corporation owes fiduciary duties to creditors rather than shareholders does not mean that creditors "effectively take charge" of the reorganization, as Mr. Cleveland erroneously contends. In fact, contrary to Loewen's suggestion, this rule (which Loewen describes as the "absolute priority rule") is not unique to bankruptcy law, but is instead a longstanding principle of business law that applies even to corporations that have not sought the shelter of the bankruptcy code. See, e.g., In re Kingston Square Associates, 214 B.R. 713, 735 (Bankr. S.D.N.Y. 1997) ("[I]t is universally agreed that when a corporation approaches insolvency or actually becomes insolvent, directors' fiduciary duties expand to include general creditors.").⁵² While Loewen no doubt proposed its

⁵²See also Robert B. Millner, What Does it Mean for Directors of Financially Troubled Corporations to Have Fiduciary Duties to Creditors?, 9 J. Bankr. L. & Prac. 201 (2000) ("the
(continued...)

reorganization plan in the discharge of its fiduciary duties to its creditors – which duties arose before Loewen even decided to file for bankruptcy protection⁵³ – that does not change the fact that Loewen's doing so was a voluntary corporate act. See Trost Response at 5 (that a debtor-in-possession owes fiduciary duties to its creditor constituencies "falls far short of the bald assertion made in the Cleveland Affidavit that 'the creditors effectively take charge [of the reorganization] from the beginning and set the terms of the reorganization'").

Loewen is thus incorrect when it asserts, without support, that "[a] corporation only acts 'voluntarily' through the will of its shareholders" (Counter-Mem. at 51). In fact, "[i]t is a basic characteristic of the corporate structure that the company alone, through its directors or management acting in its name, can take action in respect of matters that are of a corporate character." Barcelona Traction, 1970 I.C.J. at 34, ¶42. Simply because, upon the company's insolvency, Loewen's fiduciary duties shifted to the creditors – who effectively became the new, residual owners of the company – the alleged absence of TLGI shareholders' "effective say in the bankruptcy reorganization" (Counter-Mem. at 51) does not make Loewen's decision to

⁵²(...continued)

notion that directors' fiduciary duties shift from shareholders to creditors upon a corporation's insolvency . . . is not new").

⁵³See, e.g., In re Ben Franklin Retail Stores, Inc., 225 B.R. 646, 653 (Bankr. N.D. Ill. 1998) (at the point when corporation's debts exceed assets, fiduciary duties of corporate management shift to creditors "who 'now occupy the position of residual owners'" of the corporation) (quoting Christopher W. Frost, The Theory, Reality and Pragmatism of Corporate Governance in Bankruptcy Reorganizations, 72 Am. Bankr. L. J. 103, 108 (1998)); Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., 1991 WL 277613 (Del. Ch. 1991) at *33 ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers [i.e., the shareholders], but owes its duty to the corporate enterprise.").

restructure as a U.S. corporation any less voluntary.⁵⁴

In any event, the bankruptcy court has already determined that Loewen proposed the reorganization plan voluntarily and in good faith after negotiating at arms length with its creditors and other constituencies. In confirming the plan, the court held that

the Plan is designed to allow the Debtors to reorganize by resolving certain pending litigation and providing them with a capital structure that will allow them to satisfy their obligations with sufficient liquidity and capital resources and to fund necessary capital expenditures and otherwise conduct their businesses. Moreover, the Plan itself and *the arms length negotiations among the Debtors, the Creditors' Committee and the Debtors' other constituencies leading to the Plan's formulation*, as well as the overwhelming support of creditors for the Plan, provide independent evidence of the Debtor's good faith in proposing the Plan.

(Confirmation Order at 11) (A3851) (emphasis added). The court's finding that the Loewen entities and the creditors' committee negotiated the terms of the plan at "arms length" flatly – and conclusively – refutes Loewen's claim that it did not voluntarily restructure its business and thereby transfer ownership of the NAFTA claims to a United States entity.

D. Principles of Equity, Even Assuming Their Applicability To The Continuous Nationality Rule, Clearly Favor Dismissal Of Loewen's NAFTA Claims

Loewen contends that, notwithstanding the fact that its NAFTA claims are now owned by

⁵⁴Loewen's claim that TLGI's shareholders had "no effective say in the bankruptcy reorganization" is overstated in any event. "It has been argued persuasively that even post-petition, in a corporate chapter 11 case, until it is clear that there will be no going concern (or liquidation) value available for stockholders, the directors continue to owe fiduciary duties to stockholders." Robert B. Millner, What Does it Mean for Directors of Financially Troubled Corporations to Have Fiduciary Duties to Creditors?, 9 J. Bankr. L. & Prac. 201, 217 (2000) (citing Harvey R. Miller, Corporate Governance in Chapter 11: The Fiduciary Relationship Between Directors and Stockholders of Solvent and Insolvent Corporations, 23 Seton Hall L. Rev. 1467 (1993)). See also Andrew E. Bogen, et al., Landmarks on an Unmapped Terrain: Defining the Rights of Debtholders, 5 Insights 19, 23 (1991) ("It does not follow from the existence of a fiduciary duty to creditors, however, that the interests of stockholders must be disregarded in insolvency.") (discussing In re Lionel Corp., 72 F.2d 1063 (2d Cir. 1983)).

a United States national, "principles of equity and justice" counsel this Tribunal to overlook international law and to permit these U.S.-owned claims to proceed against the United States. (Counter-Mem. at 79). Loewen offers principally two such equitable considerations that it contends counsel against dismissal here: First, Loewen makes the outlandish claim – the accuracy of which Loewen's experts are remarkably willing to accept without question or independent verification – that the United States is somehow responsible for Loewen's bankruptcy and, therefore, is not entitled to "tak[e] advantage of its own wrong." (Counter-Mem. at 79).⁵⁵ Second, Loewen merely reiterates its contention (which is no less unfounded the second time) that the restructuring by which the change in nationality took place was somehow not the "voluntary" choice of Loewen. (*Id.* at 80).⁵⁶

Loewen's appeal to considerations of equity, even if based in fact (which it is not), is not relevant to the question before the Tribunal. As both State practice and international decisional law make clear, the continuous nationality rule is not a matter of equitable discretion for a

⁵⁵For example, Mr. Cory relies exclusively on Loewen's own allegations for his inherently contradictory assertion that "the miscarriage of justice *alleged* in the NAFTA Claims *was* a significant factor in the bankruptcy of the Loewen Debtors," (Cory Report ¶92) (emphasis added), and uses this mistaken assumption as a primary basis for his opinion that equity counsels against piercing Nafcanco's corporate veil. Similarly, Sir Robert Jennings, after "confess[ing] again that [he is] no corporate lawyer," nevertheless proceeds to speculate as a "layman observer" that Loewen's restructuring was not voluntary but instead "appears to be the final stage of the working out of the effects of the bizarre damages awarded in the Mississippi jury's verdict." (Fifth Jennings Op. at 11).

⁵⁶Loewen also hints that the length of time that has elapsed since the *O'Keefe* litigation is a further equitable ground for overlooking the continuous nationality rule. (Counter-Mem. at 32). Given that Loewen itself delayed the filing of its NAFTA claims for a full three years after the *O'Keefe* litigation, and then sought several months of extensions for itself in the course of this proceeding, Loewen cannot be heard to complain that the time required for the careful resolution of this complex arbitration works any inequity here.

Tribunal to apply or ignore as it sees fit. Rather, the issue is simply one of fact: if it is determined that ownership of a claim has devolved to a national of the respondent State, then the claim is inadmissible and the Tribunal must reject it. See e.g., Case of Archbishop Perché (Fr. v. U.S.), reprinted in 3 J. Moore, *International Arbitrations* 2401, 2418 (1898) (in rejecting claim because of changed nationality, "we deem it proper for us to express our regret that we can not take jurisdiction of a case which seems upon its face to be so equitable.").

Even if equitable considerations were relevant to the application of the continuous nationality rule, the relevant equities would plainly favor dismissal of the NAFTA claims. The United States has already demonstrated that Loewen's decision to restructure and thereby change the nationality of ownership of the NAFTA claims was unquestionably a voluntary corporate act. (see supra at 68-72). In the balance of this section, therefore, the United States addresses Loewen's allegation that the United States was in some way responsible for Loewen's bankruptcy, and discusses other important equities that Loewen and its experts ignore, all of which clearly favor dismissal of Loewen's NAFTA claims.

1. The Contention That The United States Is At All Responsible For Loewen's Bankruptcy Is Utterly Specious

One of Loewen's more extravagant claims in this case is the assertion that "the 1999 Loewen bankruptcy," which occurred well more than three years after the settlement of the *O'Keefe* litigation, "was caused in large part by the illegal *O'Keefe* verdict and judgment." (Counter-Mem. at 79). The United States has already shown that this claim is patently false. See, e.g., U.S. Jurisd. Resp. at 62-65 & Tab D thereto. Indeed, the contrary of Loewen's claim is so widely accepted among industry experts that it is no surprise that Loewen can offer no support for its claim other than the company's own self-serving statements made since the filing of this

NAFTA proceeding. (Counter-Mem. at 3, 79).

In fact, it is now common knowledge that the entire death-care industry, not only Loewen, has suffered severe financial distress in the last few years for reasons having nothing to do with the *O'Keefe* judgments. For example, Service Corp. International ("SCI"), the world's largest death-care company and Loewen's principal competitor, saw its stock price fall from nearly \$50 per share in early 1998 to \$1.56 per share in early 2001,⁵⁷ while Prime Succession, another large death-care consolidator, filed for bankruptcy protection in July 2000.⁵⁸ Although Loewen's decline was some months earlier than that of its competitors, analysts agree that "the industry's problems run much deeper than one high-profile stock tumble [i.e., that of The Loewen Group]. Shareholders across the board have seen their investments in the death-care industry turn to rot. . . . *The roots of the downturn are the same for the market as for Loewen.*" (U.S. App. at 159) (emphasis added).⁵⁹

Indeed, until it filed this NAFTA proceeding, Loewen never even mentioned the *O'Keefe* litigation as the source of its financial distress. To the contrary, after it settled the *O'Keefe*

⁵⁷Stock chart available at <http://www.smartmoney.com> under ticker symbol "SRV."

⁵⁸See, e.g., Prime Succession Holdings, Inc. Files Chapter 11, 36 Bankr. Court Decisions 2 (Aug. 8, 2000); Michael Utley, A Dying Business: Funeral Home Companies Fight for Life as Stocks Plummet, The Press-Enterprise, 2000 WL 25667853 (Oct. 29, 2000).

⁵⁹In January 2000, Alderwoods' current chairman, John Lacey, expressed his "strong" belief "that all of the major funeral care businesses will go through the same thing as Loewen." (US APP 204). Mr. Lacey viewed this development as a competitive advantage, as "Loewen will be the first to have confronted the issues and will come out of Chapter 11 [bankruptcy] in a competitive mode." Id.

matter, Loewen assured its investors – under penalty of prosecution⁶⁰ – that "core operations have been unaffected" by the litigation (A1516) and that "[b]eyond legal costs, there will be almost no impact on 1996 results" (A1526).

Instead, like its competitors, Loewen blamed its financial problems on a variety of other factors, such as declining death rates. (See U.S. App. at 156). Even these reasons, however, were roundly rejected by market experts, who saw fundamental mismanagement as the source of the problem: "[D]on't blame fatality counts for gloomy times in the \$14-billion (U.S.), so-called death care industry. A spree of ill-advised acquisitions, poor management of local operations and failures to keep pace with consumers' changing tastes are largely to blame for the industry's problems, analysts and executives say." (U.S. App. at 155; see also U.S. App. at 160) (observing that SCI, "as Loewen had done before, blamed the falling death rate for its shortfall. But again, the free-spending attitude was the root of the problem, say analysts."); U.S. App. at 163 ("A combination of factors, but primarily unbridled spending, brought on the crisis, analysts say."); U.S. App. at 204 ("The zeal for acquisition of new properties was the primary reason for Loewen's descent into bankruptcy.").

Even Loewen itself has admitted, in more candid moments, that its bankruptcy was occasioned not by the Mississippi courts, but by the poor performance of the company's prior management team, led by Mr. Loewen. As Loewen's spokesman explained in the months

⁶⁰Under the United States' securities laws, it is unlawful to make a materially false or misleading statement or omission in connection with the purchase or sale of a security (provided that the statement is made or omitted with scienter). See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 196, 214 (1976). Moreover, when a corporation makes assertions in a manner reasonably calculated to influence the investing public, it is legally obligated to disclose sufficient information so that any assertion made is not misleading or so incomplete as to mislead. Basic Inc. v. Levinson, 485 U.S. 224, 235 n.13 (1988).

following the company's filing for bankruptcy protection (after Mr. Loewen had been replaced), Mr. Loewen's management team was simply “interested in growth for growth’s sake, acquisitions at any cost, just to produce big numbers. . . . [S]o much damage had been done by the acquisitions binge of previous years that the damage could only be undone through Chapter 11 [of the U.S. Bankruptcy Code].” (U.S. App. at 204).

The only expert evidence before the Tribunal is fully in accord with this view: "many of the business practices that The Loewen Group employed before and at the time of the Mississippi settlement – especially its aggressive 'growth through acquisitions' strategy – had by that time already become excessively risky, unsustainable and, if left uncorrected, would eventually have brought down the company *regardless* of whether the Mississippi litigation and out-of-court settlement had ever taken place.” Declaration of Steven Saltzman, C.F.A. at 3 (provided at Tab D to U.S. Jurisd. Resp.) (emphasis in original). In short, there is no competent evidence in the record of this case nor any basis in fact for Loewen's contention that the *O'Keefe* litigation was *any* cause – let alone a "substantial" cause – of the company's 1999 bankruptcy filing.⁶¹

2. Equity Does Not Permit A Tribunal To Accept Corporate Forms That Are Created Expressly To Avoid Operation Of The Continuous Nationality Rule

There is no dispute that the "Reinvestment Transactions" undertaken as part of Loewen's restructuring were intended solely for the purpose of maintaining this Tribunal's jurisdiction over

⁶¹Moreover, even if the *O'Keefe* judgments could somehow be viewed as a factor contributing factor in Loewen's bankruptcy (despite all expert opinion and common sense to the contrary), Loewen itself was responsible for the results of that litigation. As the United States demonstrated on the merits of this case, Loewen's own performance in the *O'Keefe* litigation, as well as the company's voluntary decision to forego an appeal of the jury verdict in favor of a settlement, were the proximate cause of any damages that Loewen allegedly suffered as a result of the *O'Keefe* case.

the NAFTA claims.⁶² Nevertheless, Loewen contends that the Tribunal should not look past the sham corporate structure it has created because to do so would, in Loewen's view, be "unfair" simply because Loewen's NAFTA claims would be lost. Loewen's sense of the equities, however, is precisely backward.

International tribunals have long regarded as improper the use of a "corporation of convenience" to "exert a purely fictional control for jurisdictional purposes." Autopista, ICSID Case No. ARB/00/5, at ¶ 122. It is for this reason that "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) Foreign Relations Law § 213 n.2 ("[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.").

Indeed, if Loewen were correct that the mere loss of its NAFTA claims under these circumstances were sufficiently "unfair" to justify ignoring the continuous nationality rule, then no international claim would ever be dismissed on this ground. Yet, international tribunals have done so in countless cases for over a century, even where the change in nationality was far less calculated or voluntary than here. See supra at 60-61 (discussing cases rejecting claims where change of nationality resulted from death of original claimant). There is nothing "unfair" or "unjust" in this result. As Professor Borchard explained: "why such solicitude for the man who

⁶²See U.S. App. at 1825, 1828, 1831, 1835, 1838, 1849, 1855, 1858 (conceding 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").

denationalizes himself? He has changed nationalities, doubtless, with his eyes open and for his personal advantage.” Borchard, Protection of Citizens, 43 Yale L.J. at 382.

3. It Is Not Only Inequitable, But Contrary To International Law, For An International Tribunal To Order A Sovereign State To Pay Its Own Nationals Absent Its Consent

It is a fundamental precept of international law that "[t]he sovereignty and equality of states represent the basic constitutional doctrine of the law of nations" Brownlie, Principles of Public International Law at 289. For this reason, international tribunals cannot proceed in the absence of an "unequivocal indication" of a "voluntary and indisputable" acceptance by the State of the tribunal's jurisdiction. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1993 I.C.J. 325, 341-42 (Sept. 13) (Decision on Provisional Measures).

As the United States has demonstrated, there is no such "unequivocal indication" that the NAFTA Parties agreed to derogate from the continuous nationality rule and thereby allow claimants to seek damages from their own State. See supra at 10-18. To the contrary, the NAFTA Parties expressly prohibited claimants from pursuing claims against their own State. See NAFTA art. 1117(4) ("An investment may not make a claim under this Section"). To permit these claims – which are in truth owned by Alderwoods and prosecuted by Alderwoods for its own benefit (and for the benefit of the majority-U.S. investors who were Loewen's creditors and are now Alderwoods' owners) – to proceed in the face of this express prohibition would constitute an egregious violation of the sovereignty of the United States.

Even without such a clear intention, the injustice of ignoring the continuous nationality requirement in these circumstances is plain. As one international tribunal explained, "it cannot

be denied that when it is certain and known to the tribunal, that a change of nationality has taken place prior to the date of the award, it would hardly be just to obligate the respondent Government to pay compensation to a citizen of a country other than that with which it entered into a convention." Eschauzier, 5 R.I.A.A. at 209.

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

In its Counter-Memorial, Loewen concedes that TLGI no longer owns or controls LGII (now Alderwoods). Loewen admits that TLGI has neither any interest in nor any control over the Article 1117 claim that it had previously asserted on LGII/Alderwoods' behalf – at a time before it severed all ties with LGII/Alderwoods, transferred away all its assets and disbanded its directors, officers and employees. Loewen further acknowledges that, despite Article 1117(4)'s mandate that an “investment may not make a claim under this Section,” it has created an artificial structure intended to permit LGII/Alderwoods, the investment, to control every aspect of the claim as well as receive any proceeds.

Loewen nonetheless contends that TLGI may properly continue to press the claim in accordance with Article 1117's provision for an investor to claim on behalf of a “juridical person that the investor owns or controls.” NAFTA art. 1117(1). Loewen purports to find support for this proposition in “reality” (Counter-Mem. at 67) and the purposes and text of Article 1117. (Id. at 66-68). Loewen's contentions are baseless.

First, the reality here is that TLGI is a legal fiction and LGII/Alderwoods is, for all intents and purposes, the entity making the claim. This is precisely the scenario barred by Article 1117(4): “An investment may not make a claim under this Section.” The “reality” here is plain

– and it does not support Loewen’s assertions.

Second, the purposes of Article 1117 do not assist Loewen. Article 1117(4)’s evident purpose is to prevent nationals of the respondent State from pressing claims against their own State under the NAFTA. This purpose cannot be served by permitting LGII/Alderwoods, a U.S. company, to prosecute claims against the United States.

Article 1117(1)’s evident purpose is to permit an investor to assert a derivative claim on behalf of an enterprise that the investor owns or controls and that would otherwise be barred from asserting such a claim itself. The evident purpose of Article 1117(1)’s limitation of the right to claim to the investor who owns or controls the enterprise is to ensure that the investor controlling the claim is the one whose interests most closely coincide with those of the enterprise. This purpose cannot be served by permitting continued prosecution of the claims by TLGI – a mere name on a ledger with no interest in anything, much less an interest in LGII/Alderwoods or any aspect of the claims here.

Finally, Loewen errs in contending that the text of the NAFTA permits it to circumvent the purposes of Article 1117. Loewen contends that the great value of the domestic remedies waived by Article 1121 will ensure an enduring community of interest between investor and enterprise. (Counter-Mem. at 66). This contention is both curious and erroneous. It is curious because Loewen’s position in the written and oral proceedings on liability and competence was that the domestic remedies available to it were of no value. It is difficult to reconcile that position with its current suggestion that TLGI and LGII/Alderwoods are forever bonded by the value of those same domestic remedies. Loewen’s contention is also erroneous. Regardless of the value of the domestic remedies forsaken, an investor who no longer owns or controls the

enterprise -- and who will not receive any proceeds under Article 1135(2) – has no ongoing incentive to “cooperate” in an Article 1117 claim with the enterprise’s new owners. Loewen’s waiver argument does not hold up to scrutiny.

Loewen’s further argument, based on the Feldman decision, that Article 1117's requirements apply only on the “date of submission,” is without support. (Counter-Mem. at 68) (citing Feldman v. United Mexican States, Interim Decision on Preliminary Jurisdictional Issues, 40 I.L.M. 615, 620 at ¶ 44 (2001)). As demonstrated supra at 16-17, far from supporting Loewen, Feldman found “that Article 1117 uses the expression ‘making a claim’ in a general rather than a time-related or time-oriented meaning.” Feldman, 40 I.L.M. at 620, ¶ 44. Indeed, Feldman specifically cited Article 1117(4) as evidencing the use of the expression in its general sense “rather than to localize the arbitration in terms of time.” See id. Feldman demonstrates that, contrary to Loewen’s suggestion, Article 1117's requirements are not frozen in time. There is, of course, no dispute that TLGI cannot meet those requirements today. Accordingly, TLGI’s Article 1117 claim should be dismissed.

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.

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