

## I. INTRODUCTION

1. It is now clear that the United States has failed to make the showings necessary for this Tribunal to sustain its latest jurisdictional objection. Loewen respectfully submits that the Tribunal should overrule this objection, rule for Loewen on the merits, and order a very prompt damages proceeding.

2. Attached to this Rejoinder are opinion statements from the following experts:

- The Second Opinion of Sir Ian Sinclair (Tab A), which, like the earlier Fifth Opinion of Sir Robert Jennings, addresses the United States' misplaced reliance on "continuous nationality," a controversial practice even in diplomatic-espousal cases, and one having no relevance or application to investment-protection agreements such as NAFTA;
- The Supplementary Expert Report of Peter deC. Cory, Q.C., former Justice of the Supreme Court of Canada (Tab B), which supplements his earlier expert report as to the continuing existence and validity of TLGI under Canadian and British Columbia law, and responds to the United States' and its expert's misapplication of principles of corporate veil-piercing; and
- The Supplemental Affidavit of Jonathan B. Cleveland, Director of Houlihan Lokey Howard & Zukin, the international investment-banking firm that provided financial advice to the official committee of unsecured creditors of the Loewen bankruptcy estates (Tab C), which confirms the *involuntary* nature of the Loewen bankruptcy reorganization and resultant corporate restructuring, responds to certain academic speculations offered by the United States' bankruptcy-law expert, and emphasizes that he — Cleveland — is the *only* witness in this case who has given first-hand testimony about the actual motivations and voluntariness of the Loewen restructuring.

3. In Section II, we show that Chapter 11 of NAFTA conclusively sets the date of submission as the last critical date for evaluating matters of nationality and control, and that the United States cannot prove either that NAFTA's text demands continuous nationality through the date of award, or that it allows for such a rule to be imported from a body of international law extrinsic to the Agreement itself.

4. In Section III, we show that the United States also has not met its burden of proving that customary international law demanded continuous nationality through the date of award.

5. In Section IV, we show that the United States cannot prove that Claimant The Loewen Group, Inc. (“TLGI”) no longer exists, nor can it demonstrate that TLGI does not own the NAFTA claims at issue here. Moreover, the United States cannot prove that the admittedly separate companies of Alderwoods Group International (“AGI”) and Nafcanco should nonetheless be disregarded and treated as one, single, American company.

6. Finally, in Section V, we show that whatever else might be said about the United States’ present jurisdictional objection, basic principles of equity and fairness prevent the United States from taking advantage of its own wrong — which was a substantial contributor to Loewen’s bankruptcy and concomitant reorganization — by obtaining dismissal of the very claims that are intended to right that wrong.

## **II. NAFTA’S TEXT, CONTEXT, AND PURPOSE ALL ESTABLISH THAT NATIONALITY AND CONTROL NEED BE MAINTAINED ONLY UP TO THE SUBMISSION OF A CLAIM**

7. In its Counter-Memorial (at 4-19, 30-32), Loewen showed that the text, structure, and purposes of NAFTA generally, and Chapter 11 specifically, compel rejection of the United States’ proposed rule of continuous nationality and control through award, and require application of a date-of-submission rule. The United States’ responses do nothing to undermine those showings.

### **A. The United States Now Agrees That Its “Rule” Of Continuous Nationality And Control Until Award Cannot Be Located In The Text Of NAFTA Chapter 11**

8. The United States does not dispute that the starting point for interpreting any treaty is its text. *See* Vienna Convention on the Law of Treaties, art. 31(1); *see also* TLGI 2d

Juris. Counter-Mem. at 4-7. Nor does the United States recant its previous submission, in another NAFTA Chapter 11 arbitration, that Articles 1116 and 1117 govern standing under Chapter 11. *See Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, U.S. Subm. on Prelim. Matters, ¶ 4; *see also Feldman Karpa* (Interim Decision on Preliminary Juris. Issues, Dec. 6, 2000), 40 I.L.M. 615, ¶ 25 (2001) (“NAFTA Article 1117(1)(a) is the main applicable provision with respect to the standing issue under consideration.”); *see also id.*, ¶ 34 (same).

9. Additionally, and dispositively, the United States no longer disputes that Loewen continues to satisfy all of the express requirements of NAFTA Chapter 11 (with the exception of Article 1117(4), which will be addressed below). Indeed, the United States now concedes that NAFTA Chapter Eleven “*does not . . . expressly incorporate[]*” its proffered continuous-nationality rule. (U.S. 2d Juris. Reply at 18.)

10. As Loewen has already shown, Articles 1116 and 1117 require only that Loewen was an investor of Canada and that it owned or controlled LGII (1) when it was injured by the United States’ breach of Chapter 11’s investment guarantees, and (2) when it submitted its claims before this Tribunal. (*See* TLGI 2d Juris. Counter-Mem. at 4-7.) Any changes in nationality or control after the date of submission are irrelevant. (*See id.* at 4-13.) The United States does not dispute that Loewen satisfies those two requirements. Thus, the United States’ argument now rests almost exclusively on its assertion that its “rule” of continuous nationality has been imported into NAFTA through Article 1131(1).

**B. NAFTA Requires Nationality And Control To Be Established Only Up To The Date Of Submission, And Article 1131(1) Does Not Alter Or Add To Those Requirements**

11. Having abandoned virtually all of its own “textual” arguments (*compare* U.S. 2d Juris. Mem. at 10, 16-18 *with* U.S. 2d Juris. Reply at 10-18), the United States now seeks instead

to convince this Tribunal that NAFTA Chapter 11's terms are so devoid of any textual requirements addressing nationality and control that extrinsic requirements — in particular its so-called “rule” of continuous nationality and control until award — must be read into the treaty to fill that gap. (*See* U.S. 2d Juris. Reply at 14-15, 18.) Specifically, the United States now asserts that “NAFTA Articles 1116 and 1117 are silent as to nationality both *before* and *after* a claim is submitted.” (*Id.* at 14 (emphasis added); *see also id.* at 15 (“neither Articles 1116 nor 1117 speak[] to the nationality of a claimant at the time of injury or at any time before submission”).) It thus asserts that by operation of NAFTA Article 1131(1), an additional, implicit requirement — the United States’ alleged continuity-until-final-award “rule” of customary international law — is added to Articles 1116 and 1117 (and the rest of Chapter 11). (*See* U.S. 2d Juris. Reply at 11, 18.)

12. Article 1131(1) states: “A Tribunal established under this Section shall decide the issues in dispute *in accordance with this Agreement* and *applicable* rules of international law.” (Emphasis added.) This text refutes the United States’ contention for four separate reasons. *First*, even were there a rule of international law requiring continuous nationality through the date of an award, it would be irrelevant where, as here, the treaty itself addresses the issue. *See* NAFTA Article 1131(1) (providing for decision “in accordance with this Agreement”); Vienna Convention on the Law of Treaties, art. 31(1) (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”); Section II(B)(1), *infra*. *Second*, the United States’ proffered “rule” is contrary to the express terms of NAFTA Chapter 11, which incorporate the ICSID Convention; thus, applying that “rule” to a Chapter 11 arbitration by definition would not be “in accordance with this Agreement.” Article 1131(1); *see also* TLGI 2d Juris. Counter-

Mem. at 4-19; Section II(B)(2), *infra*. *Third*, the United States’ “rule” would also not be in accordance with NAFTA because it is directly contrary to the context and purposes of NAFTA generally and Chapter 11 in particular. (*See* TLGI 2d Juris. Counter-Mem. at 30-32; Section II(B)(3), *infra*.) *And fourth*, even if continuity through award were a “rule” of “customary international law,” that principle, drawn from diplomatic-protection authorities, would not be “applicable” to the very different context of investor-State disputes. Article 1131(1); *see* TLGI 2d Juris. Counter-Mem. at 32-39; *see also* Fifth Jennings Op. at 2-6; Second Sinclair Op. ¶¶ 8-9; Sections II(B)(4), III(A), *infra*.

**1. NAFTA’s Text Establishes That Nationality And Control Are Determined Only Up To The Date Of Submission**

13. Article 1131(1) states that NAFTA is to be interpreted “in accordance with th[e] Agreement” itself. Contrary to the United States’ present assertions, Articles 1116 and 1117 speak to matters of nationality and control both at the time of injury and at the time of submission. (*See* TLGI 2d Juris. Counter-Mem. at 5-7.) The United States does not dispute that these articles speak directly to nationality at the time of submission by establishing that an “investor of a Party” “may submit” a claim that “another Party” (Article 1116(1)) or “the other Party” (Article 1117(1)) “has breached an obligation.” And Article 1117(1) speaks to control at the time of submission by requiring — in the present tense — that the submitting claimant “owns or controls directly or indirectly” the enterprise at issue.

14. But as Loewen has already demonstrated (TLGI 2d Juris. Counter-Mem. at 5-6) — and the United States cannot seriously dispute — these articles also speak to nationality and control at the time of injury, *i.e.* the time of breach. The “breach[] [of] an obligation under . . . Section A” of Chapter 11 (Articles 1116(1), 1117(1)) can only occur if such an obligation exists; Section A of Chapter 11 only creates obligations owed directly to foreign investors and their

foreign-controlled or foreign-owned investments. *See generally* Section A of Chapter 11; *see also* U.S. 2d Juris. Reply at 55. Thus, without the appropriate nationality and control at the time of injury, there could be no “breach.”

15. The United States is of course correct that Articles 1116 and 1117 contain no nationality or control requirements *after* the date of submission (U.S. 2d Juris. Reply at 14, 18), but that is precisely Loewen’s point. Because NAFTA’s text directly addresses both the beginning and ending requirements for establishing nationality and control, it is both unnecessary and improper to read any further requirements into the Agreement. Loewen has satisfied the textual requirements, and that is the end of the matter.

**2. The ICSID Convention, Which Is Incorporated Into NAFTA By Article 1120, Is An Insurmountable Barrier To The United States’ Proposed “Rule”**

16. Loewen showed (TLGI 2d Juris. Counter-Mem. at 13-19) that Article 25(2)(b) of the ICSID Convention, which is expressly incorporated into NAFTA Chapter 11, establishes the date of submission as the last critical date for ascertaining nationality and control and confirms the inapplicability of the United States’ proposed “rule.” *See* Article 1120(1), (2). Indeed, the United States does not dispute that Article 1120(2) states that the arbitration rules incorporated by Article 1120(1) “shall govern the arbitration except to the extent modified by” Section B of Chapter 11. The United States also does not dispute that Article 25(2)(b) of the ICSID Convention in fact establishes the date of submission as the last critical date. And the United States concedes that NAFTA Chapter 11 does not “expressly” modify ICSID Article 25(2)(b) to substitute the date of award as the critical date. (*See* U.S. 2d Juris. Reply at 18; Section II(A), *supra*.) Moreover, the United States explicitly “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 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.” (U.S. 2d Juris. Reply at 44-45 (internal quotation marks omitted).) Therefore, the date of submission must be the last critical date for determining nationality and control in cases proceeding under the ICSID Additional Facility, as well as the ICSID Convention.

17. Nonetheless, despite its concessions, the United States persists — by relying on Article 1131 — in urging that the date-of-submission rule of the ICSID Convention is trumped by its “rule” of continuous nationality through award. This is so, it argues, because customary international law (or at least the United States’ version of it), and not the express terms of NAFTA and ICSID, would provide the relevant rule of decision in any NAFTA case under the ICSID Convention simply because Article 1131(1) references “applicable rules of international law.” (*See* U.S. 2d Juris. Reply at 40-41.) With all due respect, that argument is absurd.

18. There is no doubt that the critical dates of ICSID Article 25(2)(b) apply in a NAFTA arbitration. NAFTA expressly incorporates the entire ICSID Convention, unless a particular provision is explicitly changed: Article 1120(1) provides that “a disputing investor may submit the claim to arbitration under . . . the ICSID Convention,” and Article 1120(2) provides that such “arbitration rules shall govern the arbitration except to the extent modified by this Section.” As another NAFTA Chapter 11 Tribunal has confirmed, such modifications can be made only through “a rule in Section B of Chapter Eleven which *specifically addresses* the issue”; otherwise, the issue will be “governed by . . . the Arbitration Rules.” *Feldman Karpa* (Interim Decision), 40 I.L.M., ¶ 54. NAFTA does not expressly modify the critical date requirements of Article 25(2)(b) of the ICSID Convention, and the U.S. does not so contend. (*See* U.S. 2d Juris. Reply at 18.)

19. In the face of this express textual incorporation of ICSID Article 25(2)(b)'s critical dates, the United States nonetheless urges that when the NAFTA Parties consented to arbitration under the ICSID Convention (*see* Article 1122(2)(a)), they selectively — yet silently — excluded Article 25. (*See* U.S. 2d Juris. Reply at 42-44.) The vehicle for this alleged *implicit* exclusion is said to be NAFTA Article 1131(1). (*See id.* at 44.) But “[c]onsent to the jurisdiction of the Centre implies a submission to *all relevant rules of the Convention*,” C. Schreuer, *The ICSID Convention: A Commentary* 193 (2001) (emphasis added), not just *some* of the rules, and the ICSID Convention itself provides that once consent has been given, “no party may withdraw its consent unilaterally.” ICSID Conv. Art. 25(1). The consent made in Article 1122(1) of NAFTA states that “Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement,” which of course includes Article 1120.

20. Thus, absent an express and specific NAFTA modification of ICSID Article 25(2)(b)'s critical date requirements — which the United States concedes does not exist in NAFTA's text — Article 25(2)(b) supplies the rule of decision regarding the critical dates for nationality and control in any NAFTA arbitration conducted under the ICSID Convention. And because the United States “agrees” that NAFTA claimants must be treated the same under the ICSID Additional Facility as under the ICSID Convention (U.S. 2d Juris. Reply at 44-45), it must also supply the rule of decision here.

21. In sum: ICSID Article 25(2)(b)'s critical-date provisions, which are specifically incorporated without modification into Chapter 11 by Articles 1120(1) and (2), set the last critical date for nationality and control at the date of submission; because the United States' “rule” is directly contradictory to ICSID Article 25(2)(b), it is by definition not “in accordance

with” NAFTA and therefore would not be “applicable” under Article 1131(1), even if it were a “rule[] of international law.”

### **3. The United States’ Proposed “Rule” Is Contrary To NAFTA’s Context And Purposes**

22. NAFTA Chapter 11 also addresses nationality in several other areas, which — taken together, in context — make clear that the drafters of NAFTA intended to broaden and expand international concepts of nationality, not to revert back to rules of diplomatic protection rejected in the context of investment arbitration. For example, the definition of “investor of a Party” in Article 1139 provides that, for natural persons, a claimant must be “a national . . . of such Party.” Article 201, in turn, states that the term “national” includes both a “citizen” *and* a “permanent resident of a Party.” Similarly, with regard to juridical persons the term “enterprise of a Party” is defined, in Article 1139, to include not only “an enterprise constituted or organized under the law of a Party,” but also the mere unincorporated “branch” of any enterprise so long as that branch is “carrying out business activities there.”

23. Indeed, as Loewen showed (TLGI 2d Juris. Counter-Mem. at 70-71), without dispute from the United States (*see* Section IV(C), *infra*), the NAFTA Parties’ implementing statements confirm that these definitions were designed to disregard rigid principles of nationality in order to extend the NAFTA Chapter 11 investment protections to all North American enterprises, regardless of their nationality of ownership. Viewed in this light, it is impossible to believe that the NAFTA Parties intentionally created such a liberal and expansive regime for protecting North American investment, but simultaneously meant to incorporate (or allow for the incorporation of) rigid, limiting, and politically-motivated nationality limitations found only in the realm of diplomatic protection.

24. Similarly, the United States’ “rule” is utterly contrary to NAFTA’s trade and investment-protecting purposes, as Loewen has demonstrated. (*See* TLGI 2d Juris. Counter-Mem. at 30-32.) While there is no real dispute between Loewen and the United States that those purposes exist — including the NAFTA Parties’ shared desire to “increase *substantially* investment opportunities in the territories of the Parties” (Article 102(1)(c) (emphasis added)) — the United States somehow finds in this broad and unqualified statement of purpose an express limitation of scope. The United States finds two bases for this limiting principle: (1) because Article 102(1)(c) does not say “increase *entirely* investment opportunities”; and (2) because NAFTA is designed to protect *foreign* investment from the actions of *host* states. (U.S. 2d Juris. Reply at 54-55.) The former point refutes itself, and the latter only reinforces Loewen’s argument: Loewen was indisputably a Canadian company when it was unlawfully subjected to manifest injustice at the hands of the Mississippi jury — the time when it was most in need of NAFTA’s protections — and at the time it submitted its claims. By looking to the time of injury and the time of submission (the two critical dates of Articles 1116 and 1117), NAFTA Chapter 11 achieves its intended purpose of protecting foreign investment from the wrongs of host states which give rise to vested Chapter 11 claims.

25. The United States’ corresponding claim (U.S. 2d Juris. Reply at 55) that its proposed “rule” would not undermine Chapter 11’s goal of protecting foreign investments and “liberalizing existing restrictions” on investment (TLGI 2d Juris. Counter-Mem. at 30 (quoting Daniel Price, the U.S. negotiator for Chapter 11)) is equally untenable. The mere fact that its “rule” originates in ancient diplomatic-protection cases demonstrates that the United States seeks not to liberalize existing restrictions, but to insert into NAFTA old and questionable restrictions

that can only be viewed as historical museum-pieces, and certainly not as modern investment-protection principles.

26. Similarly untenable is the United States' claim (U.S. 2d Juris. Reply at 55-56) that barring investors from selling or restructuring their investments until *after* a vested Chapter 11 claim is fully adjudicated (inevitably a several-years-long process, as this case has shown) would in no way restrict or discourage the movement of investment. The United States asserts that it "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." (*Id.* at 55) Rather, it claims that "it is Loewen's transfer of *ownership of the NAFTA claims . . .* as well as the wholesale change in the nationality of Loewen's corporate group, that bars those claims." (*Id.* (emphasis in original).) Whatever the United States might mean by this curious assertion (Loewen has demonstrated that TLGI, a British Columbia corporation, continues to own those claims), it has not shown, and cannot show, that its proposed rule is in any way consonant with the purposes of NAFTA or Chapter 11.

27. Perhaps the folly of the United States' position is best illustrated by its complaint (U.S. 2d Juris. Reply at 80) that Loewen "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*" from Loewen's Article 1117 claim. (Emphasis added.) In order to make this complaint, the United States completely ignores Article 1135(2), which *requires* that all proceeds from an Article 1117 claim be paid not to the investor but to the enterprise. But even more contradictory is the United States' complaint that allowing Loewen's claim to go forward now would frustrate Article 1117(1)'s "evident purpose" of ensuring that control of the claim is placed in the hands of "the one whose interests most closely coincide with those of the

enterprise.” (U.S. 2d Juris. Reply at 81.) Since, under the United States’ flawed version of the facts, Alderwoods Group International is both investor/claimant and enterprise, it is difficult to see the logic of the United States’ argument.

28. In sum: The context and purposes of NAFTA and Chapter 11 confirm that the United States’ proposed “rule” cannot coexist with the Agreement, and that it therefore cannot be “applicable” under Article 1131(1).

**4. The Customary International Law Of Investment — The “Applicable” International Law — Repudiates The United States’ Proffered “Rule”**

29. Finally, Loewen showed (TLGI 2d Juris. Counter-Mem. at 19-26) that even though past diplomatic practices have varied widely on issues of continuous nationality (*see* Second Sinclair Op. ¶ 5), the international law of investment protection — a recent development of which NAFTA is a fundamental part — has been virtually uniform. Thus, even if the text of NAFTA, and the incorporated ICSID Convention, did not provide exactly the same answer, this customary international law of investment protection, created and evidenced by the worldwide network of investment treaties, also sets the critical date at the date of submission to arbitration. And it is this international investment law — as opposed to the United States’ “rule” of the customary international law of diplomatic protection — that is “applicable” law under Article 1131(1). Unable to satisfy the burden of proving the existence of its own rule, the United States responds by impermissibly trying to shift the burden to Loewen, and by incorrectly attempting to characterize these important treaties as irrelevant.

30. *First*, contrary to the United States’ submission (U.S. 2d Juris. Reply at 45), Loewen does not bear the “burden of establishing that the BITs create” the customary international law of investment. The burden of proving an applicable rule of customary international law rests first and foremost on the United States, which has not proved, and cannot

prove, the existence of the “rule” on which its entire jurisdictional objection is based. Indeed, the United States bears the burden of “prov[ing]” that its proffered continuity-until-award rule “is established in such a manner that it has become binding” not only in espousal cases, but in investor-state disputes such as this one. (See U.S. 2d Juris. Reply at 45 n.31 (quoting *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), 1952 I.C.J. 176, 200) (internal quotation marks omitted).)

31. *Second*, Loewen need not prove that the BITs create the “customary” international law of investment because Article 1131(1) provides that when no answer is found in the text of NAFTA itself, these proceedings are to be decided according to the “applicable rules of *international law*” (emphasis added), which includes both customary *and* treaty law. In a very similar provision of the ICSID Convention (Article 42(1)), the phrase “international law” has naturally been “understood in the sense given to it by Article 38(1) of the Statute of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.” *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965*, 1 ICSID Rep. 23, 31 (1993). Article 38(1), of course, looks to both treaties and custom as sources of international law. *See id.* at 31 n.3. Further, each of the NAFTA signatories has, in the bilateral investment treaties it has signed, expressly recognized — through the unmodified incorporation of the ICSID Convention— the date of submission as the latest critical date for determining nationality and control. *See, e.g., Agreement between the Swiss Confederation and the United Mexican States on the Promotion and Reciprocal Protection of Investments* (July 10, 1995), art. 11 *and* Schedule: Settlement of Disputes between a Party and an Investor of the Other Party, art. 4(1)(a) (providing that the “disputing investor may submit the claim to arbitration under . . . the

ICSID Convention . . . .”); TLGI 2d Juris. Counter-Mem., Tab F (Treaty Appendix referencing numerous U.S. and Canadian BITs incorporating the ICSID Convention). As a consequence, these BITs constitute “applicable rules of international law,” since they “establish[] rules expressly recognized by the contesting states” under Article 38(1)(a) of the ICJ Statute. *See Report of the Executive Directors, supra*, at 31, n.3.

32. *Third*, even if the phrase “applicable rules of international law” were improperly limited to read “applicable rules of *customary* international law,” as the United States seems to suggest, the international BIT regime in fact creates the most “applicable rules” of customary international law for this case. As Loewen’s survey of recent BITs demonstrated (*see* TLGI 2d Juris. Counter-Mem. at 21), virtually all such BITs expressly incorporate the ICSID Convention’s date-of-submission rule for determining nationality and control, or expressly set an even earlier critical date. None provides that the date of award is the critical date. (*See id.* at 19-26.) According to then-U.S. State Department Legal Advisor Davis Robinson, it is through such treaties that “States have shown their real practice.” D. Robinson, *Expropriation in the Restatement (Revised)*, 78 Am. J. Int’l L. 176, 177 (1984). Thus, where bilateral treaties “are habitually framed in the same way, a court may regard the usual form as the law even in the absence of a treaty obligation.” I. Brownlie, *Principles of Public International Law* 13 (1998). Sir Hersch Lauterpacht agrees: “It is possible to hold — and the [ICJ] has held so on occasions — that the frequency and identity of treaty provisions on a given subject, far from proving that they constitute an exception from the customary rule, result in the creation of international custom.” H. Lauterpacht, *The Development of International Law by the International Court* 378 (1982) (citing *The Wimbledon*, 1923 P.C.I.J., Series A, No. 1, 6, 26-28). The United States has offered little basis for this Tribunal to ignore this highly relevant customary law in favor of its

preferred “rule,” which is derived (and even then, selectively so) from old diplomatic-espousal cases.

33. *Fourth*, in any event, NAFTA Article 1103 — the most-favored-nation provision — entitles Loewen to the benefits found in the most favorable U.S. BITs, *i.e.*, the date-of-injury rule for determining both nationality and control. (*See* TLGI 2d Juris. Counter-Mem. at 26-29.)

34. In sum: The widespread network of BITs creates the “applicable rules of international law” in this context, conclusively refutes any argument for setting the critical date for nationality or control at the date of award, and makes Article 1131(1) of no benefit to the United States’ most recent jurisdictional objection.

### **C. Nothing In Article 1117 Provides Support For The United States**

35. The United States’ attempt to find support for its continuous-nationality “rule” in Article 1117 is surprising given its contrary construction of that Article in an earlier phase of these proceedings. Far from ensuring that a national cannot recover damages from its own State, Article 1117 is specifically designed to ensure that very result. In the United States’ words, “the unassailable point,” is

that an Article 1117 claim is asserted *on behalf* of an enterprise, which itself is entitled to any recovery. *See* art. 1135(2). Any alleged injury inured to the detriment of the enterprise; thus any recovery must inure to the enterprise’s benefit.

(U.S. Juris. Resp. at 94 (emphasis in original) (footnote omitted).) Thus, as the United States own arguments make clear, a national of the respondent State is *always* “the real party in interest” in an Article 1117 claim. (U.S. Juris. Mem. at 91.) This is hardly the mark of a treaty provision built upon the supposed “repugnance to States . . . of making payment to their own nationals.” (U.S. 2d. Juris. Reply at 38.) Rather, it is an “unassailable” example of a “clear treaty provision[] to the contrary.” (*Id.*)

36. The United States' repeated invocation of Article 1117(4) ("An investment may not make a claim under this Section") similarly fails on several grounds. *First*, the phrase "make a claim" refers to the singular act of submitting a claim, an event which took place in October 1998, when, even under the United States' flawed factual submission, no "investment" was a claimant. (See TLGI 2d Juris. Counter-Mem. at 8-9, 68.) Moreover, the United States' suggestion that Article 1117(4)'s restriction on investments making claims "arguably extends beyond the time of submission" (U.S. 2d Juris. Reply at 17 n.5) finds no support in the *Feldman Karpa* decision, and flatly contradicts the United States' own position in that case. (See TLGI 2d Juris. Counter-Mem. at 68.)

37. *Second*, the United States' contention that Article 1117(4) reflects its claimed traditional "repugnance to States . . . of making payment to their own nationals" (U.S. 2d Juris. Reply at 38) ignores both the express language of NAFTA and the last 50 years of world history. NAFTA Articles 1117(4) and 1135(2) expressly provide that even though an investment may be barred from submitting a claim in its own name under Article 1117(1), "an award of monetary damages and any applicable interest shall provide that the sum be paid *to the enterprise*." Article 1135(2)(b) (emphasis added). Thus, again, NAFTA *requires* a national of the respondent State to be the beneficial owner — "the real party in interest" (U.S. Juris. Mem. at 91) — of an Article 1117 claim. Nor does this requirement represent a break from existing international norms. States are subject to international claims for the benefit of, and are therefore required to make payments directly to, their own nationals not only under NAFTA, but also under the ICSID Convention (*see* ICSID Conv. Art. 25(2)(b)), the U.S. Model BIT and all the U.S. BITs that follow it (*see* U.S. 2d Juris. Reply at 13-14), and numerous human rights conventions. *See, e.g.*, African Charter on Human & People's Rights (Banjul Charter), 21 I.L.M. 59 (1981); American

Convention on Human Rights, 9 I.L.M. 673 (1970); *see also* Fifth Jennings Op. at 5; Second Sinclair Op. ¶ 9. Whatever repugnance may have existed a century or more ago has long since been overtaken by the evolution of international law.

38. *Third*, the very existence of Article 1117(4) disproves the United States’ “non-derogation” theory, (*see, e.g.*, U.S. Juris. Reply at 10-11, 18, 79), while proving the applicability of the ICSID Convention’s rules. If, as the United States argues, its proffered diplomatic-protection “rule” of continuous nationality automatically applies to NAFTA absent an express derogation in its text, there would have been no need to include Article 1117(4) at all. Any claim submitted for the benefit of a national of the respondent State would automatically be barred by the United States’ “rule.” But the ICSID Convention, like the U.S. BITs, allows not only foreign investors *but also* local investments to make claims against the host State in their own names. *See* ICSID Conv. Art. 25(2)(b). NAFTA Article 1117(4) was therefore necessary to prevent claims from being submitted directly by local investments, not as a superfluous confirmation of the United States’ dubious “rule.” Indeed, as noted above, Article 1120(2) requires any modifications to the ICSID Convention to be made “specifically” in the text of Section B of Chapter 11. *See Feldman Karpa*, 40 I.L.M., ¶ 54. Therefore, Article 1117(4), like the rest of Chapter 11, confirms that the Convention’s critical date provisions for nationality and control apply, because there is no textual derogation as to these dates.

39. In sum: The plain text of Articles 1117 and 1135(2)(b), as well as the United States’ prior construction of them, prove the *inapplicability* of the United States’ diplomatic protection “rule,” while Article 1117(4) proves the *applicability* of the ICSID Convention’s critical date requirements.

### III. THE UNITED STATES CANNOT CARRY ITS BURDEN OF PROVING THE EXISTENCE AND CONTENT OF ITS CONTINUOUS-NATIONALITY “RULE”

40. Much could be said here about the United States’ continued efforts to craft a modern investment rule out of a selective reading of old diplomatic-espousal authorities. But it is enough to limit our showing to the more significant problems in the United States’ latest submission.

41. *First*, it is the United States’ burden to prove the existence and content of the “rule” on which it purports to rely, and the United States acknowledges this. (U.S. 2d Juris. Reply at 45 n.31.) *Second*, the United States cannot shift its burden of proof by, for example, arguing that “Loewen offers no coherent reason” why diplomatic practices should not apply where an investor has the right to prosecute a claim on its own behalf. (U.S. 2d Juris. Reply at 37.) Especially in light of the profound changes that the BIT system has created within international law, J. Paulsson, *Arbitration Without Privity*, 10 ICSID Rev.–F.I.L.J. 232 (1995) (cited in U.S. 2d Juris. Reply at 48), it is the United States’ burden to prove that its “rule” — admittedly derived from old diplomatic practices — should and does apply to investment-protection regimes such as NAFTA. *See id.* at 233 (the BIT system “impels us to reconsider fundamental assumptions about the international legal process as it affects investors abroad”). The United States has not met — and cannot possibly meet — that burden, as its own authority demonstrates:

Whatever may have been [diplomatic protection’s] value in securing the physical safety of individuals, this mechanism has proved itself unworkable as a way of protecting business interests in the context of contemporary international economic life. . . . It is of course too early to tell whether this new field of international arbitration will fundamentally alter practice or remain a marginal feature. *What is already clear however is that this is not a subgenre of an existing discipline. It is dramatically different from anything previously known in the international sphere.*”

*Id.* at 255-56 (emphasis added).

**A. Diplomatic Practices Do Not Apply**

42. Loewen showed, and Sir Robert confirmed in his unrebutted expert opinion, that “the rule of the nationality of claims was never a free-standing general rule of international law; it was a concomitant, and of the very essence, of diplomatic protection.” (Fifth Jennings Op. at 3; *see also* TLGI 2d Juris. Counter-Mem. at 33-39.) And as Sir Ian notes in his attached opinion, “the Loewen Group claims under Chapter Eleven of the NAFTA have nothing to do with the rules applicable to the modalities governing the pursuit of inter-state claims within the framework of the traditional institution of diplomatic protection.” (Second Sinclair Op. ¶ 8.) The United States’ attempts to explain away the many authorities Loewen offered in support of that showing cannot withstand scrutiny.

43. The United States suggests (U.S. 2d Juris. Reply at 36 n.23) that the Tribunal should ignore the fact that the International Law Commission’s Draft Articles on State Responsibility do not contain a continuous-nationality requirement (TLGI 2d Juris. Counter-Mem. at 36), because the ILC left development of a continuous-nationality rule to its work on Diplomatic Protection. That, of course, is exactly Loewen’s point. “Nationality” is the link that justifies diplomatic protection; it is not a requirement for holding States responsible for their international wrongs. Thus, Loewen does not argue, as the United States suggests, “that *this particular* rule of international law (*i.e.*, that of continuous nationality) was selectively and conveniently excluded from NAFTA.” (U.S. 2d Juris. Reply at 9.) Rather, Loewen has demonstrated that any “rule” of diplomatic protection is simply inapplicable to investor-State disputes. The United States’ assertion to the contrary is, as Sir Ian observes, “founded on a blind, not to say perverse, disavowal or ignoring of the manner in which international law has developed over the past fifty years.” (Second Sinclair Op. ¶ 9.)

44. Next, Loewen has shown (TLGI 2d Juris. Counter-Mem. at 33-39) that international authorities have long recognized the important distinctions between diplomatic-protection cases and cases involving direct access to international tribunals, as well as the need to replace the former with the latter in order to accord effective protection to foreign investments. The United States treats those authorities as though they do not say what they clearly do. For example, the United States contends that when Borchard proposed making “nationality immaterial” by “enabling individuals to sue foreign states in an international forum” (TLGI 2d Juris. Counter-Mem. at 35 (quoting Borchard, *The Protection of Citizens Abroad and Change of Original Nationality*, 43 Yale L.J. 359, 383 (1934))), he did not really mean what he said. Instead, the United States illogically contends that Borchard’s plan for making “nationality immaterial” (Borchard, *supra*, at 383) was to make the individual right of direct access to international tribunals subject to “safeguards” which would make nationality material. (U.S. 2d Juris. Reply at 37 n.24.) Such logic cannot be squared with Borchard’s observation, later in the same article, that under his approach an individual would no longer “depend for his rights upon the accident of nationality.” Borchard, *supra*, at 391.

45. Finally, the United States ignores all the authority demonstrating that the reasons for conditioning diplomatic protection on continuous nationality in the first place — to ensure that *the espousing State* has a legitimate interest in the claim, and to prevent protection-shopping and claim-shopping — are simply inapplicable where the claimant has both the right and responsibility of pressing its own claim. (TLGI 2d Juris. Counter-Mem. at 37-39.) Instead, the United States seems to suggest that the only “reaso[n] for international law’s requirement of nationality on the *dies ad quem*” is “the repugnance to States, absent clear treaty provisions to the contrary, of making payment to their own nationals on a claim under international law,”

which supposedly would “constitute an egregious violation of” U.S. sovereignty were Loewen’s claims allowed to proceed. (U.S. 2d Juris. Reply at 38; *see also id.* at 79.) As noted above (Section II(C), *supra*), not only does NAFTA Article 1135(2) expressly require the proceeds of any award made under Article 1117(1) to be paid to the injured enterprise — by definition a national of the respondent State — but the web of investment and human rights treaties also requires payments from a State to its own nationals.

46. In sum: Diplomatic espousal is different from, and its nationality requirements cannot be grafted onto, investment-protection regimes such as NAFTA.

**B. The United States Has Not Carried Its Burden Of Proving The Existence Of Any Continuous-Nationality “Rule,” Even In Diplomatic-Espousal Cases**

47. Loewen previously showed (TLGI 2d Juris. Counter-Mem. at 39-43) that the United States’ continuous-nationality “rule” is hardly “well-established.” The fact that the United States characterizes Loewen’s showing on this issue as “half-hearted[,]” and based solely on “dicta” in one authority “and a lone dissent” in another (U.S. 2d Juris. Reply at 26 n.10), simply underscores the United States’ preference for ignoring rather than confronting contrary authority.

48. In fact, Loewen demonstrated that judges and commentators alike have been refuting efforts to portray continuous nationality as a “rule” of diplomatic protection since those efforts began; Special Rapporteur Dugard’s recent, comprehensive report demonstrates conclusively that the disagreement with a continuous-nationality “rule” is not isolated but widespread. (TLGI 2d Juris. Counter-Mem. at 39-43.) And far from relying solely on the opinions of Umpire Parker and Judge van Eysinga (as the United States suggests), Loewen showed that their conclusions are supported by the work of many other authorities as well — not the least of which include O’Connell, Weston, Verzijl and Dugard. (*See id.* at 40, 42.)

49. Using the *Landreau* case as just one example of such authority, Loewen showed that the United States' own past practices establish the discretionary nature of conditioning diplomatic protection on continuous nationality. (TLGI 2d Juris. Counter-Mem. at 40-41.) The United States now argues that *Landreau* is inapposite because the State parties there (the United States and Peru) agreed to ignore the fact that Landreau's claim did not satisfy the continuous-nationality "rule." (U.S. 2d Juris. Reply at 24.) Of course, if it were true that "the disputing States had clearly agreed that the issue of compliance with the continuous nationality rule would not be before the tribunal" (*id.*), one might ask why Peru raised this challenge before the *Landreau* commission in the first place. Further, even if the United States were correct, that would only prove that States have the discretion to enter treaties making the "rule" irrelevant. It also follows that by negotiating an investment treaty that makes post-submission changes in nationality irrelevant, the NAFTA Parties have not "granted investors greater rights than States themselves have under international claims law." (U.S. 2d Juris. Reply at 33 (emphasis removed).)

50. In sum: The United States has not proved that the discretionary practices of diplomatic protection have created *any* "rule" of continuous nationality.

**C. The United States Has Not Carried Its Burden Of Proving A "Rule" Requiring Continuous Nationality Through The Date Of Award**

51. Loewen showed that, even among those authorities who believed continuous nationality was a rule of diplomatic protection, the majority view was always that original nationality was required only up to the date of presentation. (TLGI 2d Juris. Counter-Mem. at 43-50.)

52. In an expert opinion unchallenged by the United States, Sir Robert Jennings further showed that the minority, or "British," date-of-award test is the result of a 1926 article by

Sir Cecil Hurst, who took issue with the majority date-of-presentation rule advocated by American writers. (Fifth Jennings Op. at 6-8.) Before then, Great Britain had vigorously opposed any suggestion that its standing to prosecute a claim arising out of an injury to one of its nationals was in any way affected by a subsequent change in his or her nationality. *See Stevenson* (Gr. Brit. v. Venez.), 9 R.I.A.A. 494, 495 (1903) (“In the view of the British Government the nationality of Mrs. Stevenson and her children is irrelevant” where the original, deceased, claimant was a British national). Against this background, Sir Cecil himself recognized that his proposed rule of continuous nationality through award represented a break from the views of “the text book writers” and others — including Borchard, Ralston, Hyde and Commissioner Andersen — all of whom concluded “that a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that the title to such claim must have remained continuously in the hands of citizens of that Government until the time of its presentation for filing before the commission.” C. Hurst, *Nationality of Claims*, [1926] 7 Brit. Y.B. Int’l L. 163, 164; *see also id.* at 179, 180.

53. Sir Robert’s Opinion (at 7-8) also detailed how the British Government has long since concluded a “tactful abandonment” of Hurst’s minority view, as reflected in the 1983 revision of its *Rules regarding the Taking up of International Claims by Her Majestic Government*. The United States nonetheless contends that the British Government’s revised rules do not really mean what they quite clearly say when they state that an international claim is “sustainable” if the claimant is ““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.*”” (U.S. 2d Juris. Reply at 22 n.7 (quoting *Rules regarding the Taking up of International Claims by Her Majestic Government*) (emphasis added).) According to the United

States, “[m]erely 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.” (*Id.*) But it does mean exactly that: Sir Robert states in his unchallenged opinion that the date of presentation is the last critical date; and this is confirmed by Sir Ian’s Second Opinion (¶ 3), as well as his conclusion over 50 years ago that, even as of 1950, “modern British practice” required the claimant to “be a British national both at the time when the injury was suffered *and at the time when the claim is presented.*” I.M. Sinclair, *Nationality of Claims: British Practice* [1950] Brit. Y.B. Int’l L. 124, 144 (emphasis added). The United States cannot hope to meet its burden with unsupported speculation that things do not really mean what they so clearly say.

54. Despite all of these showings, the United States continues to argue that the majority State practice, as well as the majority of international commentators, support its date-of-award “rule.” (U.S. 2d. Juris. Reply at 19.) This assertion cannot withstand even a cursory review. For instance, the United States cites a survey by the League of Nations as establishing that, at least in 1929, a majority of governments supported a date-of-award “rule.” (U.S. 2d Juris. Reply at 19, 26.) But the United States fails to mention that, of all the States then in existence, the survey reported the views of only **19** States — and the United States was not one of them. *See Bases of Discussion for the Conference Drawn up by the Preparatory Committee*, League of Nations Doc. C.75.M.69.1929.V. at 140-45 (1929), *reprinted in* 2 S. Rosenne, *League of Nations Conference for the Codification of International Law* [1930] 423, 562-67 (1975). Of those 19, the United States itself acknowledges that only a *minority* of eight supported its date-

of-award “rule.” (U.S. 2d. Juris. Mem. at 14 n.23.) And two of the eight (India and New Zealand) were dominions of the British empire and simply let Great Britain speak for them. *Bases of Discussion, supra*, at 562-67.

55. This, then, is the “majority” on which the United States relies — 70-plus-year-old statements from 6 of 19 responding countries. Even if New Zealand and India were generously included as supporting a continuous-nationality rule, that still would leave only a *minority* of 8 out of 19 — which would still fail to account for the subsequent abandonment of Sir Cecil’s views. It was thus truly an understatement for the surveyors to observe that “[t]he replies are not unanimous as to the moment at which a claim must possess a national character in order that it may be supported by the State.” *Id.* at 567.

56. The United States’ erroneous reliance on the 1929 Survey infects other areas of its Reply as well, for many of the other authorities on which the United States relies also use the flawed 1929 Survey to justify a date-of-award rule. *See, e.g.*, E.J. Aréchaga, *Observations Complémentaires*, 51 *Annuaire de l’Institut de Droit Int’l* 210-11 (1965); Brownlie, *supra*, at 484 & n.39; F.V. Garcia-Amador, *Recent Codification of the Law of State Responsibility* 82 (1974); *Eschauzier (Gr. Brit.) v. Mexico*, 5 R.I.A.A. 207, 210 (1931). In fact, Aréchaga, Garcia-Amador, and the *Eschauzier* tribunal all acknowledged that the decisions of arbitral tribunals supported a date-of-presentation rule, but then cited the 1929 League of Nations survey as justification for adopting a date-of-award principle instead. *See* Aréchaga, *supra*, at 208, 211; Garcia-Amador, *supra*, at 82; *Eschauzier, supra*, at 209, 211. The *Eschauzier* tribunal placed special weight on the fact that the Respondent, Great Britain, which was then espousing Hurst’s minority view, had replied to the 1929 Survey in favor of a date-of-award test. *See Eschauzier, supra*, at 210-11. Not surprisingly, Brownlie and Aréchaga cited Hurst, in addition to the

Survey, to support a continuous-nationality-through-award principle. *See* Aréchaga, *supra*, at 211; Brownlie, *supra*, at 484 & n.40. But neither Hurst nor the Survey supports the conclusion that the United States seeks to draw out of Aréchaga, Brownlie, Garcia-Amador, and *Eschauzier*.

57. The other authorities cited by the United States likewise fail to provide support for its supposed “majority” view. *Benchiton* (*see* U.S. 2d Juris. Reply at 19) did not involve protection of a national at all, but rather of a foreigner employed as an interpreter by the British government. *See Benchiton Case* (1924), 1923-1924 I.L.R. 189. The United States also omits to mention two other critical factors present in *Benchiton*: *One*, Benchiton renounced British protection four years *before* Great Britain listed his claim as among those to be submitted for arbitration under a special convention with Spain; *two*, Huber, the Rapporteur who denied Benchiton’s claim on jurisdictional grounds, qualified his decision by noting that because he was acting only as a Rapporteur who “had to make a report not to render an arbitral award,” he felt he had “discretionary powers which . . . made it unnecessary for him to state any limitations on the broad principle which he had enunciated.” *Id.* at 190.

58. With respect to *Oppenheim’s*, the United States seeks to make much of the fact that “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*.” (U.S. 2d Juris. Reply at 32.) Even so, *Oppenheim’s* also states that “[i]n some cases, it may be sufficient for the nationality of the claimant state to have been continuously held until the presentation of the claim rather than until the making of the award.” *See* 1 *Oppenheim’s International Law* § 150 at 512 n.6 (Jennings and Watts eds. 9th ed. 1992). The United States also neglects to mention that the quotation on which it does rely has appeared in *Oppenheim’s* since the Fourth Edition was published in 1928 — in the heyday of Sir

Cecil Hurst's even-then-aberrant, and now discarded, views. *See* 1 *Oppenheim's* § 155b (A.D. McNair ed., 4th ed. 1928). Notably, the first three editions of *Oppenheim's*, published in 1900, 1905, and 1920 respectively, make no mention of a "continuous-nationality" rule, even though the third edition, for instance, discusses nationality at length, including its function as the "link between [Individuals] and the Law of Nations," as well as the right of a "[H]ome State" to protect the "persons and property" of nationals abroad. *See, e.g.*, 1 *Oppenheim's* §§ 155, 291, 293-94, 319-20 (R.F. Roxburg ed., 3d ed. 1920). But its only conclusion regarding the actual exercise of such protection was that "[i]t is, however, quite impossible to lay down hard and fast rules as regards the question in which way, and how far in each case, the right of protection ought to be exercised. Everything depends on the merits of the individual case, and must be left to the discretion of the State concerned." *Id.* § 319, at 495.

59. It was not until the Fourth Edition, published two years after Hurst's article advocating a date-of-award test, that this new "British" view appeared in *Oppenheim's*. *See* 1 *Oppenheim's* § 155b (McNair ed. 1928). Thereafter, the proposition was simply carried forward — *verbatim* — through each subsequent edition, including the Ninth Edition edited by Sir Robert and Sir Arthur Watts. But when writing on a clean slate, Sir Robert has hardly endorsed the continuous-nationality "rule," much less Hurst's version of it. A full 25 years before his association with *Oppenheim's*, he wrote:

The rule of nationality of claims, indeed, is illogical on any view. Thus, as generally stated, it provides that the individual in question must have possessed that link of nationality continuously from the time of injury up to the time of the presentation of the claim and even, according to some authorities, up to the time of an award; though it is true that there may be some mitigation of this rule . . . But both the requirement and the mitigation are surprising because, if the theory is that the injury to the individual national is what creates the injury to the State, it should follow that the existence of a nationality link at the moment of the injury would suffice."

R.Y. Jennings, *Recueil Des Cours 1967*, Chapter 8: The Responsibility of States at 153-54, Académie de Droit International (1967) (emphasis added).

60. That, no doubt, is why Brownlie cites Sir Robert as being among the “respectable body of opinion which would reject the principle altogether.” Brownlie, *supra*, at 483 & n.36. To that “respectable body” must be added Sir Ian (*see* Second Sinclair Op. ¶ 7), and Professor Borchard. Although the United States inexplicably cites Borchard as favoring a date-of-award rule, it is clear that Hurst, who the United States also cites, expressly proposed his date-of-award test in opposition to the date-of-presentation rule “laid down” by Borchard. *See* Hurst, *supra*, at 180 (“Professor Borchard’s word is ‘presentation,’ and ‘presentation’ refers to the entering or filing in the register of the commission, not to the moment at which the evidence or arguments are presented to the Commission.”).

61. In sum: The United States has not carried its burden of proving that any rule of continuous nationality that might exist within the context of diplomatic protection requires continuity through the date of the award.

**D. The United States’ Own Past Practices And Statements Contradict Its Current “Rule”**

62. What is perhaps most disturbing about the United States’ present arguments is how clearly they contradict its own past positions in the international arena. (*See* TLGI Counter Mem. at 40-42.) The United States has repeatedly identified the date of presentation — and not the date of award — as the critical date for testing the nationality of claims. *See, e.g.*, Letter From Assistant Legal Adviser English to Albert Dib (Dec. 21, 1960), *reprinted in* 8 Whiteman, *Digest of International Law* 1243 (1970) (“a claim may properly be espoused by one government against another government only on behalf of a national of the government espousing a claim, who had that status at the time the claim arose and continuously thereafter *to the date of*

*presentation of the claim.*”) (emphasis added); *Case of Archbishop Perché* (Fr. v. U.S.), reprinted in 3 *Moore’s International Arbitrations* 2401, 2415 (1898) (Oral Argument of U.S.) (commission’s jurisdiction over all claims submitted “by citizens of either country” requires that claim have relevant nationality “*at the time of its presentation*”) (emphasis in original); *Foreign Claims Settlement Commission of the United States: Decisions and Annotations, 1950-1967* at 169 (“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*”) (emphasis added); Foreign Claims Settlement Comm’n of the United States, *Tenth Semiannual Report to Congress For The Period Ending June 30, 1959* at 17 (confirming date of filing rule).

63. The United States urges the Tribunal to ignore these and other statements contradicting its current litigating position because, it claims, they were intended to address only the specific context of pre-presentation changes in nationality, and so were not meant to articulate the general, and allegedly broader, “rule” it now claims to invoke. (U.S. Juris. Reply at 20-22.) But it is clear that those statements were intended to announce principles of general application, not to address specific facts, and in doing so the United States chose a particular articulation of the general rule. Thus, Legal Advisor English’s letter, quoted above, spoke of “generally accepted principles of international law.” 8 Whiteman, *supra*, at 1243. And in *Administrative Decision No. V, German-U.S. Mixed Claims Comm’n*, 7 R.I.A.A. 119, 150 (1924), for example, the United States argued that the specific language of the Treaty of Berlin made it unnecessary for a claim to have been American in origin, so long as it was American-owned on the date the Treaty became effective. *See Brief on Behalf of the United States on the Question of Diverse Nationality* (German-U.S. Mixed Claims Comm’n) 1, 14. The United States did not suggest that the Treaty language in any way addressed the date through which American

nationality need be maintained. Yet the United States closed its argument by observing that “[t]he claim must, however, continue to be owned by an American national *up to and including the date of submission* to the Mixed Claims Commission.” *Id.* at 15 (emphasis added).

64. In sum: The United States’ own past practices and statements support a date-of-submission rule, to the extent they support any “rule” at all.

**E. The United States’ Attempt To Narrow The Field Of Relevant Authority Is Unsupported By The Case Law**

65. The United States seems to think it can simply disregard the volumes of authority supporting a date-of-submission rule on the ground that those authorities did not also address whether continuous nationality was required as of the date of the award. (*See, e.g.*, U.S. 2d Juris. Reply at 20-22.) But given the vast number of authorities that state the rule as requiring the relevant nationality only up to the date of presentation, it is difficult to take this rhetorical strategy seriously. Likewise, the United States’ efforts to shift the burden to Loewen to produce a case in which a decision was rendered in favor of a “national of the respondent State” (U.S. 2d Juris. Reply at 20) must be viewed as a calculated distraction. In any event, there are plenty of authorities that so hold.

66. Before addressing those authorities, however, it must be noted that even if the United States were correct that there are no cases making expressly clear an award was being made to a claimant despite a post-presentation change in nationality to the respondent State, that would hardly prove that no such awards have been made. If anything, the absence of such cases would only tend to show — particularly in view of the predominant date-of-presentation rule — that States have simply not seen fit to join the issue before international tribunals with respect to post-submission changes in nationality. And in all events, the United States cannot possibly

hope to sustain its weighty burden by relying on a perceived *absence* of authority on the point it needs to support.

67. More importantly, Loewen has already shown that in the *Chopin* case, the French-American Mixed Claims Tribunal found the possibility that the beneficiaries of the original French claimant were United States citizens irrelevant to their right to an award on his “vested” claim. (TLGI 2d Juris. Counter-Mem. at 47 (quoting 3 *Moore’s International Arbitrations*, 2506-07).) The United States says (U.S. 2d Juris. Reply at 31) that there is no basis for that conclusion, but it is sufficient to note that Loewen’s showing was based on the conclusion expressly reached by Mr. Boutwell, counsel for the United States in the *Chopin* case. *See* 3 *Moore’s, supra*, at 2506-07 (quoting *Oscar Chopin v. United States*, No. 592, *Boutwell’s Report*, 88). And, as Loewen has already pointed out, Borchard confirmed Boutwell’s assessment of the *Chopin* case. (TLGI 2d Juris. Counter-Mem. at 47 (quoting Borchard, *Diplomatic Protection of Citizens Abroad* 665-66, 666 n.1 (1916)).)

68. What the record in *Chopin* does not support is the United States’ assertion that France and the United States agreed in that case “that a change in nationality after presentation of the claim was precluded under international law.” (U.S. Juris. Reply at 30.) While *evidence* of Eugenie Chopin’s marriage to a non-French national was produced after the memorial was filed, the record does not indicate whether the marriage *itself* occurred before or after the filing. *See French and American Claims Commission, 1880-1884: Records of Claims, Argument of the Counsel for the United States, Chopin v. United States*, No. 592, at 1; *id.*, *Motion to Dismiss Claim in Part for Want of Jurisdiction* (May 24, 1883), ¶¶ 2-3. More importantly, the fact that the claim on behalf of Eugenie was withdrawn “*by consent of claimant*” demonstrates that

France did not consider withdrawal to be obligatory. *See id.*, *Argument of the Counsel for the United States* at 1 (emphasis added).

69. Moreover, Boutwell and Borchard were hardly alone in their conclusions regarding this case. In the *Stevenson* case, Umpire Plumley cited *Chopin* in support of his conclusion that the death of a British claimant following the presentation of his claim, and the consequent change in its nationality to that of the respondent State, would not affect the validity of the claim. *Stevenson*, 9 R.I.A.A. at 510. He then went on to explain:

Such would be the opinion of the umpire independent of the *Chopin* case. It meets the requirements, viz: (a) British citizenship *at the time of origin* of the claim; (b) British citizenship *at the time of the presentation* of the claim before the Commission. When thus presented, a right to recovery vested in those then having a lawful claim.

*Id.* (emphasis added).

70. The same result obtained in the *Halley* cases despite the United States' objection that because the original claimant (a British citizen) had died, and an administrator was prosecuting the claim on behalf of an heir who was a citizen of the United States, the claimant lacked standing to proceed. *Report of Her Majesty's Agent of the Pleadings and Awards of the Mixed Commission on British and American Claims (Howard's Report)* 15 (1874). The commission overruled the objection, the majority "being of opinion that where the claim is prosecuted by an administrator in respect of injury to property of an intestate who was exclusively a British subject, and the beneficiaries are British subjects as well as American citizens, the claim may be prosecuted for their benefit." *Id.* at 18 (quoting commission decision).

71. Hurst reported that:

In three cases before the Franco-Venezuelan Commission, Massiana, Daniel, and Peton, where the original claimant had been

French, the claims were allowed without respect to the nationality of the heirs. Mr. Filtz took the view that there was no occasion to examine whether the heirs enjoyed the nationality of the original claimant.

Hurst, *supra*, at 174 (citing Ralston's *Report of the French-Venezuelan Commission* 217, 462).

And in two cases before the U.S.-Venezuelan Mixed Claims Commission, the United States won awards in favor of the estates of deceased U.S. nationals despite the fact that the beneficiaries of those estates were nationals of Venezuela. *See Willet* (U.S. v. Venez.), 3 *Moore's International Arbitrations* 2254; *Peck* (U.S. v. Venez.), *id.* at 2257. The fact that the United States has previously taken action and asserted positions directly contrary to its arguments in this case proves only that its formulation of the "rule" in this litigation is just that — a litigating position, not a "rule."

72. In sum: The United States cannot succeed by strategically defining away all of the many relevant date-of-presentation authorities.

#### **IV. EVEN UNDER THE UNITED STATES' PROFFERED "RULE" OF CONTINUOUS NATIONALITY, LOEWEN'S CLAIMS CONTINUE**

73. Loewen showed in its Counter-Memorial (at 50-79), that, even if the United States' "rule" of continuous nationality until award in fact existed and applied here, it still would not warrant dismissal of Loewen's NAFTA claims because TLGI — even after its bankruptcy reorganization — continues to exist under British Columbia law and continues to own the Article 1116 and Article 1117 claims; another Canadian company (Nafcanco) directs the prosecution of those claims; Canadian entities will receive any proceeds of Loewen's Article 1116 claim; and United States entities will receive any proceeds of Loewen's Article 1117 claim, as required by Article 1135(2). As we show in Section IV(A), below, these facts are indisputable.

74. Likewise, Loewen showed (*see* TLGI 2d Juris. Counter-Mem. at 50-51), based in significant part on the Affidavit of Jonathan B. Cleveland, advisor to the committee of unsecured

creditors in the Loewen bankruptcy, that the particular corporate structure that resulted from the bankruptcy reorganization of the Loewen companies was driven by Loewen's creditors, not Loewen, and cannot possibly be considered a "voluntary" act on Loewen's part. While the United States takes issue with that factual submission, and offers academic speculation from its bankruptcy-law expert, Ronald Trost, we show in Section IV(B), below, that Loewen's evidence (including Cleveland's Affidavit and his Supplemental Affidavit, submitted herewith) constitutes the *only evidence* before the Tribunal regarding the voluntariness and motivations of Loewen and its creditors in connection with the Loewen bankruptcy.

75. Unable to overcome these factual difficulties, the United States again tries to lean on notions of "beneficial ownership." We previously showed (*see* TLGI 2d Juris. Counter-Mem. at 69-72), and confirm in Section IV(C) below, that such principles have no application to NAFTA Chapter 11.

**A. The Facts Are Undisputed: TLGI, And Its Claims, Continue**

76. Faced with a set of unassailable facts that do not aid its jurisdictional objection, the United States persists in urging that TLGI is not a valid and existing corporation under Canadian law; that TLGI assigned its Article 1116 claim to Nafcanco and retained nothing; and that the separate corporate structures of Nafcanco and AGI should be disregarded. (*See* U.S. 2d Juris. Reply at 6-9, 57-68.) These arguments do not withstand scrutiny.

**1. TLGI Is Duly Organized And Constituted Under British Columbia Law**

77. Together with its Counter-Memorial, Loewen submitted competent and indisputable evidence that TLGI, even after reorganization, continues to exist and own the NAFTA claims. (*See* App. at A3908.) The United States has no factual response to TLGI's Certificate of Status (*id.*), which is conclusive evidence that TLGI is a duly organized and

constituted British Columbia corporation. The United States' Reply never *mentions*, let alone addresses, the witness statements of British Columbia practitioner Patrick Furlong or former British Columbia Judge Martin Taylor, each of whom confirmed the facts and consequences, under British Columbia law, of TLGI's present status under the British Columbia *Company Act*. (See Furlong Stmt. ¶¶ 6-11; Taylor Stmt. ¶¶ 3-6.) And neither the United States nor its witnesses take issue with former Justice Peter Cory's conclusion that TLGI continues to be a valid and existing British Columbia corporation. (See Cory Stmt. ¶ 55.) This, alone, is enough for this Tribunal to overrule the United States' jurisdictional objection.

78. All the United States can offer, in the face of these undisputed and indisputable showings, is a straw-man argument and witness speculation that Loewen has not put forth "evidence that any other party intends to, or indeed can, take the necessary steps to avoid TLGI's dissolution or revive the company if it is dissolved." (U.S. 2d Juris. Reply at 7 (quoting La Forest Reply Stmt. ¶ 7).) Since Loewen has already shown that TLGI remains a valid and existing corporation, which continues to own the claims at issue, it is simply incomprehensible that Loewen — to defeat a late jurisdictional objection that is supported by no evidence — must somehow show what might happen in the future *if* a hypothetical course of events occurs.

79. As Justice Cory notes, "[i]t is not necessary to speculate at this stage on the particulars of TLGI's potential revival in the event of its dissolution." (Cory Supp. Stmt. ¶ 2.) The only important fact, as corporate solicitor Furlong explained in his earlier witness statement, is that "TLGI continues to exist as a valid company [under British Columbia law] until it is dissolved in accordance with the provisions of the [British Columbia Company] Act" — an event which "will not occur, if ever, until sometime after November, 2004 at the earliest." (Furlong

Stmt. ¶ 11.) As the International Court of Justice noted in *Barcelona Traction*, in determining whether a corporation has “ceased to exist,”

the company’s status in law is *alone* relevant, and not its economic condition, nor even the possibility of its being ‘practically defunct’ — a description on which argument has been based but which lacks all legal precision.

*Barcelona Traction* (Belg. v. Spain), 1970 I.C.J. 3, ¶ 66 (emphasis added).

80. In sum: The United States’ contention that this Tribunal should dismiss TLGI’s NAFTA claims because it might (or might not) be struck from the British Columbia Register sometime in the future is entirely without merit. The fact that TLGI continues to exist under British Columbia law, and continues to own legal title to its NAFTA claims, is all that matters.

**2. TLGI’s Assignment Of The Article 1116 Proceeds To Nafcanco Did Not Constitute An Assignment Of The Article 1116 Claim Itself**

81. The United States has previously conceded that a NAFTA claim — not just the proceeds, but the claim itself — can be properly assigned. (*See* U.S. Juris. Mem. at 91 n.59.) Yet the United States now urges that TLGI’s claims must be dismissed, in part because its assignment of the proceeds from any Article 1116 recovery, “coupled with an irrevocable power of attorney constitutes an assignment of the claim itself.” (U.S. 2d Juris. Reply at 59.) In offering this new argument, the United States fundamentally mischaracterizes Loewen’s prior argument, and misstates the law.

82. In mischaracterizing Loewen’s position, the United States portrays former Justice Cory’s earlier statement as one that “characterizes TLGI’s assignment to Nafcanco as an assignment of a cause of action and defends it as such.” (U.S. 2d Juris. Reply at 59 (citing Cory Stmt. ¶¶ 69-71).) The United States’ misinterpretation of Justice Cory’s statement represents neither his nor Loewen’s position. As Justice Cory explains, he simply noted in his earlier opinion:

that TLGI's assignment of proceeds, coupled with a power of attorney, would be upheld as valid, in light of the decisions of Canadian courts which have upheld as valid the assignment of causes of action (which included, but were not restricted to, an assignment of proceeds and the granting of a power of attorney). The cases I cited in my Report did not address the question of whether a mere assignment of proceeds, coupled with a power of attorney, constituted an assignment of the entire cause of action, leaving the assignor with no remaining property interest. On the contrary, the *Fredrickson* case concerned an express assignment of "any and all rights of action" so that the scope of the assignment was not in question. None of these cases involved an assignment which, as in the present case, *expressly reserved to the assignor legal title to the cause of action*.

(Cory Supp. Stmt. ¶ 6 (emphasis added; footnote omitted).) Thus, Justice Cory concludes "it is not the case that every assignment of proceeds and grant of a power of attorney to prosecute the action which are made to the same entity constitutes an assignment of the entire underlying cause of action to that entity." (Cory Supp. Stmt. ¶ 7.) He further concludes that "the assignment to Nafcanco did not effect an assignment of legal title to the NAFTA claims." (*Id.*)

83. Further, the fundamental point, as Justice Cory noted, was that in each of his cases "the courts look[ed] at the totality of the transactions to ensure that the assignments are part of a larger legitimate transaction." (Cory Stmt. ¶ 70.) In other words, the United States' efforts to disregard TLGI's continued existence and ownership of the claims ignores the U.S. and Canadian bankruptcy-court-approved structure of the TLGI assignments, and disregards the intent and express agreement of the parties to the assignment that TLGI retain title to the claim. Justice Cory thus concluded: "In these circumstances a Canadian court would, in my view, exercise its discretion in a manner that would avoid defeating the purpose and intent of the court-approved reorganization of the Loewen Debtors which was found to be in the best interests of their creditors." (*Id.* ¶ 72.)

84. The United States fares no better on the law. It relies upon *Foremost Tehran, Inc. v. Iran*, 10 Iran-U.S. Cl. Trib. Rep. 228 (1986), and a treatise, for the proposition that the Iran-United States Claims Tribunal “has favored beneficial over nominal ownership.” (U.S. 2d Juris. Reply at 62 (quoting C. Brower & J. Brueschke, *The Iran-United States Claims Tribunal* 111 (1998)).) Putting aside for the moment the fact that notions of “beneficial ownership” have no place in NAFTA Chapter 11 (*see* TLGI 2d Juris. Counter-Mem. at 69-72; Section IV(C), *infra*), the United States seeks to draw out of *Foremost Tehran* a rule that something more than “legal title” to an international claim is necessary for a claimant to proceed with that claim. (U.S. 2d Juris. Reply at 62.) That is assuredly not the holding of *Foremost Tehran*. There, the Iran-U.S. Claims Tribunal held that the claimant could pursue claims for both its insured and uninsured losses despite the fact that it had assigned away the “beneficial interest” in the insured portion of its claim, retaining only legal title for itself. *Foremost Tehran*, 10 Iran-U.S. Cl. Trib. Rep. at 238-39. The United States contends that the holding of *Foremost Tehran* was based on the fact that “in addition to ‘legal title’ to the insured portion,” the claimant 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].” (U.S. 2d Juris. Reply at 62 (quoting *Foremost Tehran*, 10 Iran-U.S. Cl. Trib. Rep. at 238-39).) But it is clear that what the United States now relies upon did *not* form the basis of the Tribunal’s holding; rather, it was simply a description of the facts. After making its factual findings, including the fact that the assignment agreement provided that the claimant would retain the legal title to the insured claim, the Tribunal held:

It follows that Foremost is legally entitled to pursue a claim for recovery of the insured portion of its losses as well as the uninsured portion. *Legal title* to the entire claim was vested continuously in Foremost from the date the claim arose to 19

January 1981 [the last critical date established by the Claims Settlement Declaration] and remained so thereafter, notwithstanding the *intervening settlements* with OPIC [the insurer]. *This being so*, the recovery by Foremost of a measure of compensation from its insurers cannot affect its title to claim against the present Respondents.

*Foremost Tehran*, 10 Iran-U.S. Cl. Trib. Rep. at 239 (emphasis added). The holding was therefore based on the fact that “[l]egal title to the entire claim was vested continuously” in the claimant during the required period, nothing more — just as with TLGI here.

85. Finally, even if the United States were correct that TLGI’s assignment of the Article 1116 proceeds and its grant of an irrevocable power of attorney to Nafcanco constituted an assignment of the Article 1116 claim itself, the claim would still continue. International law has long recognized the assignment of a claim so long as any nationality requirements for the claim — whatever they may be — are respected; the identity of the claimant may change so long as the particular nationality requirement is satisfied. *See Hanover Bank Claim*, United States Foreign Claims Settlement Comm’n, 26 I.L.R. 334, 335 (E. Lauterpacht ed., 1958-II) (“Another general principle of international law which could come into play in the consideration of these claims is the general rule that such a claim must have been *continuously owned by a United States national (not necessarily the same one)* at all times between the time the claim arose and the *presentation* of the claim, whether directly to the foreign government or before the appropriate adjudicating body.”) (emphasis added); *see also General Electric Co. v. Government of the Islamic Republic of Iran*, 26 Iran-U.S. Cl. Trib. Rep. 148, ¶ 20 (1991) (“the Tribunal has held repeatedly that the criterion laid down in Article VII, paragraph 2, of the Claims Settlement Declaration is that of ‘continuity of Claimants’ nationality [from the injury until the entry into force of the Agreement], not continuity of Claimants identity’ and that assignments such as this [from one U.S. company to another U.S. company] do not affect its jurisdiction.”). As Loewen

showed, it has at all times maintained a continuity of nationality with respect to the claimant, the entity prosecuting the claim, and the recipients of any award. (*See* TLGI 2d Juris. Counter-Mem. at 57-69.)

86. In sum: Loewen did not *impermissibly* assign away anything, and TLGI continues to own the NAFTA Article 1116 and Article 1117 claims.

### **3. Nafcanco Is A Separate, Distinct, And Independent Entity From Alderwoods Under Both Canadian And International Law**

87. As Loewen has shown (*see* TLGI 2d Juris. Counter-Mem. at 62), the United States' continuous-nationality argument depends on, *inter alia*, the success of both of its factual assertions — (1) that TLGI no longer exists under Canadian law, and (2) that the “corporate veil” between Nafcanco and AGI should be “pierced” and their admittedly separate corporate existences disregarded. Loewen has already shown, in its previous filings and above, that TLGI owns the claims and continues to exist as a matter of British Columbia law. Additionally, Loewen has also demonstrated (*see* TLGI 2d Juris. Counter-Mem. at 62-66), with the support of former Justice Cory (Cory Stmt. ¶¶ 79-91), that “[m]odern Canadian jurisprudence reflects an increasing tendency of the Canadian courts . . . to respect the separate legal existence of corporations and to pierce the corporate veil only where there is complete domination and control of a corporation by the shareholder,” *and then* “only in those rare circumstances in which justice demands that the corporate veil be pierced.” (Cory Stmt. ¶ 83.)

88. In response, the United States shifts back and forth from Canadian to international law, urging that “international law does not recognize Nafcanco as a separate and independent entity from Alderwoods” and that Loewen’s “entire argument rests on its understanding of Canadian law and the opinion of its expert, Mr. Cory.” (U.S. 2d Juris. Reply at 64.) Apparently recognizing that former Justice Cory’s “understanding of Canadian law” is correct, the United

States goes on to say that “[t]he tribunal, however, must apply the rule of continuous nationality in accordance with applicable principles of international, not municipal law.” (*Id.* at 64-65.) The United States, of course, does not identify any salient differences between “international” and Canadian “municipal” principles of veil-piercing; moreover, none of the United States’ international sources supports its bold, categorical assertion that “international law does not recognize Nafcanco as a separate and independent entity from Alderwoods.” (*Id.* at 64.) Indeed, those sources merely “recogniz[e] the [existence of a] ‘process of lifting the veil’ in international law” (*id.*), and that the process follows municipal law. Interestingly, the one international law case that the United States cites for its proposition — *Barcelona Traction* — held that it would be *inappropriate* to disregard the separate corporate structures at issue there.

89. More fundamentally, the court in *Barcelona Traction* itself looked to “[t]he wealth of practice already accumulated on the subject in municipal law” to inform that court of the applicable legal principles. *Barcelona Traction*, 1970 I.C.J., ¶ 56. And the principles set forth in *Barcelona Traction* are largely the same as the equitable veil-piercing principles of Canadian law: Veil-piercing is an “exceptional” remedy (*id.*, ¶ 58), and one that “has been found justified and equitable” (*id.*, ¶ 56) only in limited circumstances, to prevent “misuse” “fraud,” and “malfeasance”:

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

*institution of its own making, is equally admissible to play a similar role in international law.*

*Id.*, ¶¶ 56-58 (emphasis added). And since it would be inequitable to pierce the veil under the particular facts of this case (*see* TLGI 2d Juris. Counter-Mem. at 64; Cory Stmt. ¶¶ 88-90; Cory Supp. Stmt. ¶¶ 23, 31-32) — where the restructuring transactions were not only approved by the U.S. and Canadian courts under full disclosure, but were largely caused by the illegal *O’Keefe* verdict — the separate existences of Nafcanco and AGI cannot equitably be disregarded here, *even if* TLGI no longer existed (which, as we have shown, it surely does).

90. Indeed, the facts of Loewen’s bankruptcy reorganization demonstrate that the United States had ample opportunity to object to the structure of the reorganization had it truly believed that Nafcanco was a “sham” or a “façade.” (U.S. 2d Juris. Mem. at 2, 9, 21; U.S. 2d Juris. Reply at 65, 78.) Under the U.S. Bankruptcy Laws, the United States Bankruptcy Trustee participates in every Chapter 11 bankruptcy case in order to, *inter alia*, oversee the process. *See* 28 U.S.C. § 586; *see also* 11 U.S.C. § 307. In fact, the U.S. Trustee *did* impose certain objections to the Loewen Plan of Reorganization, but not to the Nafcanco/AGI NAFTA claim structure. Had the United States truly been concerned that this structure would work a fraud on this Tribunal or the Bankruptcy courts, it certainly had the opportunity to object, and indeed even an obligation to do so. Instead, it appears that the United States chose to lie in wait in order to advance its “fraud” objection before this Tribunal.

91. Finally, the United States’ argument — based on its expert’s opinion — that “even under Canadian law, Nafcanco would be considered the alter ego of Alderwoods” (U.S. 2d Juris. Reply at 65) under agency theory is unavailing. As former Justice Cory explains, “under agency principles” a Canadian court may disregard the separate legal identities of corporations where “there is a formal agency relationship between the subsidiary and its shareholder” or “the

shareholder so completely dominates and controls the subsidiary corporation that the subsidiary has no independent existence at all.” (Cory Supp. Stmt. ¶ 9.) But, “no evidence has been proffered [by the United States] which would create a formal agency relationship between new LGII and Nafcanco.” (Cory Supp. Stmt. ¶ 13; *see generally id.* ¶¶ 10-14.) Moreover, in the latter case, as former Justice Cory illustrates in detail (*see* Cory Supp. Stmt. ¶¶ 15-30), the current trend of Canadian case law is for courts to decline to pierce the corporate veil, “even in the face of overwhelming evidence of complete domination and control by the shareholder” (Cory Supp. Stmt. ¶ 21), “where there is a legitimate business reason for the creation of a subsidiary,” and where piercing the veil “would effect an unjust or inequitable result.” (Cory Supp. Stmt. ¶ 20; *see also id.* ¶ 21.) In his view, “a Canadian court would . . . exercise its discretion in favour of respecting the separate legal existence of Nafcanco.” (Cory Supp. Stmt. ¶ 23.)

92. In sum: There is no legal or equitable basis to disregard the separate structures of Nafcanco and AGI.

**B. The Facts Also Demonstrate That Loewen’s Reorganization Was Not In Any Sense “Voluntary”**

93. The equities in favor of Loewen are similarly buttressed by the fact that its bankruptcy was in large part caused by the United States’ international wrongs, and by the fact that — once Loewen found itself in the bankruptcy process — Loewen’s reorganized structure was the particular structure demanded by the majority (in dollar amount) of its creditors. This is a factual issue, not a legal one, but the United States offers no facts to support its claim that the decision to restructure the Loewen companies under a U.S. parent company was a voluntary business decision by Loewen’s management. The *only competent evidence* on the issue comes from an advisor to the Loewen creditors, Jonathan Cleveland — the *only witness* in this

proceeding with first-hand knowledge of the specific facts and intents surrounding Loewen's reorganized structure. That evidence shows that Loewen's reorganized structure was driven entirely by Loewen's creditors, not by Loewen itself: "The essential point is that Loewen reorganized into the United States at the direction of its creditors in order to maximize creditor recoveries. In determining the configuration of the restructured Loewen, the creditors were motivated by a number of business, tax, legal, corporate governance and other considerations." (Cleveland Aff. ¶¶ 13-14.) That undisputed fact alone extinguishes the United States' "voluntariness" arguments.

94. Having no facts to support its case for "voluntary reorganization into the United States," the United States offers legal arguments buttressed by academic speculation from its expert witness, Trost. (*See* Trost Resp. Decl. at 7, 8.) The United States argues that "Loewen's status as a debtor-in-possession throughout the entire bankruptcy proceeding afforded the company . . . exclusive control over the terms of the reorganization plan." (U.S. 2d Juris. Reply at 69.) But it is not in any way true or accurate to describe a debtor-in-possession as having "exclusive control" over the reorganization. Under the U.S. Bankruptcy Code, Loewen only had the exclusive right to *propose* a plan, not to *impose* its terms; indeed, the fact that Loewen had the "exclusive" legal right to sponsor a plan of reorganization does not mean that Loewen had the "voluntary" ability to ignore the demands of its creditors, who in reality had virtually all the leverage in Loewen's bankruptcy.

95. The Tribunal knows from earlier phases of these proceedings that the bankruptcy process significantly constrains the management freedom of the reorganizing company. As Cleveland previously explained (Cleveland Aff. ¶ 7), and explains again in his Supplemental Affidavit, "reorganization proceedings under the U.S. Bankruptcy Code are essentially a

negotiation process between the debtor and its numerous creditors, in which the creditors' simple right to exercise a power (such as those mentioned by Mr. Trost) can dramatically influence, and even determine, the course and outcome of the negotiations.” (Cleveland Supp. Aff. ¶ 5.) As Cleveland further explains, in the Loewen bankruptcy these rights in fact gave the creditors substantial leverage to put their preferred plan into place: “Indeed, in the Loewen reorganization, the authority possessed by the creditors to file a motion to terminate exclusivity and/or seek appointment of an independent trustee were key aspects of the creditors' negotiating leverage over Loewen, irrespective of its being a ‘debtor-in-possession.’” (*Id.*)

96. Even Trost's own source acknowledges this critical fact:

From the perspective of the DIP [debtor-in-possession], then, the issues at stake do not involve a risk of its ouster from the case entirely. Rather, they involve the threat of participation; that a party in interest may be allowed to file a competing plan that, in the end result, receives support from the other parties which the DIP's proposal does not. . . . Ongoing good faith negotiations that are productive provide the proper basis to extend exclusivity. A DIP's disinterest or refusal to seriously negotiate is cause to deny any extension.

Raymond T. Nimmer & Richard B. Feinberg, *Chapter 11 Business Governance: Fiduciary Duties, Business Judgment, Trustees and Exclusivity*, 6 Bankr. Dev. J. 1, 67-69 (1989) (cited in Trost Resp. Decl. at 4). And Elizabeth Warren, a bankruptcy expert previously used by the United States, analogized the Chapter 11 bankruptcy process to “a time bomb planted in the center of a business, which will go off unless management can *negotiate a successful reorganization plan.*” E. Warren, *Bankruptcy Is a Better Alternative*, Nat'l L. J., Apr. 20, 1992, 15, 16 (emphasis added). Significantly, Professor Warren recognized that emergence from bankruptcy depended upon “negotiat[ing] a successful reorganization plan,” not simply proposing (or imposing) one.

97. As Cleveland also explains in his Supplemental Affidavit, the need to avoid significant disputes over Chapter 11’s “cramdown” provisions was also critical to ensuring that the “time bomb” did not detonate: “[L]itigation over ‘cramdown’ disputes is expensive and time-consuming. . . . A successful ‘cramdown’ requires that a debtor make some concessions. In Loewen’s case, the majority of its creditors in dollar amount required that one of those concessions be the creation of a U.S. parent.” (Cleveland Supp. Aff. ¶ 6.) All of these facts — which are undisputed — demonstrate that contrary to the United States’ assertion, Loewen did not have control over the *terms* of the reorganization plan.

98. In sum: The only competent evidence of record demonstrates that the bankruptcy-reorganized structure of Loewen’s companies was not in any sense a “voluntary” decision on Loewen’s part.

### **C. Beneficial Ownership Is, By The United States’ Own Words, Irrelevant Under NAFTA**

99. Loewen’s Counter-Memorial (at 69-79) demonstrated that “beneficial ownership” is irrelevant to determinations of nationality under NAFTA Chapter 11:

- Under the definitions of “investor of a Party” and “enterprise of a Party” in Article 1139, nationality is expressly determined by the country of incorporation or country in which a branch is located and operated, without any concern for beneficial ownership interests. (TLGI 2d Juris. Counter-Mem. at 69-70.)
- The Canadian Statement on Implementation affirmatively states that “NAFTA coverage extends to investments made by any company incorporated in a NAFTA country, *regardless of country of origin*” in order to “ensure that Canada remains an attractive site as a ‘home base’ in North America for Japanese and European investors.” *Canadian Statement on Implementation, reprinted in North American Free Trade Agreements: Treaty Materials, Booklet 12A at 68* (emphasis added).
- The United States itself announced that “‘Investor of a Party’ is defined to encompass both firms (*including branches*) established in a NAFTA country, *without distinction as to nationality of ownership*, and NAFTA-country nationals.” *U.S. Statement of Administrative Action, reprinted in North American Free Trade Agreements: Treaty Materials, Booklet 8 at 128* (emphasis added).

- The United States’ negotiator for NAFTA Chapter 11, Daniel Price, has written that “while the [U.S.-Canada Free Trade Agreement] definition of investor seeks to exclude investments by subsidiaries of foreign-owned enterprises, the NAFTA protections apply to *all entities* located in NAFTA territories *regardless of foreign ownership*.” D. Price and P. Christy, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in *NAFTA: A New Frontier in International Trade and Investment in the Americas* 163, 173 (J. Bello *et al.* eds., 1994) (emphasis added).

100. The United States ignores all of these authorities, preferring to resort yet again to inapplicable cases decided in the diplomatic-protection context. This speaks volumes about the good faith in which its litigation-induced interpretation is offered. *See* L. McNair, *Law of Treaties* 465 (1961), *reprinted in* 14 Whiteman, *Digest of International Law* 366 (1970) (“The performance of treaties is subject to an over-riding obligation of mutual good faith. This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.”).

101. In sum: “Beneficial ownership” has no place in NAFTA Chapter 11.

## V. THE EQUITIES ARE WITH LOEWEN

102. Loewen showed (TLGI Juris. Counter-Mem. at 79-82) that, under any view of the law, principles of equity prevent the United States from gaining an advantage from Loewen’s bankruptcy and reorganization, since the United States is itself responsible for the *O’Keefe* verdict and judgment that led in substantial part to Loewen’s bankruptcy and reorganization. The United States astonishingly asserts in response that the factual and legal equities support *its* present jurisdictional objections. (U.S. 2d Juris. Reply at 72-80.) That assertion cannot withstand even glancing scrutiny.

**A. The United States Is Substantially Responsible For Loewen's Bankruptcy**

103. The damage inflicted by the \$500 million *O'Keefe* verdict, and the concurrent failure of the Mississippi judicial system to protect Loewen's guaranteed rights under NAFTA and international law, weakened Loewen's financial health and began the lethal chain of events that eventually culminated in Loewen's bankruptcy filing. (See TLGI 2d Juris. Counter-Mem. at 79-82; see also Notice of Claim at 46-48; TLGI Mem. at 112-119.) Of this, there can be no real dispute.

104. The United States predictably responds as it has done in the past — that Loewen's financial weakness stemmed not from the *O'Keefe* debacle, but from what the United States views with hindsight as mismanagement and over-acquisition. (U.S. 2d Juris. Reply at 74-77.) We have joined this battle with the United States in the merits phase of this case, and so will not repeat our submissions at length here, except to say this: Loewen has of course never asserted that the *O'Keefe* case was the *sole* cause of its troubles, nor has it ever denied that its primary status (and its core value at the time) was as an acquisition company. (See, e.g., TLGI Mem. at 53-54; TLGI Final Subm. at 47-49.) Indeed, before the *O'Keefe* verdict, Loewen's acquisition and consolidation strategy had brought it (and its shareholders) great success: Prior to the events of late 1995 and early 1996, Loewen was preparing to announce "record results" (App. at A1222) for its "best nine months ever" (the first nine months of 1995). (App. at A1372.) But the *O'Keefe* litigation changed everything. Those are the unvarnished facts.

105. The United States' contrary contentions are belied by the factual evidence already before this Tribunal. One of the United States' own sources vividly concluded, subsequent to the bankruptcy filing, that the *O'Keefe* jury verdict was the beginning of Loewen's "death spiral." (U.S. App. at 0943.) The company's day-to-day operations were severely, immediately, and negatively affected. (TLGI Mem. at 52-61, 112-19.) As Loewen's court-approved

reorganization Disclosure Statement put it, “the *O’Keefe* litigation had a lasting, damaging effect on [the Loewen companies’] acquisition program and their overall financial health and was a significant cause of the commencement of the Reorganization Cases.” (U.S. App. at 1416.) A prime barometer of corporate reputation, the *Wall Street Journal*, acknowledged this very fact, contemporaneous with the concluding chapters of the *O’Keefe* case:

Even if Loewen somehow is able to post the full bond requirement, its business is likely to be harmed irrevocably. The company’s ability to conduct its day-to-day business in the ultraconservative funeral services sector depends heavily on its reputation for straight-dealing, which already has taken a beating because of publicity surrounding the jury verdict against the company.

*Ruling May Force Loewen to Seek Bankruptcy Shelter*, Wall St. J., Jan. 25, 1996.

106. The United States’ reliance on statements made by Loewen representatives (*see* U.S. 2d Juris. Reply at 75 n.59, 76-77) is unavailing. None of those statements excludes the *O’Keefe* litigation as one of the principal causes of its bankruptcy and reorganization; indeed, those statements are in no way inconsistent with Loewen’s position — which it has maintained throughout this arbitration — that:

[t]he Mississippi proceeding was, unfortunately, a defining moment for Loewen. While Loewen . . . does not claim that the *O’Keefe* verdict is the sole source of its current bankruptcy reorganization — the fact remains that the damage inflicted on Loewen by the *O’Keefe* litigation was profound, and continues to this day.

(TLGI Mem. at 119.)

107. In sum: The United States now seeks to benefit from a wrong it substantially caused. Equity will not allow this.

**B. Equitable Principles Of International Law Require A Rejection Of The United States' Present Jurisdictional Objection**

108. As the Permanent Court of International Justice noted 65 years ago, “[w]hat are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals.” *The Diversion of Water from the Meuse*, 1937 P.C.I.J. No. 70 (Ser. A/B), at 76 (Sep. Op. of Hudson, J.). Indeed, “[p]robably the most widely used and cited ‘principle’ of international law is the principle of general equity in the interpretation of legal documents and relations.” Friedmann, *The Changing Structure of International Law* (1964) 197-98, reprinted in 14 Whiteman, *supra*, at 366. Treaties such as the NAFTA must therefore be interpreted equitably.

109. As we have shown above and in our Counter-Memorial, the best case the United States can make is that the text, structure, and purpose of NAFTA Chapter 11 does not affirmatively *reject* its proffered “rule” of continuous nationality through a final award; indeed, the United States admits that NAFTA’s text does not “expressly incorporate[] the specific requirements of the continuous nationality rule.” (U.S. 2d Juris. Reply at 18.) If the United States were correct that NAFTA’s text is silent or ambiguous (which it is not, *see* Section II(B), *supra*), equity would then provide an interpretive principle for resolving that ambiguity, and would bar the United States’ attempt to revoke this Tribunal’s jurisdiction. As the United States has itself asserted: “In doubtful cases that construction is to be adopted which will work the least injustice — which will put the contract on the foundation of justice and equity rather than of inequality.” Mr. Livingston, U.S. Sec. of State, to Baron Lederer, Nov. 5, 1832, MS. Notes to For. Legs., V. 63, reprinted in 5 Moore, *Digest of International Law* 251 (1906). *See also* 5 Hackworth, *Digest of International Law* at 223 (“courts have usually held that where treaties are open to two constructions, one restricting the rights which may be claimed under it and the other

enlarging those rights, the more liberal interpretation is to be preferred, bearing in mind the purposes of the treaty and the fact that diplomatic relations between nations require the utmost good faith”). As Loewen has already shown (TLGI 2d Juris. Counter-Mem. at 79-82), “equity and justice” (*id.* at 82) require a rejection of the United States’ current jurisdictional objection.

110. Moreover, because the United States concedes that its “rule” cannot be found in NAFTA’s text (U.S. 2d Juris. Reply at 18), its argument that “the continuous nationality rule is not a matter of equitable discretion for a Tribunal to apply or ignore as it sees fit” (*id.* at 73-74) is difficult to comprehend. Even if NAFTA’s terms did *not* expressly adopt a date-of-submission rule, equity would not be called upon here to “override” the United States’ proposed “rule” of customary international law, but rather to aid in the interpretation of the requirements that *do* appear in NAFTA. As former ICJ President Manfred Lachs said: “Equity aims at proper application of law in a particular case in order to avoid decisions that are a reflection of abstract principles detached from the circumstances that a court or arbitration tribunal may face. . . . Equity provides a means by which . . . provisions of treaties . . . may take a needed breath in order to meet the challenge of specific situations arising . . . in international relations . . . .” M. Lachs, *Equity in Arbitration and in Judicial Settlement of Disputes*, reprinted in *The Flame Rekindled: New Hopes for International Arbitration* 125, 127 (S. Muller & W. Mijs, eds. 1994). See also Friedmann, *supra*, reprinted in 14 Whiteman, *supra*, at 367 (quoting Judge Manley Hudson of the P.C.I.J. as stating: “[T]he task of equity is described as being ‘to liberalize and to temper the application of law, to prevent extreme injustice in particular cases, to lead into new directions for which received materials point the way.’”).

111. It must be noted, however, that the United States’ own past practices — contrary to its present litigating position — suggest that equity *can* override the United States’ proffered

continuous-nationality-through-award “rule.” The *Restatement (Third) of the Foreign Relations Law of the United States* § 213, cmt. d, states that “[t]he United States has provided diplomatic protection for . . . companies [incorporated under the laws of another State but having some connection to the U.S.] in case of expropriation or other injury, particularly where the act was directed at the corporation because of its links with the United States.” *See also Administrative Decision No. V*, 7 R.I.A.A. at 150 (noting that the U.S. “has in the past asserted and received payment for American claims which had passed into alien ownership”). Thus, either the United States’ proffered “rule” does not exist, or it has itself violated this “rule” where it was equitable to do so. *See generally Barcelona Traction*, 1970 I.C.J. at 100 (Sep. Op. of Fitzmaurice, J.) (asserting that “the continuity rule . . . should be eschewed where it would work injustice . . .”).

112. Finally, the United States’ contention that it would be inequitable under international legal principles to allow Loewen to proceed with its vested claims (U.S. 2d Juris. Reply at 79-80) rings particularly hollow in the face of Article 1135(2). For all the United States’ newly found indignation at the prospect of paying an award to one of its own nationals, it does not and cannot dispute — and so chooses instead to ignore — that Article 1135(2), expressly and unequivocally, requires it to do just that. As we have shown, this NAFTA provision needs no interpretation to prove that the equities of the present circumstances lie with Loewen, and not, as the United States claims, on the side of its jurisdictional objection.

113. In sum: Equity compels a rejection of the United States’ proffered continuity-through-final-award “rule” under NAFTA.

## VI. CONCLUSION

114. For all of these reasons, and those set forth in Loewen's Counter-Memorial, the Tribunal should overrule the United States' present jurisdictional objection, rule for Loewen on the merits, and order a prompt damages phase.

Respectfully submitted,

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IN THE MATTER OF:

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

Claimants/Investors,

v.

**THE UNITED STATES OF AMERICA,**

Respondent/Party.

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

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**REJOINDER OF THE LOEWEN GROUP, INC.  
ON MATTERS OF JURISDICTION AND COMPETENCE**

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