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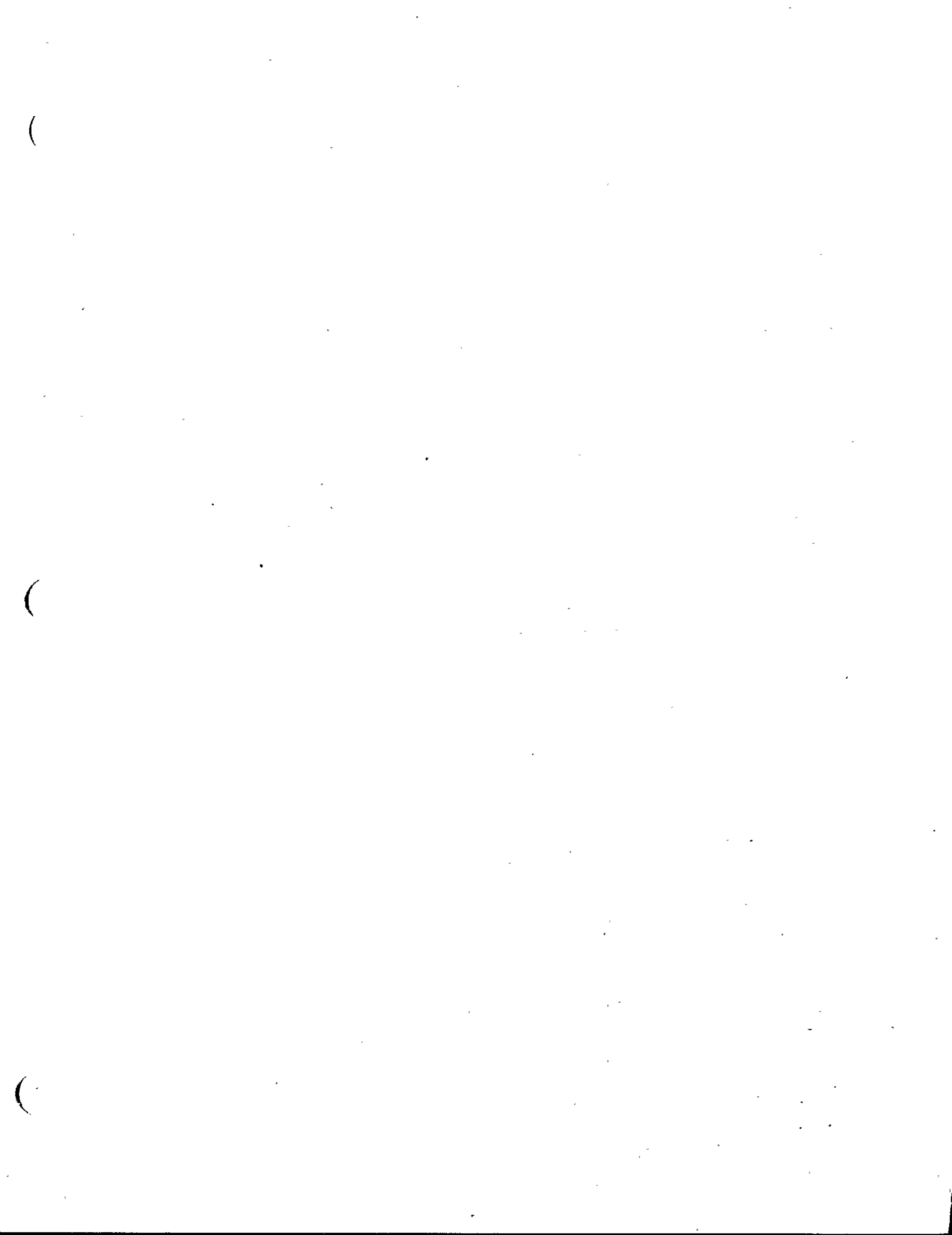

IN THE MATTER OF:

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

RESPONSE OF THE UNITED STATES OF AMERICA TO THE SUBMISSIONS OF CLAIMANTS CONCERNING MATTERS OF JURISDICTION AND COMPETENCE

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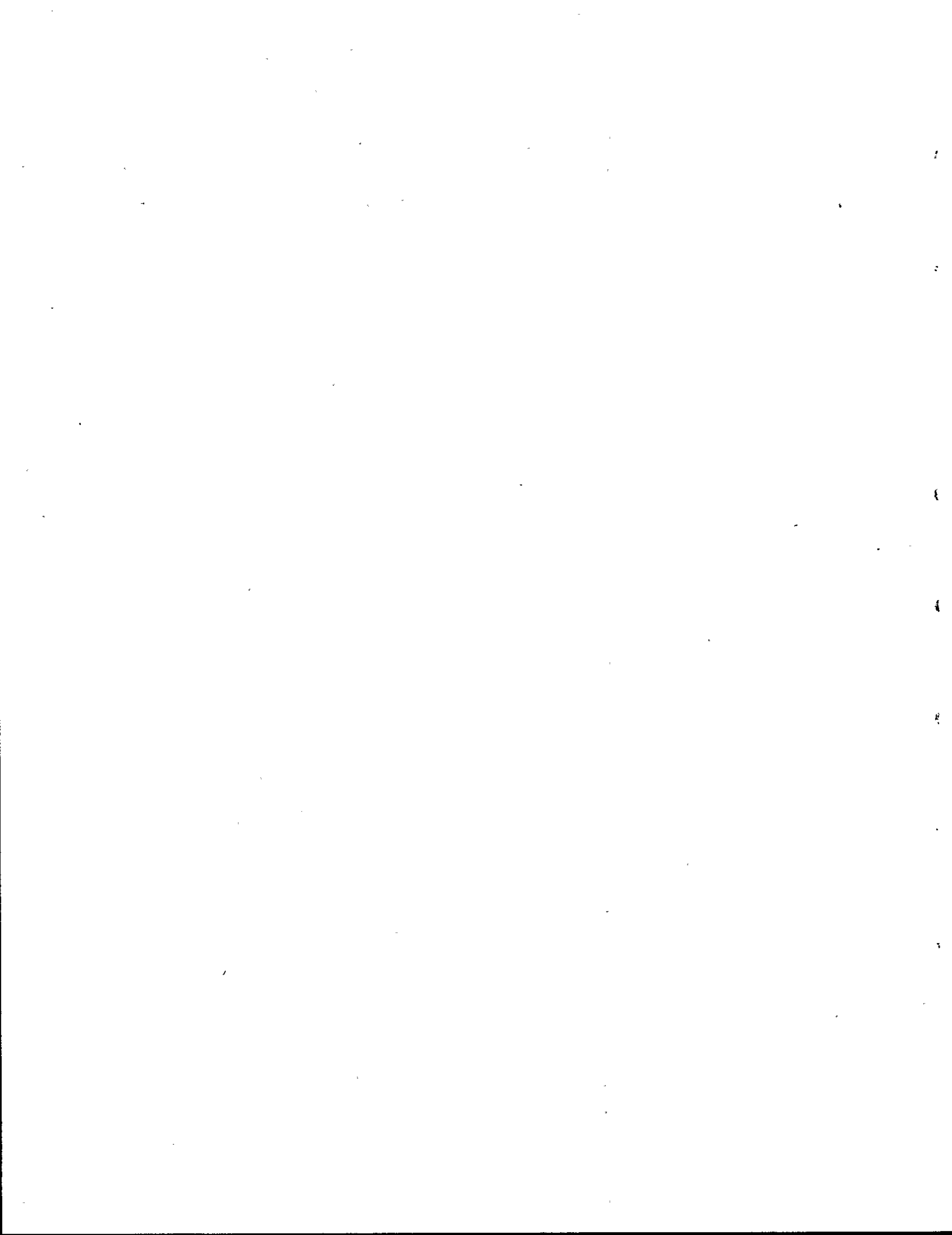

TABLE OF CONTENTS

		Page
INTRODUCTION		1
I.	THE MISSISSIPPI COURT JUDGMENTS ARE NOT "MEASURES ADOPTED OR MAINTAINED" BY THE UNITED STATES	2
	A. The Text Of The NAFTA Does Not Sweep All Judicial Acts Into The Phrase "Measures Adopted or Maintained" By A NAFTA Party	4
	B. Both International And Municipal Law Accord The Judiciary A Unique Status, And State Responsibility For Judicial Action Under Customary International Law May Be Found In Only The Most Extraordinary Circumstances	8
	C. Because The Mississippi Litigation Was A Dispute Among Private Parties, The Court Judgments In That Case Cannot Be Construed As "Measures Adopted Or Maintained" By The United States	10
	D. Any Ambiguity Is Subject To Restrictive Interpretation In Favor Of The Parties To The NAFTA	13
II.	COURT JUDGMENTS THAT ARE STILL CAPABLE OF APPEAL DO NOT QUALIFY AS "MEASURES ADOPTED OR MAINTAINED" BY A NAFTA PARTY AND CANNOT, AS A MATTER OF LAW, GIVE RISE TO A BREACH OF NAFTA CHAPTER 11	16
	A. The Text Of The NAFTA And Customary International Law Require Finality As A Substantive Element Of Claims Challenging Judicial Acts	17
	B. The Substantive Requirement Of Finality For Challenges To Judicial Acts Is Distinct From The Procedural Requirement To Exhaust Local Remedies And Is Not Waived By NAFTA Article 1121	19
	1. The Substantive Requirement of Finality for Challenges To Judicial Acts Is Distinct From The Procedural Requirement To Exhaust Local Remedies	20
	2. NAFTA Article 1121 Does Not Waive The Requirement That A Court Judgment Must Be Final Before It Can Be The Subject Of An International Claim	28

III. THE UNITED STATES CANNOT BE HELD LIABLE FOR THE MISSISSIPPI COURT JUDGMENTS BECAUSE THEY WERE NOT FINAL ACTS OF THE UNITED STATES JUDICIAL SYSTEM 32

A. Claimants Misapprehend Their Burden, Which Requires Them To Demonstrate That The Means Of Further Appeal Of The Mississippi Judgments Would Have Been Manifestly Ineffective Or Obviously Futile 32

B. Loewen Has Not Refuted The United States' Showing That, At The Time Of The Underlying Events, Loewen Would Have Had A Reasonable Opportunity To Obtain Review In Federal Court And A Stay of Execution Pending Adjudication Of Its Claims........ 37

1. Loewen's Argument That It Had "No Realistic Probability" Of Obtaining Certiorari Review Cannot Withstand Scrutiny........ 39

a. Loewen's Due Process Challenge Would Not Have Been Too "Fact-Bound" For Supreme Court Review........ 41

b. In Its Petition For Certiorari, Loewen Could Have Raised Important Questions Relating To Punitive Damages 45

c. The *Pennzoil* Decisions Demonstrate That Loewen Could Have Presented A "Certworthy" Question For Supreme Court Review 46

2. Loewen Has Offered No Explanation For The Documents Showing That It Viewed Supreme Court Review As A Reasonable Option Up Until The Day It Settled........ 50

3. Assuming the Truth Of Loewen's Allegations That It Was A Victim Of Judicial Discrimination, It Could Have Filed A Civil Rights Action In Federal District Court........ 54

C. Loewen Could Have Proceeded, And Was Prepared To Proceed, With The Appeal Under The Protection Of The Reorganization Provisions (Chapter 11) Of The U.S. Bankruptcy Code 59

1. Reorganization Under Chapter 11 Was A Viable, Strategic And Reasonable Option For The Loewen Group As A Business Matter, And Would Have Afforded The Company A Critical Opportunity To Stop Its Reckless Strategy Of Aggressive Growth Through Acquisitions 61

2. Loewen's "Evidence" Of The Costs Of A Chapter 11 Proceeding Is Inaccurate And Misleading 65

3. The Evidence That Loewen's Professed Reasons For Rejecting The Chapter 11 Option Are Mere Pretext Remains Compelling 68

4. **REDACTED** 74

5. Claimants Cannot Advance This NAFTA Claim On The Basis Of The Alleged (And Highly Speculative) Costs Of A Chapter 11 Reorganization Proceeding That Loewen Never Pursued 80

IV. THE UNITED STATES, AS A MATTER OF LAW, CANNOT BE HELD LIABLE FOR THE MISSISSIPPI COURTS' ALLEGED FAILURES TO ACT BECAUSE LOEWEN NEVER ARGUED FOR COURT ACTION ON THE GROUNDS THAT IT ALLEGES IN THIS PROCEEDING 81

A. Neither NAFTA Chapter 11 Nor Customary International Law Imposes A Duty On Domestic Courts To Provide Protections That A Party Does Not Seek 81

B. Loewen Never Objected On The Grounds Of Alienage, Race Or Class At Any Point During The Mississippi Trial 84

C. Loewen Never Argued That The Supersedeas Bond Should Have Been Reduced On The Grounds That Chapter 11 Reorganization Protection Was Not A Reasonable Remedy For The Company 88

V. RAYMOND LOEWEN'S ARTICLE 1117 CLAIM MUST BE DISMISSED BECAUSE HE DOES NOT "OWN OR CONTROL" THE ENTERPRISE AT ISSUE 92

CONCLUSION 95

INTRODUCTION

When this arbitration began, the Tribunal was told that the Mississippi jury verdict was the product of a seven-week trial infected by scores of improper appeals to the jury's alleged "anti-Canadian, racial, and class biases," which The Loewen Group ("Loewen") was allegedly given no opportunity to appeal by virtue of an "arbitrary" application of a statutory supersedeas bond rule. See Notice of Claim at ¶¶ 4, 5. At the same time, Claimants vigorously opposed (with limited success) the efforts of the United States to conduct any discovery to determine whether, in fact, these extreme allegations had any foundation. In light of the evidence that has emerged over the past several months, one can readily see why Claimants opposed discovery as they did.

In stark contrast to the fiction portrayed in Claimants' various submissions throughout this proceeding, the contemporaneous evidence establishes several facts that are fatal to Claimants' claim as a threshold matter. For example, notwithstanding their unsupported assertions to the contrary, Loewen *never* objected on the grounds of nationality, race or class bias at any point during the Mississippi trial. Similarly, Loewen's own documents (which Claimants choose to ignore entirely in their submissions) make clear that the company was fully aware of, and was prepared to pursue, several reasonable and viable means by which it could have appealed the jury verdict, but which the company simply elected to forego.

The United States has already explained in its Memorial on Matters of Competence and Jurisdiction ("U.S. Mem.") why these and other facts deprive this Tribunal of jurisdiction to hear Claimants' case, and why the claim should be dismissed in its entirety at this stage of the proceedings. As explained below, Claimants' submissions in response to the U.S. Memorial do nothing to change this result.

I. THE MISSISSIPPI COURT JUDGMENTS ARE NOT "MEASURES ADOPTED OR MAINTAINED" BY THE UNITED STATES

Loewen argues at great length that the Tribunal has jurisdiction in this matter because, it contends, NAFTA Chapter 11 permits challenges to all forms of judicial action. See Submission of The Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States ("TLGI Sub.") at 3-20. At the same time, Loewen concedes that state responsibility for judicial action "is different in concept from the definition of 'measure.'" Id. at 20. Because NAFTA Chapter 11 is expressly limited only to "measures adopted or maintained" by a NAFTA Party (see NAFTA Article 1101(1)), Loewen would thus appear to concede as well that NAFTA Chapter 11 does not extend to all forms of judicial action.

This basic contradiction inherent in Loewen's argument stems not only from Claimants' evasion of the expressly limited scope of NAFTA Chapter 11, but also from a fundamental misunderstanding of the United States' jurisdictional objections. Contrary to Loewen's claim, the United States does not contend in this case that NAFTA Article 1101 broadly excludes all judicial action from the definition of "measures adopted or maintained" by a NAFTA Party. To the contrary, the United States made clear that it may be appropriate, in certain circumstances not present here, to construe judicial action in a given case to be a "measure." See U.S. Mem. at 29 n.21.

Rather, the United States rejects the notion of a broad, categorical *inclusion* of all judicial acts within the scope of the NAFTA, the text of which cannot support such a broad construction. As Loewen's own international law expert, Sir Robert Jennings, cautions, it is wise to "reject[] any *a priori* solution of the 'measures' problem, and insist[] instead on examining the actual

juridical context in which the term has been used *in that particular case*." Second Opinion of Sir Robert Jennings, Q.C. (Tab A to TLGI Sub.) ("Jennings Second Op.") at 5 (emphasis in original). Unfortunately, Claimants – and, with respect, Sir Robert himself – proceed to ignore this very admonition and contend broadly that *all* domestic judicial acts are "measures adopted or maintained" by the government under NAFTA Chapter 11.

As explained in the attached statement of Professor David D. Caron, a distinguished expert in the international law of state responsibility ("Caron Statement") (appended hereto at Tab A), a NAFTA Chapter 11 Tribunal in any case challenging judicial action must determine at the outset whether the particular judicial action is properly regarded as a "measure adopted or maintained," in light of the circumstances of the particular case.[1] This is so because, contrary to Claimants' contention, the text of the NAFTA cannot be interpreted to extend to judicial actions of all types. A NAFTA Chapter 11 Tribunal must therefore consider the particular judicial action in question, recognizing that judicial acts are accorded special treatment under both international and domestic law and can give rise to state responsibility under customary international law in only the most extraordinary of circumstances. See Caron Statement at 10-30.

When these Mississippi judgments are so examined, it is readily apparent that the judicial acts challenged in this case cannot constitute a "measure adopted or maintained" by the United States within the meaning of NAFTA Article 1101. In particular, because the Mississippi

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[1]See Caron Statement at 6; cf. Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 153-54 (Feb. 5) (whether judicial acts or omissions "would entail international responsibilities as constituting infringements of international law, must of course be decided from the nature of each act and omission in question," in light of "the characteristics of the judicial function of a State as a whole and the judiciary in relation to the executive in particular.") (separate opinion of Judge Tanaka).

litigation exclusively involved private parties, with no government participation, the court judgments rendered in that litigation are not fairly viewed as acts of state that could render the United States liable for a breach of its obligations under NAFTA Chapter 11. To the extent that, after such an examination, the question whether the Mississippi judgments are "measures adopted or maintained" for purposes of NAFTA Chapter 11 remains ambiguous, the NAFTA must be interpreted restrictively to exclude such judgments from its coverage, in deference to the sovereignty of the NAFTA Parties.

A. The Text Of The NAFTA Does Not Sweep All Judicial Acts Into The Phrase "Measures Adopted or Maintained" By A NAFTA Party

The essence of Loewen's interpretive argument is that the phrase "measures adopted or maintained" in the NAFTA must be construed to include all "acts attributable to a State under international law," including all judicial acts. TLGI Sub. at 20. The basic flaw of this argument, however, is that it is simply not what the text of the NAFTA says. Instead, the term "measure" is defined by an illustrative list that does not expressly refer at all to judicial acts. See NAFTA Article 201. Had the drafters intended the broad meaning for which Claimants argue here, it would have been quite easy for them to have defined "measure" to mean "any act that is attributable to a State under international law." That they did not do so must be accorded significance.

The United States has already provided an exhaustive textual analysis of this issue, which need not be rehearsed here. As we discussed in detail in the United States' Memorial, the relevant text of the agreement makes clear that NAFTA Chapter 11 does not extend broadly to all judicial action and, in particular, to the domestic court judgments that Claimants have challenged

in this case. See U.S. Mem. at 27-48; see also Caron Statement at 6 ("The phrase 'measures adopted or maintained' clearly circumscribes a category of acts that is narrower than all acts attributable to the State."). Because much of the argument set forth in Loewen's most recent submission was already addressed in our Memorial, we limit our reply only to those few additional interpretive claims that Loewen has advanced.

First, Loewen relies extensively on the recent decision of the tribunal in Azinian v. United Mexican States, ICSID Case No. ARB(AF)/97/2 (Nov. 1, 1999), another case under NAFTA Chapter 11, as support for its claim that the term "measures" in NAFTA Chapter 11 includes all judicial action. Loewen fundamentally misstates both the facts and holding of Azinian, however, as that case did not present the question of whether NAFTA Chapter 11 applies to judicial action.

Contrary to Loewen's manifestly incorrect characterization of the case, the dispute in Azinian did not "involve[] a challenge to decisions by the Mexican courts . . . ." TLGI Sub. at 4. Rather, the case involved only a challenge to a Mexican city council's alleged breach of a concession contract. See, e.g., Azinian at ¶ 35 (describing "Claimants' challenge to the validity of the purported termination of the Concession Contract . . . ."). Indeed, the Azinian tribunal could not have been clearer that the case did not involve a challenge to judicial actions, as it observed specifically that "*the Claimants have raised no complaints against the Mexican courts; they do not allege a denial of justice.*" Id. at ¶100 (emphasis added). The Azinian decision, therefore, is entirely inapposite here.

Although the Azinian tribunal offered some discussion of the principles applicable to "denial of justice" claims (despite its observation that no such claim was presented in the case),

the tribunal's *obiter dictum* in this regard did not establish – and could not have established – that such claims are cognizable under NAFTA Chapter 11. See id. at ¶¶ 101-104, 120. For example, the parties did not argue, and the tribunal did not discuss, the meaning of the term "measures" or of NAFTA Article 1101's limitation of the scope of NAFTA Chapter 11. Neither did the tribunal have the benefit of any argument from the parties as to whether or how NAFTA Chapter 11 could be construed to apply to judicial acts. The Azinian decision, therefore, provides no support for Loewen's interpretive claim.[2]

Second, Loewen contends that provisions of NAFTA Chapter 17 requiring the NAFTA Parties to provide certain "civil judicial procedures" for the enforcement of intellectual property rights "confirms that the term 'procedure' encompasses all types of judicial acts . . . ." TLGI Sub. at 9-10. Loewen's contention is mistaken. As the United States has already explained, see U.S. Mem. at 37, the fact that the NAFTA Parties are required to empower their courts to provide a specified list of judicial procedures – such as the list in Articles 1715(1) and (2), on which Loewen relies – does not mean that any individual court decision is open to challenge under the NAFTA. The United States empowers its courts to provide the procedures required by Article 1715 through such enactments as Title 28 of the United States Code (relating to the Judiciary and Judicial Procedure), the Copyright Act of 1976, 17 U.S.C. § 1 et seq., and the Lanham Trademark Act, 15 U.S.C. Ch. 22. The fact that these statutory enactments establish "civil

[2]Unlike the present case, the domestic dispute that formed the basis of the Azinian claim was between an investor and a governmental entity. In contrast, the Mississippi judgments at issue in this case were rendered in a purely private dispute in which no governmental entity was involved. The fact that the government was a party to the underlying court proceedings in Azinian thus renders the Azinian tribunal's discussion of "denial of justice" claims all the more irrelevant to the issue presented here. See infra at 10-13.

judicial procedures" simply does not mean that "all types of judicial acts" -- such as a court's decision involving those enactments in any particular case -- are open to challenge under NAFTA Chapter 11. Loewen's reliance on NAFTA Chapter 17, therefore, is entirely misplaced.

Third, Loewen contends that Chapter 10 of the NAFTA "confirms that final judicial decisions are 'measures.'" TLGI Sub. at 10. Loewen relies in particular on Article 1019, which requires the NAFTA Parties to publish any "law, regulation, *precedential judicial decision*, administrative ruling of general application and any procedure" regarding government procurement of goods and services. NAFTA Article 1019(1) (emphasis added). Significantly, however, this list of government actions differs materially from the list used to illustrate the definition of "measure" in NAFTA Article 201, which does not include any reference to "judicial decisions," whether precedential or not. Article 1019 thus further demonstrates the NAFTA Parties' ability to include judicial decisions with precision where they intended to do so.

More important, Loewen ignores that the reference to judicial action in Article 1019 is carefully limited only to *precedential* judicial decisions, and does not sweep broadly to include all judicial action. See NAFTA Article 1019(1). By referring only to "precedential" decisions, the NAFTA Parties recognized the difference between common-law rules created by judicial precedent and an individual court judgment in a given case. Unlike an individual court judgment (such as the judgments at issue in this case), a common-law rule or right of action may fairly be analogized to statutory law -- which is clearly a "measure" -- as both establish a right or proscription that affects future conduct beyond the parties to a given case. By specifying only "precedential" decisions and rulings of "general application," therefore, Article 1019 makes clear that the NAFTA Parties had in mind only pre-existing legal rules, and not (as Loewen would

have it) all judicial action.[3] Indeed, this is precisely the point of our discussion in the U.S. Memorial concerning Loewen's misstatement of Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). See U.S. Mem. at 45-46 (noting that Cipollone found only that a common-law right of action for damages, rather than individual court judgments in such cases, fell within the definition of "requirement" under the statute in question). Article 1019, therefore, provides no support for Loewen's effort to sweep all judicial action into the coverage of NAFTA Chapter 11.

B. Both International And Municipal Law Accord The Judiciary A Unique Status, And State Responsibility For Judicial Action Under Customary International Law May Be Found In Only The Most Extraordinary Circumstances

While the United States agrees with Loewen that acts of the judiciary may be attributable to the state, it does not follow that all judicial acts are therefore "measures" capable of violating an obligation undertaken in an international agreement such as NAFTA Chapter 11. To the contrary, unlike actions of the executive or the legislature, judicial acts can violate customary international law obligations in only the most extreme and unusual of circumstances. See, e.g., T. Baty, The Canons of International Law 127 (1930) ("It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are."); Edwin M. Borchard, Diplomatic Protection of Citizens Abroad 195-96 (1915) (because "[i]n well-regulated states, the courts are more independent of executive control than any other authorities . . . [,] the state is not liable for the acts of its judicial authorities unless there has been some flagrant or notorious injustice or denial of justice sanctioned by the court of last resort."); Alwyn V. Freeman, International Responsibility of States for Denial of Justice 33 (1938) ("[T]he

[3]Surely Loewen does not contend (nor could it) that the Mississippi jury verdict was in any way "precedential" or in any way created a common-law rule of general application.

question of proof of illegal action will be more difficult [with respect to judicial action] than is the case with other organs of the State.").

The United States, too, distinguishes between judicial action and other forms of government action as a matter of its own domestic law. For example, the U.S. Supreme Court has long recognized liability for legislative and regulatory actions that violate the economic protections of the U.S. Constitution, but has never recognized liability for judicial action under those same provisions. See, e.g., Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055, 1075 n.121 (1997) (observing that the U.S. Supreme Court "has never taken the view" that judicial decisions can violate either the Takings Clause or the Contract Clause of the U.S. Constitution); Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1453 (1990) (observing with disapproval that "[t]he few scholars to have seriously addressed the issue have generally argued that it would be catastrophic to subject the courts to the same constitutional constraints as the legislative and executive branches . . . ."); Dwight H. Merriam, What Is The Relevant Parcel In Takings Litigation?, SC43 ALI-ABA 505, 552 (1998) ("[I]t seems unlikely for reasons both practical and philosophical that the concept of judicial takings will generate broad support from the courts."). Indeed, as one study concluded, "[i]n the overwhelming majority of the [world's] legal systems investigated, the State is not liable for the conduct of its judicial organs." Opinion of the Max-Planck Institute in Haftung des Staates für rechtswidriges Verhalten seiner Organe at 773 (1967) (quoted in Barcelona Traction, 1970 I.C.J. at 155 (separate opinion of Judge Tanaka)).

Given the unique status of the judiciary in both international and municipal legal systems, the actions of domestic courts are accorded a far greater presumption of regularity under

international law than are legislative or administrative acts. See Caron Statement at 14-26. As Judge Tanaka of the International Court of Justice explained in Barcelona Traction,

> [i]t is an extremely serious matter to make a charge of a denial of justice vis-a-vis à State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.

1970 I.C.J. at 160 (separate opinion of Judge Tanaka). See also id. at 155-56 (describing qualified immunity of states for acts of the judiciary "by reason of the independence of the judiciary," as opposed to acts of the legislative and executive organs of government). It is against this backdrop that any determination of whether a particular judicial action is a "measure" within NAFTA Article 1101 should be made.

C. Because The Mississippi Litigation Was A Dispute Among Private Parties, The Court Judgments In That Case Cannot Be Construed As "Measures Adopted Or Maintained" By The United States

The Loewen Group contends that there is no basis for "distinguish[ing], for purposes of construing a 'measure' or other state action requirement, between judicial acts in litigation where the government is a party and judicial acts in litigation between private parties." TLGI Sub. at 4. This is not so.

The "act of state" doctrine, which generally provides that domestic courts will not judge the validity of official acts of a foreign sovereign, see e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), has long recognized the distinction between judicial decisions in cases involving the government and those in cases involving only private parties. As explained in the Restatement (Second) of Foreign Relations Law of the United States,

> [a] judgment of a court may be an act of state. Usually it is not, *because it involves the interests of private litigants* or because court adjudication is not the usual way in which the state exercises its jurisdiction to give effect to its public interests.

Restatement (Second) of Foreign Relations Law of the United States § 41 cmt. d (1965) (emphasis added). The Restatement provides the following illustration of the principle, which, in substance, describes the Mississippi court judgments at issue here:

> In a suit in tort by X against Y, a court of state A decides that X is entitled to a specified amount of damages. This decision is not an act of state . . . .

Id. (illustration 4).

This principle has been applied in numerous cases. For example, in Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597 (9th Cir. 1976), a U.S. company sought to challenge, in a U.S. court, a judicial decree issued by a court of Honduras that the company alleged was improperly procured by private parties. The Timberlane court held that the Honduran judicial decree was not an "act of state" over which the U.S. court lacked jurisdiction because "the allegedly 'sovereign' acts of Honduras consisted of judicial proceedings which were initiated by . . . a private party and . . . not by the Honduran government itself." Id. at 608.[4] See also Liu v. Republic of China, 892 F.2d 1419, 1433-34 (9th Cir. 1989) (quoting Restatement); Dominicus Americana Bohio v. Gulf & Western Indus., 473 F. Supp. 680, 689 (S.D.N.Y. 1979) ("[T]he initiation of judicial proceedings in a foreign country is not encompassed by the act of state doctrine even though foreign courts are responsible for the ultimate outcome of the proceedings.").

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[4]Although Timberlane's alternative holding was overruled by statute, neither legislative nor subsequent judicial action disturbed the court's holding concerning the "act of state" doctrine. See Timberlane Lumber Co. v. Bank of Am., 749 F.2d 1378 (9th Cir. 1984).

The "act of state" doctrine is (as Sir Robert Jennings has himself observed) recognized in jurisdictions around the world, even if by a different name. See 1 Oppenheim's International Law 368-69 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992). It is well-settled that "the general principles of law recognized by civilized nations" may be regarded as a source of international law. See Statute of the International Court of Justice, Oct. 24, 1945, art. 38(1)(c), 59 Stat. 1055; see also, e.g., Ian Brownlie, Principles of Public International Law 16 (5th ed. 1998) (ICJ is authorized "to apply the general principles of municipal jurisprudence . . . in so far as they are applicable to relations of States.") (quotation omitted); id. at 3 (Article 38 of the ICJ Statute is "generally regarded as a complete statement of the sources of international law.").

The principles underlying the "act of state" doctrine also find expression in the text of NAFTA Chapter 11. As we explained in our Memorial, the limitation of NAFTA Article 1101 only to measures "adopted or maintained" by the government indicates the drafters' intent to limit NAFTA Chapter 11 to those actions that involve ratification by the government. See, e.g., U.S. Mem. at 54. This limitation accords with the focus of the "act of state" doctrine on acts in which the government has "exercised its jurisdiction to give effect to its public interests." Restatement (Second) § 41.

Moreover, the "act of state" doctrine provides a useful analytical framework for decision in this case, as the ultimate inquiry is the same; i.e., under what circumstances may an act be regarded as one of the State? Indeed, the use of the "act of state" doctrine's analysis affords an appealing symmetry between the legitimate spheres of authority for international and domestic tribunals: if an act is truly that of a foreign government, the international tribunal will have jurisdiction that the domestic court will decline, whereas an act that is not an "act of state" may

be addressed only in the domestic court. Cf. Brownlie at 507 (act of state doctrine may be useful to "the maintenance of a sensible relationship between national and international courts."). The "act of state" doctrine thus serves as an appropriate guide for determining whether a given judicial act is properly regarded as a "measure adopted or maintained" within the scope of NAFTA Article 1101.

Consistent with this principle, the Mississippi court judgments at issue here cannot be viewed as either an "act of state" or as a "measure adopted or maintained" by the United States under NAFTA Chapter 11. As noted, the O'Keefe litigation arose from a dispute among purely private parties, in which no government was involved. As in Timberlane, "the allegedly 'sovereign' acts" of the government in this case "consisted of judicial proceedings which were initiated by . . . a private party and . . . not by the . . . government itself." Timberlane, 549 F.2d at 608. The Mississippi judgments, therefore, are virtually textbook examples of judicial actions that are not properly those of the United States under the "act of state" doctrine and thus should not be viewed as "measures adopted or maintained" by the United States for purposes of NAFTA Chapter 11. See Restatement (Second) § 41 cmt. d, illustration 4.

D. Any Ambiguity Is Subject To Restrictive Interpretation In Favor Of The Parties To The NAFTA

Loewen contends that, even in the event of uncertainty as to whether the Mississippi court judgments are "measures adopted or maintained" for purposes of NAFTA Chaper 11, the doctrine of restrictive interpretation may not be employed to resolve that uncertainty in favor of the sovereignty of the United States. Loewen is wrong.

Contrary to Loewen's assertion, the doctrine of restrictive interpretation remains a vital

principle of international dispute resolution in certain circumstances, particularly in the context of interpreting jurisdictional grants in international agreements. Even within the past few years, the doctrine has been applied by many of the world's leading international tribunals to construe international agreements in favor of sovereign interests. See, e.g., WTO Appellate Body Report on EC Measures Concerning Meat and Meat Products (Hormones), 1998 WL 25520, at *71 n.154 (Jan.16, 1998); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 341-42 (Sept. 13) (international adjudication may proceed only upon an "unequivocal indication" of a "voluntary and indisputable" acceptance by the State of the tribunal's jurisdiction).

The Vienna Convention did not change this fact. To the contrary, the Vienna Convention expressly authorizes the use of "supplementary means of interpretation" to determine the meaning of ambiguous or obscure treaty provisions, or where interpretation would otherwise lead to an absurd or unreasonable result. See Vienna Convention on the Law of Treaties, art. 32. As Loewen's own expert, Sir Robert Jennings, has explained in a more detached setting (and in terms even broader than the United States would accept), the doctrine of restrictive interpretation is an entirely appropriate supplementary means of treaty interpretation in such circumstances, consistent with the provisions of the Vienna Convention. See Oppenheim's at 1278-79 ("If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.").

We agree with Loewen that the doctrine does not apply in all circumstances. For example, as we have explained, we agree with the criticism that restrictive interpretation could,

in disputes between states, "lead[] to restrictions on the obligations of one sovereign State to the detriment of any benefits in a treaty provided to another sovereign State." U.S. Mem. at 41 n.24 (quoting Charles N. Brower & Jason D. Brueschke, The Iran-United States Claims Tribunal 267 (1998)) (internal quotation omitted).[5] However, unlike the "state-to-state" context in which such a criticism has merit, the doctrine of restrictive interpretation remains a viable interpretive canon in investor-state disputes such as this one, where only one party to the dispute was a party to the underlying agreement. Cf. Oppenheim's at 1276 (the value and relevance of supplementary means of interpretation vary from treaty to treaty); Caron Statement at 31.

Indeed, a rule of restrictive interpretation is necessary in NAFTA Chapter 11 investor-state disputes to safeguard the sovereign interests of all three of the NAFTA Parties. Any Government that is the claimant in a state-to-state dispute knows that it might be the respondent in a similar future dispute. Before proposing any interpretation of an international agreement, therefore, a Government advancing a state-to-state claim must take into consideration the effect such an interpretation would have on its own sovereign interests. By contrast, in investor-state disputes under NAFTA Chapter 11, the three NAFTA Parties appear as respondents, whereas private investors appear always as claimants. A private investor making a claim never needs to balance the sovereign interests of any of the NAFTA Parties (not even those

[5]We note that one prominent scholar, on whose early writings Loewen relies for its criticism of restrictive interpretation, later expressed a different view in interpreting jurisdictional grants while sitting as a judge on the International Court of Justice. Compare TLGI Sub. at 13-14 (quoting Hersch Lauterpacht, Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties, 26 Brit. Y.B. Int'l L. 48, 84 (1949)) with Certain Norwegian Loans (France v. Norway), 1957 I.C.J. 9, 58 (July 6) (it is a "fundamental principle of international judicial settlement" that "the Court will not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt.") (separate opinion of Judge Lauterpacht).

of its own Government) against its own purely private, commercial interests. For this reason as well, therefore, it is entirely appropriate to interpret NAFTA Chapter 11 restrictively in investor-state disputes in order to protect important sovereign interests against overreaching by private claimants.

II. COURT JUDGMENTS THAT ARE STILL CAPABLE OF APPEAL DO NOT QUALIFY AS "MEASURES ADOPTED OR MAINTAINED" BY A NAFTA PARTY AND CANNOT, AS A MATTER OF LAW, GIVE RISE TO A BREACH OF NAFTA CHAPTER 11

As the United States demonstrated in its Memorial, a lower court judgment that was capable of appeal cannot qualify as a "measure adopted or maintained" by a NAFTA Party and cannot, as a matter of law, establish that a Party has breached an obligation under NAFTA Chapter 11. See U.S. Mem. at 49-56. In response, Loewen contends that the requirement of finality of judicial action was waived by NAFTA Article 1121, thus permitting an investor to challenge any lower court action in an international proceeding under NAFTA Chapter 11, regardless of whether appeals from the lower court action were available in the domestic judicial system. See TLGI Sub. at 20-25.

Contrary to Loewen's assertions, the requirement of finality is a substantive element of any NAFTA Chapter 11 claim based on judicial acts, and is distinct from the local remedies rule, which is a procedural prerequisite to presenting a claim under customary international law. As Professor Caron explains, "a judicial act can only be a 'measure' when it is a final systemic pronouncement of the sovereign; that is, an act which the judicial system has had an opportunity to review." Caron Statement at 7. Article 1121 is a procedural provision and cannot waive the substantive requirement of finality. Moreover, even if the requirement to appeal were seen as

merely procedural, Article 1121 must be read narrowly to waive the local remedies rule only to the extent necessary to make the article effective. Loewen has not provided the "clear proof" necessary to establish that the exhaustion requirement was waived with respect to claims based on judicial action.

A. The Text Of The NAFTA And Customary International Law Require Finality As A Substantive Element Of Claims Challenging Judicial Acts

Claimants' case depends on the extraordinary proposition that a foreign national may bring an international challenge to the decision of a domestic court, even when that foreign national elects not to allow the internal corrective mechanism of appeal to function. Prior adjudicators have found the mere suggestion of such a rule unthinkable. See, e.g., Jennings, Laughland & Co. v. Mexico, (U.S. v. Mex. 1874), reprinted in 3 John B. Moore, History and Digest of International Arbitrations, 3135, 3136 (1898) ("The umpire does not conceive that any government . . . can thus be made responsible for the misconduct of an inferior judicial officer when no attempt whatever has been made to obtain justice from a higher court.") (Thornton, U.). Courts, by their nature, operate in self-correcting appellate tiers, which only together constitute a judicial system. See U.S. Mem. at 50-52. For purposes of international claims law, they function as a single unit. See Edwin M. Borchard, Responsibility of States at the Hague Codification Conference, 24 Am. J. Int'l L. 517, 532 (1930) ("[J]udicial action is a single action from beginning to end, and . . . it cannot be said that the State has spoken finally until all appeals have been exhausted.") (citing Belgian delegate).

The United States has consistently held this view. For example, in 1901, the United States rejected a claim for reparation in a case substantially similar to this one on the grounds that

a denial of justice could not be premised on an unappealed court decision, notwithstanding the requirement of an appeal bond. In Ferrara's Case (1901), reprinted in 6 John B. Moore, Digest of International Law 672 (1906), an Italian national alleged that she was deprived of her opportunity to appeal a state court judgment in the United States by the requirement of an appeal bond that she could not afford. The United States rejected the claim, noting that

> [i]t frequently happens that litigants are denied rights by the decisions of inferior courts and are obliged, in order to establish such rights, to carry the case to the courts of last resort. The plaintiff . . . should pursue the judicial remedy afforded by our laws, perfecting her appeal to the court of appeals . . . of Colorado, and, if necessary thereafter, by appropriate proceedings, bring the case before the Supreme Court of the United States.

Id. at 674. Addressing the bond issue specifically, the United States explained, in terms equally applicable to the present claim, that

> [t]he poverty of the plaintiff, which, it is alleged, prevented her from taking the necessary legal proceedings to establish her rights, affords no basis for a claim of denial of justice. It is a rule practiced not only by many American courts, but also by those of other civilized states, that the plaintiff shall, as a condition to the prosecution of his case, give a bond to secure the costs (caution judicatum solvi) he may thereby occasion. Such requirement can not be treated as a denial of free access to the courts, nor as a denial of justice giving ground for diplomatic intervention. . . . Much less could the United States be expected to pay outright this claim, considering that *the Government was not in the remotest degree connected with the transaction out of which the claim arose*, and that *justice has not been judicially denied.*

Id. at 674-75 (emphasis added).

The invasive nature of international review of a domestic court decision makes it particularly important that the decision under examination be the final product of a judicial system, with the benefit of all possible levels of judicial review. It is only with the utmost caution that an international tribunal may reexamine the actions of a domestic judiciary: "It is an

extremely serious matter to make a charge of denial of justice vis-a-vis a State. It involves . . . a moral condemnation of that judiciary. As a result, the allegation of denial of justice is considered to be a grave charge . . . ." Barcelona Traction, 1970 I.C.J. at 160 (separate opinion of Judge Tanaka) supra at 10; Caron Statement at 15-19.

The text of NAFTA Chapter 11 fully reflects this finality requirement as a substantive precondition to jurisdiction. First, Article 1101 requires that a measure be either "adopted" or "maintained" by a Party in order to fit within the scope of Chapter 11 and its dispute resolution provisions, terms which themselves reflect finality. See U.S. Mem. at 53-54. Second, NAFTA Articles 1116 and 1117 require allegation of a "breach," which, as a matter of law, mandates finality of government action. See, e.g., id.; Amos B. Corwin v. Venezuela (U.S. v. Venez.), reprinted in 3 Moore, International Arbitrations at 3218 ("It is thoroughly well settled that in . . . judicial sentences generally where appeals are reasonably attainable -- a state's liability begins only when the court of *last resort*, accessible by reasonable means, has acted on it.") (Little, Comm'r) (emphasis in original). Both a "measure" and a legally sufficient allegation of a "breach" are strict jurisdictional prerequisites that any claimant must meet. See U.S. Mem. at 54. Claimants' submissions are notable for their failure even to mention these express textual requirements.

B. The Substantive Requirement Of Finality For Challenges To Judicial Acts Is Distinct From The Procedural Requirement To Exhaust Local Remedies And Is Not Waived By NAFTA Article 1121

Loewen rests its entire argument on the dual assertions that the finality requirement is identical to the customary international law rule of exhaustion of local remedies (the "local

remedies rule"), and that the NAFTA waived this customary international law rule in its entirety. Loewen is wrong in both respects.

1. The Substantive Requirement of Finality for Challenges To Judicial Acts Is Distinct From The Procedural Requirement To Exhaust Local Remedies

Contrary to Loewen's claim, Chapter 11's requirement of finality with respect to claims of judicial breach is distinct from the general customary international law requirement that a claimant must exhaust all domestic remedies for an international wrong before a claim can be presented diplomatically. Judicial finality requires the *judicial system* to reach a final determination before it can engage state responsibility. The local remedies rule, in contrast, requires a claimant to seek and exhaust both judicial and non-judicial remedies for all alleged breaches of international law – *performed by any branch* – before, as a procedural matter, the claim can be heard.

It is true that the local remedies rule and the judicial finality requirement share certain characteristics. And, as a general matter, the local remedies rule eclipses the operation of the judicial finality rule, since, if the former is in effect, one need never examine the latter separately. Thus, it is no surprise that descriptions of the local remedies rule incorporate the concept of a final decision by the highest possible court, see TLGI Sub. at 23, or that the support for judicial finality has often been expressed in the context of the local remedies rule. See id. at 22. This does not mean, however, that the doctrines are identical, but instead shows only that elements of the rationale for one may support the application of the other.

For example, as Loewen observes, the Interhandel case was decided on the grounds that Interhandel had failed to exhaust local remedies. But the reasoning underlying the decision --

that "[b]efore the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated"-- is equally strong support for the substantive requirement of judicial finality. See Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 45-46 (Mar. 21) (separate opinion of Judge Cordova). The fact that judicial finality is commonly obscured by the local remedies rule should not deter this Tribunal from recognizing that rule's narrower cousin as a distinct constraint on its exercise of jurisdiction.

As David Mummery, cited also by Loewen, observed, "[t]he rules relating to denial of justice, with which the local remedies rule is often confused, spring from different roots." David R. Mummery, The Content of the Duty to Exhaust Local Judicial Remedies, 58 Am. J. Int'l L. 389, 411 (1964). Judicial finality is the primary rule underlying the concept of "denial of justice," for it cannot be said that "justice" is denied until the system of justice has spoken. See id. at 413 ("Denial of justice involves measuring the respondent state's *system of justice* against an international standard") (emphasis added). As Mummery further explains, "the confusion [between denial of justice and the local remedies rule] is greatest in the area of judicial institutions . . . . Here the denial of justice concept and the local remedies rule are each being used to examine essentially the same issue, viz., the availability and nature of the domestic judicial remedy." Mummery at 412.

Despite the similarities between the two principles, they are analytically distinct. This distinction is reflected in the Draft Articles on State Responsibility prepared at the 1930 League of Nations Codification Conference. Article 9 of that draft, which lists bases of state responsibility, includes a provision for judicial acts that clearly recognizes a finality requirement:

> International responsibility is incurred by a State if damage is sustained by a foreigner as a result of the fact:
>
> (1) that a judicial decision, *which is not subject to appeal*, is clearly incompatible with the international obligations of the State.

4 League of Nations, Acts of the Conference for the Codification of International Law, art. 9 at 236-37 (1930) (emphasis added). The 1930 Draft Articles thus recognize a distinction between finality – one element in the substantive definition of liability – and the procedural concept of exhaustion of local remedies, which is treated in a separate article. See id. art. 4 at 236 ("The State's international responsibility may not be invoked as regards reparation for damage sustained by a foreigner until after exhaustion of the remedies available to the injured person under the municipal law of the state."). See also Fred K. Nielsen, International Law Applied to Reclamations 28-29, 70 (1933) (including exhaustion both as a substantive element of state responsibility for acts of judicial authorities and in the description of procedural rules applicable to international tribunals).

Even authors who see the finality requirement as an aspect of the local remedies rule consider it a substantive one. For example, as we noted in the U.S. Memorial, Freeman contrasts the procedural nature of the local remedies rule in "original violations of international law prior to and unconnected with the administration of justice" with its "substantive faculty of creating responsibility where local remedies function defectively" in cases involving private parties. See U.S. Mem. at 51 n.30. Although Loewen asserts that Freeman's distinction turns on whether the actors are private or public, not on whether they are judicial or non-judicial, Loewen is mistaken. See TLGI Sub. at 23-24 (citing Freeman). The paragraph following the cited language clarifies that the "fundamental distinction" is "between claims arising out of original breaches of

international law other than failures in administering justice, and claims founded solely on a defective operation of the judicial function and in which no international wrong was committed prior to the operation of local remedies." Freeman at 407-408 (emphasis added).[6] Thus, Freeman is indeed distinguishing between judicial wrongs -- where the appeal requirement is substantive -- and non-judicial wrongs -- where it is not.[7]

Because of the serious nature of the charge of denial of justice and the extremely exacting standard of proof required for such claims, international tribunals are rarely faced with challenges to judicial acts. See supra, at 8, 10. This, together with the general applicability of the local remedies rule, means that there are very few cases in which tribunals have needed to analyze the question of finality in isolation. However, when the occasion to do so has arisen, international tribunals have required judicial finality independent of the local remedies rule. For example, in

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[6]Although Freeman elsewhere remarks that "a denial of justice is no less a violation of an international rule merely because it emanates from a court of first instance," in the same breath he recognizes the weakness of that position: "And yet one may be justified in demanding whether, in a realistic sense, justice can be considered as denied when in fact justice has not finally spoken; when there still remains the substantial possibility that an appellate tribunal will correct the wrong below." Freeman at 445. Ultimately, Freeman does not resolve the issue, reasoning that the local remedies rule will, in any event, prevent claims from being raised prior to judicial finality. Id. at 446.

[7]The Whiteman citation to which the Loewen Group refers should be similarly read. See TLGI Sub. at 24 (citing 8 Marjorie M. Whiteman, Digest of International Law, at 789 (1967)). In essence, it makes the same point -- that exhaustion is substantive in cases where judicial action is the source of the harm claimed; procedural in others. Whiteman labels the distinction "imputable to the State" versus "not imputable to the State" -- but this nomenclature may merely reflect a notion that, in the claims context, state responsibility does not attach for a judicial decision until that decision is final; thus, a judicial act cannot be "imputable to the State" until it is the product of a final decision. See, e.g., 5 Moore International Arbitrations, 4471, at 4472-73 ("[A] state is politically answerable only for the decisions of its highest tribunals.") (from Mr. Kane's notes on the Commissioners' decisions in cases brought under the French Indemnity: Convention with France of July 4, 1831 (U.S. - France)).

the context of a lump sum settlement agreement, the American-Turkish Claims Commission at least once rejected a claim based on judicial actions because the claimant failed to appeal. See Christo G. Pirocaco v. Republic of Turkey, (1923), reprinted in Fred K. Nielsen, American-Turkish Claims Settlement under the Agreement of December 24, 1923, 587, 589 (1937) ("As a general rule, a denial of justice can be predicated only on a decision of a court of last resort. A litigant must exhaust his remedies before it can be said that he has had that final judicial determination of his case which the law affords.").[8] Thus, even where the broad local remedies rule is not applicable, tribunals nonetheless have determined that, for claims based on judicial actions, finality is required. See also 5 Moore, International Arbitrations at 4471, 4472-73 (applying finality requirement to judicial proceedings in a lump sum settlement agreement context) (from Mr. Kane's notes on the Commissioners' decisions in cases brought under the French Indemnity: Convention with France of July 4, 1831 (U.S. - France)).

None of the cases cited by Loewen is to the contrary. Although Loewen asserts that

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[8]It seems clear that exhaustion of local remedies was not a general requirement for compensation under the American-Turkish Claims Commission, as those claims were settled by lump sum agreement, in which the local remedies rule typically is not considered a bar. See, e.g., 1 Richard B. Lillich and Burns H. Weston, International Claims: Their Settlement by Lump Sum Agreements 5-6 (1975) (local remedies rule typically is not considered a bar to adjudication of claims under lump sum settlement agreements, even where the rule is not expressly waived in the agreement). Moreover, the jurisprudence of the American-Turkish Claims Commission clearly implies that exhaustion of local remedies was not generally required. See Starr Piano Co. v. Republic of Turkey (1923), reprinted in Fred K. Nielsen, American-Turkish Claims Settlement 314, 316-17 (finding that seeking local remedies and having them denied is only one of three ways to establish claim). See also Armour & Co. v. Republic of Turkey, id. at 154-55 (awarding compensation based on requisition receipts where there was no suggestion that claimant sought compensation from Turkish Government in local courts); Quaker City Rubber Co. v. Republic of Turkey, id. at 229 (same); Whittemore Bros. Corp. v. Republic of Turkey, id. at 575 (same); The Texas Co. v. Republic of Turkey, id. at 579-80 (same); Socony-Vacuum Oil Co., Inc. v. Republic of Turkey, id. at 377 (same, except seizure proven through other methods).

"international tribunals have often reviewed the decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable," TLGI Sub. at 21, all of the cases on which Loewen relies fundamentally involved challenges to administrative rather than judicial acts, or involved challenges to what appear to be final judicial decisions.

For example, in G.W. McNear, Inc. v. United Mexican States, 4 R.I.A.A. 373 (U.S. v. Mex. 1928), the challenged act was the seizure of a shipment of wheat by Mexican customs authorities. Although court proceedings of a "summary character" authorized the seizure, the Commission did not find that the court action breached Mexico's international responsibility; in fact, the Commission noted that "[i]t is possible that the court was justified in ordering the seizure of the goods in the course of proceedings of a summary character." Id. at 375. Instead, the Commission held that it was *the customs authorities'* continued retention of the wheat after they had been informed of the rightful owner that constituted the violation. Even the concurring opinion of Commissioner Nielsen, cited by Loewen, rests liability on the acts of "the administrative authorities," and not on "the court whose process was invoked." Id. at 375-76.

Similarly, The Texas Company (U.S. v. Mexico), Decision 32-B, reprinted in American Mexican Claims Commission 142 (1948), involved a challenge to the "interpretation or application" of several Mexican export taxes. Although the decision mentions that there were proceedings in Mexican courts on the interpretation of the decrees, and notes that exhaustion of remedies is not required, it appears that the subject of the claim was the alleged illegal exaction of taxes by the executive -- an administrative, not judicial, function.

The case of Young, Smith & Co. v. Spain (U.S. v. Spain 1879), reprinted in 3 Moore, International Arbitrations at 3147, also involved a challenge to administrative action -- the

seizure by Spanish administrative authorities of the property of American citizens, and the resolution of the matter by an administrative official. See id. at 3148. In that case, the umpire explicitly based his finding of jurisdiction on "the unlawful seizure by Spanish authorities . . . even if no allegation of a denial of justice be superadded to the original demand." Id. at 3148 (Baron Blanc, Umpire). As in the previous cases, court action did not form the basis of the claim and thus the case lends no support to Loewen's contention.

The case of Frederic Bronner v. Mexico, (U.S. v. Mex.), reprinted in 3 Moore International Arbitrations at 3135 (1898) (Thornton, U.), on which Loewen also relies, is to similar effect. Like the G.W. McNear case, the Bronner case involved the confiscation of goods by the Mexican customs-house authorities. While the opinion used the term "denial of justice," the original wrong at issue appears to have been an administrative, not judicial, act.

More fundamentally, to the extent that the claim in Bronner was based on a judicial decision, it is almost certain that the judicial decision at issue was a final decision of the Mexican court system. Despite Loewen's assertion that there was "no evidence that the judicial decision was appealed to Mexico's highest court," TLGI Sub. at 22, the opinion expressly refers to the decision of the "Mexican tribunals" – in the plural – regarding the administrative confiscation. Moreover, because Sir Edward Thornton, the umpire who decided this case, routinely dismissed claims brought under the same Convention (the U.S.-Mexico Claims Convention of July 4, 1868) due to claimants' failure to appeal, it is highly unlikely that the judicial decisions in Bronner were subject to further appeal. See, e.g., Jennings, Laughland & Co. v. Mexico, 3 Moore, International Arbitrations, at 3135-36 (Thornton U.) (dismissed for failure to appeal court decision); Alfred A. Green & Co. v. Mexico, (1876) id. at 3139 (same); Benjamin Burn v.

Mexico, (1876) id., at 3140 (same); Schooner Ada, Smith and Mason v. Mexico, (1875), id. at 3143-44 (same); Charles B. Smith v. Mexico, id. at 3146 (same); William J. Blumhardt v. Mexico, id. at 3146-47 (same).

Even if, in some cases, international tribunals have taken jurisdiction over claims based on judicial actions that are still subject to appeal, this does not prove Loewen's point.[9] While prior decisions can give some guidance as to the content of international law requirements, this Tribunal is of course in no way bound to follow the decision of any other Tribunal, even that of other NAFTA Tribunals. See NAFTA Articles 1131, 1136(1). These are developing areas of international law, subject to active intellectual debate among respected scholars. Even if international law sources provide conflicting guidance on the relationship between the concept of finality and the local remedies rule (and Loewen has failed to identify any genuine conflict on this point), at bottom there is a general recognition of the need to allow domestic judicial systems to reach a final, independent decision before subjecting them to international scrutiny. See U.S. Mem. at 50-53. The contrary rule could subject a national government to probing international review of its judicial processes in every case in which a foreign litigant chooses not to appeal -- including failing to appeal for reasons as unjustifiable as neglect or indifference on the part of the litigant himself. The Parties cannot have intended such a result. See Caron Statement at 30-31.

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[9]We are aware, for example, of a set of cases in which an international tribunal disallowed demurrers urging rejection of claims that arose out of unappealed prize court determinations. See, e.g., Napier Case (U.S. v. Gr. Brit.), No. 143, reprinted in 3 Moore, International Arbitrations at 3152-54. The Commissioners found that "there may be circumstances which may make it [their] duty . . . to consider some of the cases in which there has been no appeal." In cases where the claimants had failed to pursue reasonably available avenues of appeal, however, the Commissioners summarily disallowed the claims on that ground alone, without reaching the substantive merits of the claims. Id. at 3157-59.

This tribunal should follow the fundamental assumptions underlying the long history of international review of final domestic judicial decisions, and recognize that finality is a substantive element of any challenge to judicial action in an international proceeding under NAFTA Chapter 11.

2. NAFTA Article 1121 Does Not Waive The Requirement That A Court Judgment Must Be Final Before It Can Be The Subject Of An International Claim

Loewen concedes (as it must) that, under general principles of international law, finality is required to state a claim based on judicial action, if by nothing else than the operation of the local remedies rule. See TLGI Sub. at 22-24, 26-28. Loewen's argument therefore depends on reading NAFTA's Article 1121 somehow to abolish that fundamental requirement. But Article 1121 did not do so. Instead, Article 1121 is fully consistent with a judicial finality requirement, even if that requirement is considered procedural.

As shown previously, judicial finality is a substantive element of establishing both a "measure adopted or maintained by a Party" and a "breach" of applicable law. This requirement is independent of any procedural requirement to exhaust local remedies. Article 1121, providing "Conditions Precedent" to submission of a claim, is located in the procedural section of Chapter 11, Section B, and addresses only procedural matters, not substantive ones. Hence it does not waive substantive requirements necessary to establish a claim.

As one prominent scholar explains, cases involving a procedural requirement to exhaust are fundamentally different from cases in which exhaustion is a substantive element of a claim:

> The distinction is of great importance in those cases where, for instance, before a claims commission, the rule of local remedies is dispensed with. Such a provision can only dispense with the rule with regard to the former category of

> cases, but not with regard to the latter. For in the second category of cases, where local remedies have not yet failed either by insufficient action or by their absence, there is no internationally unlawful act and hence no claim to be presented.

Bin Cheng, General Principles of Law as applied by International Courts and Tribunals 179-80 (1987). The terms of Article 1121 reflect its procedural nature; it assumes the preexistence of a "measure" that can, as a matter of law, constitute a "breach." See NAFTA Articles 1121(1)(b) and 1121(2)(b) (requiring waiver of an investor's rights to bring certain "proceedings with respect to the *measure* of the disputing Party that is alleged to be a *breach*") (emphasis added). It cannot possibly apply where – because of judicial finality or for some other reason – either the "measure" or the alleged "breach" has not yet come into existence. Thus, absent a "measure" and a valid allegation of "breach," Article 1121 can have no effect.

Requiring finality before a claim based on judicial acts may be brought does not render Article 1121 ineffective. It does mean that, with respect to claims of judicial breach, no "further proceedings . . . with respect to the measure" will be practically available, but Article 1121 nowhere suggests that further proceedings must always be possible. Even under Claimants' reading of Article 1121, there are some circumstances in which no further proceedings will be possible – for example, an investor may have already exhausted all domestic remedies before initiating the arbitration. Moreover, the finality requirement is limited to judicial action; typically, state action alleged to breach NAFTA will consist of legislative or administrative action. Therefore, in the vast majority of Chapter 11 cases, "proceedings . . . with respect to the measure . . . alleged to be a breach" will be possible. See Caron Statement at 33-34. Article 1121 is thus fully consistent with the requirement that judicial action be final before a claim for a judicial breach may be brought under NAFTA Chapter 11.

Indeed, even if judicial finality were seen as a procedural requirement (as opposed to a substantive element both of a "measure" and of an alleged judicial "breach" of NAFTA Chapter 11's requirements), and nothing more than one aspect of the local remedies rule, Article 1121 would still not eliminate the requirement. Because any effect Article 1121 has on the local remedies rule is only by implication, any implied waiver must be read narrowly, to dispense with only those international law requirements that are necessary to make Article 1121 effective.

Nowhere in the text of Article 1121 is there an explicit waiver of the local remedies rule.[10] Compare Convention Between Great Britain and the United Mexican States, Nov. 19, 1926, Art. 6, reprinted in 5 R.I.A.A. 7, 9 ("[I]t is agreed that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of such claim."); General Claims Convention of September 8, 1923 (U.S. v. Mex.) art. 5, reprinted in 4 R.I.A.A. at 13 ("The High Contracting Parties . . . agree that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim."). Instead, Article 1121 merely requires investors to waive their rights to certain recourse in local courts. While this provision implies some relaxation of the local remedies rule,[11] the text does not specify exactly how or to what extent the local

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[10]The Loewen Group's expert, Sir Robert Jennings, at first concedes this point in paragraph 39 of his affidavit: "[t]he dispensing [of the rule of local remedies] is not made expressly; in fact there is no mention of the rule throughout the treaty." Unfortunately, Sir Robert seems to forget this concession in his conclusion that "because NAFTA expressly waives the traditional exhaustion requirement, there can be no 'judicial finality' requirement." Second Jennings Op. at 10-11.

[11]As discussed above, if the local remedies rule were given its broadest application, no NAFTA Chapter 11 proceeding could be brought until the claimant had litigated every claim

remedies rule should be modified.

There is, of course, no question that States can eliminate the local remedies rule by international agreement. See, e.g., 1 Georg Schwarzenberger, International Law 610 (1957). It is also true, however, that any such agreement must be clearly expressed or unequivocally implied. See Elettronica Sicula S.p.A. (U.S. v. Italy), 1989 I.C.J. 4, 31 (July 20) ("The Chamber has no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so."). "In short, though there is the possibility of an arbitration agreement intended to dispense with the exhaustion of local remedies without stipulating expressly such an intention,

. . . its exceptions to its applicability cannot be presumed. Such clauses must be expressed or, at least, implied so clearly and unequivocably that they leave no room for any doubt as to the intention of the States parties to the arbitration agreement." 2 F.V. Garcia-Amador, The Changing Law of International Claims 467 (1984).

Without doubt, the Parties to the NAFTA contemplated some loosening of the procedural requirement of recourse to local remedies. But it is difficult to see how the Parties could have in this indirect way superseded their explicit limitation of the scope of Chapter 11 to "measures adopted or maintained by a Party" and consented to such a significant intrusion into the operation

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through the domestic court system. If that were the case, Article 1121's required waiver would be superfluous as there would be no effective recourse left to waive.

of their domestic judicial systems. Judicial finality is a concept distinct from the local remedies rule, and one based on distinct policy considerations. Loewen has provided no proof – let alone "clear" proof – that the United States has chosen to forego its right to judicial finality in consenting to arbitration under Chapter 11. As the International Court of Justice provided in Elettronica Sicula, it is such "clear" proof that would be needed for Claimants' position to prevail.

III. THE UNITED STATES CANNOT BE HELD LIABLE FOR THE MISSISSIPPI COURT JUDGMENTS BECAUSE THEY WERE NOT FINAL ACTS OF THE UNITED STATES JUDICIAL SYSTEM

The United States demonstrated at length in its Memorial that: (1) all of the court judgments at issue in this arbitration were still subject to appeal in higher courts, (2) several reasonable and viable options were available to Loewen by which it could have pursued those appeals, (3) Loewen was fully aware of, and was prepared to pursue, many of those options, and (4) Loewen elected instead to forego the appeals and to settle the Mississippi litigation. See U.S. Mem. at 49-86. As we explained in our Memorial, these central facts deprive the Tribunal of jurisdiction to hear Claimants' complaints concerning the Mississippi judgments. Claimants' submissions fail to overcome this fatal jurisdictional flaw in their claim.

A. Claimants Misapprehend Their Burden, Which Requires Them To Demonstrate That The Means Of Further Appeal Of The Mississippi Judgments Would Have Been Manifestly Ineffective Or Obviously Futile

As we explained in the United States' Memorial, a claimant may excuse his failure to appeal a court action only in the most extreme circumstances. See U.S. Mem. at 54-56. It is not enough to argue, as Claimants attempt to do here, that further appeals would have been difficult, costly or unlikely to succeed. Id. Rather, to establish the international responsibility of the

United States for the actions of lower courts, "the test is obvious futility or manifest ineffectiveness [of means of appeal], not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests." C.F. Amerasinghe, Local Remedies in International Law 195 (1990); see also Claim of Finnish Shipowners (Fin. v. Gr. Brit.), 3 R.I.A.A. 1479, 1504 (1934). Poverty, ignorance of legal rights, faulty legal advice, and pretended impossibility or uselessness have all been rejected as excusing the failure to appeal. See, e.g., Borchard at 824.

Claimants offer no support for any different criterion of what constitutes an "effective" remedy to which recourse is required. To the contrary, Loewen's own sources make clear that the failure to pursue appeals may be excused only in the most extraordinary circumstances. For example, Loewen invokes Judge Hersch Lauterpacht's separate opinion in the Norwegian Loans case for the observation that the exhaustion requirement has, in some cases, been applied with "elasticity." TLGI Sub. at 26 (quoting Judge Lauterpacht). Loewen ignores Judge Lauterpacht's further discussion, however, which requires that a claimant must avail itself of any possible remedy, "however contingent and theoretical these remedies may be . . . ." Norwegian Loans Case, 1957 I.C.J Rep. 9, 39 (separate opinion of Judge Lauterpacht). As Judge Lauterpacht explained, the burden is on the claimant to establish ineffectiveness of appeal "so abundantly clear as to rule out, as a matter of reasonable possibility, any effective remedy before [the] courts." Id.; see also, e.g., X v. United Kingdom, App. No. 3651/68, 31 Eur. Comm'n H.R. Dec. & Rep. 72, 90 (1970) ("[I]t is established under international law that 'if there is any doubt as to whether a given remedy is or is not intrinsically able to offer a real chance of success, that is a point which must be submitted to the domestic courts themselves before any appeal can be made

to the international court.'") (citing Panevezys-Saldutiskis Railway Case, 1939 P.C.I.J. (ser. A/B) No. 76 (Feb. 28)).

Bereft of support for a contrary standard, Loewen instead draws inaccurate and misleading conclusions from the existing authorities. For example, Loewen suggests that its duty to pursue appeals may be excused simply because Loewen has alleged a "denial of justice" by the lower courts. See TLGI Sub. at 25-26. Loewen has it precisely backwards: by definition, a "denial of justice" claim may be based only on a final, unappealable judicial decision, as there can be no denial of justice unless the courts of a State have, as a whole, failed to provide just adjudication. See Mummery at 413 ("Denial of justice involves measuring the respondent state's *system of justice* against an international standard") (emphasis added); see also supra at 17-22.[12]

Only where the claimant can demonstrate that no justice could be obtained through further appeals -- by demonstrating, in particular, that the entire judicial system of the State is incapable of affording justice – may the claimant's failure to appeal be excused. See, e.g., Amerisinghe at 200 ("absence of due process of law *in the legal system* of the host or respondent

[12]Claimants also make the extraordinary suggestion that, because remedies must be exhausted through all possible avenues, including international arbitration, this NAFTA action itself should be seen as a form of exhaustion that may be used in lieu of completion of the domestic appellate process. See TLGI Sub. at 26. This suggestion would, of course, turn the exhaustion requirement on its head, as it would allow an international tribunal to adjudicate a claim of denial of justice before justice has actually been denied; i.e., where the judicial system of the State as a whole has not yet spoken. Loewen simply ignores the fact that the existence of an international agreement providing for international adjudication does not itself render a claim admissible. See, e.g., The Salem Case (U.S. v. Egypt) (1932), reprinted in 2 R.I.A.A. 1161,1189 ("International arbitral tribunals have repeatedly acknowledged that the conclusion of an arbitration agreement involves no abandonment of the claim to exhaust all legal means.").

State is a good excuse for not exhausting remedies.") (emphasis added).[13] This point is conceded even by those who use the term "denial of justice" to refer to the initial wrong rather than the systemic failure:

> [i]t has sometimes been maintained that a palpable denial of justice in the lower courts will operate to relieve a claimant from the bonds of the rule. This is clearly inaccurate as a general proposition, for as long as there remains a possibility of revising the sentence by appeal, resort to the higher tribunals is a sine qua non of presenting a claim. Nevertheless, it is undoubtedly true that the circumstances under which such a denial of justice was produced may reveal the futility and hopelessness of further proceedings, so that an omission to appeal will be uncensurable.

Freeman at 422. Far from seeking to prove the "futility and hopelessness of further proceedings," Claimants assert that an appeal of the Mississippi jury verdict was "almost certain" to succeed. Because Loewen did not pursue such an appeal, this Tribunal has no jurisdiction to hear this claim. See e.g., Louis B. Sohn & R.R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens, (Draft No. 12 with Explanatory Notes) at 168 (1961) (if a State provides a reasonable possibility for appeal, and the claimant neglects to take advantage of it, "the claimant will have lost his opportunity to exhaust an effective remedy, and he will therefore be treated for international purposes as not having exhausted his remedy.").

Claimants also err in assuming that their alleged "subjective" understanding of the availability of means of appeal somehow controls the jurisdictional questions at issue here. See,

[13]The other sources identified by Loewen fully recognize this high standard. See, e.g., Brown's Case, (U.S. v. Gt. Britain 1923), reprinted in Fred K. Nielsen, American and British Claims Arbitration, 187, 198-99 (futility of further proceedings was "fully demonstrated" where "[t]he judiciary . . . was at length reduced to submission and brought into line with a determined policy of the Executive to reach the desired result regardless of Constitutional guarantees and inhibitions," thus leaving claimant's rights "so manifestly insecure" as to justify international claim).

e.g., Submission of Raymond L. Loewen Regarding Competence and Jurisdiction ("RLL Sub."). at 17 (arguing that "[t]he subjective mental state of Mr. Loewen and TLGI at the time of settlement is an issue of fact . . . ."). Although a claimant's subjective knowledge of available means of appeal is no doubt highly indicative that those remedies were available in fact, "[t]he test of ineffectiveness of the remedy is meant to be objective." Schwarzenberger, International Law, at 609. "[T]he complainant's personal opinion as to the (assumed) uselessness of a given domestic remedy is no ground for absolving him from the obligation of exhaustion." A.A. Cancado Trindade, The Application of the Rule of Exhaustion of Local Remedies in International Law 111 (1983). See also X v. Federal Republic of Germany, App. 289/57, 1 Eur. Comm'n H.R. Dec. & Rep. (1957), 1 Eur. Yb. H.R. 149 (". . . the appellant's personal opinion as to the chances of success of a potential appeal . . . may not be taken into consideration, because that opinion is not based on any element capable of demonstrating that the appeal would likely have been ineffective or insufficient . . . .").[14]

Thus, an international tribunal must look to objective standards to determine if, in fact, the means of appeal were "manifestly ineffective" or "obviously futile." That the question of whether a remedy was effective "is a matter of law and fact which the tribunal must ordinarily investigate and decide on the evidence before it" does not make the question any less preliminary. Amerasinghe at 235. To the contrary, the failure of a claimant to pursue appeals deprives the Tribunal of the power to hear the claim, "however contingent and theoretical these

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[14]Translation by the United States, original as follows: ". . . l'opinion personnelle du requérant quant aux chances de succès d'un éventuel appel . . . ne saurait être prise en considération, car cette opinion ne s'appuie sur aucun élément susceptible de prouver que cet appel aurait vraisemblablement été inefficace ou insuffisant . . . ."

remedies may be . . . ." Norwegian Loans, 1957 I.C.J. at 39 (separate opinion of Judge Lauterpacht). As the United States demonstrated in its Memorial at pages 56-85, and as we further demonstrate below, Claimants cannot meet their substantial burden in this case.

B. Loewen Has Not Refuted The United States' Showing That, At The Time Of The Underlying Events, Loewen Would Have Had A Reasonable Opportunity To Obtain Review In Federal Court And A Stay of Execution Pending Adjudication Of Its Claims

The United States demonstrated in its Memorial that, at the time of the underlying events, Loewen could have sought, and would have had a reasonable opportunity to obtain, review of the Mississippi Supreme Court's decision to require a $625 million supersedeas bond in either the United States Supreme Court (by way of a petition for certiorari) or in federal district court (by way of a collateral action based on a federal civil rights statute). See U.S. Mem at 56-62, 67-69; Statement of Drew S. Days, III ("Days Opening Statement") (attached to U.S. Mem. at Tab A). Using documents Loewen produced in discovery, the United States also demonstrated that, at the time of the underlying events, Loewen itself viewed both of these options as viable alternatives. See U.S. Mem. at 62-67, 69-72.

Loewen's response is curious. For example, Loewen does not acknowledge (let alone come to grips with) any of the numerous documents from its own files establishing that it viewed federal court review as a reasonable means of obtaining a stay of the O'Keefe judgment pending an appeal on the merits. This Tribunal twice has ruled that such documents are relevant evidence. See Order of the Tribunal on Respondent's Claim for Further and Better Discovery by the Claimants at 2-3 (Dec. 9, 1999); Decision and Order of the Tribunal on Respondent's Claim for Further and Better Discovery by the Claimants at 2-3 (June 2, 2000). Yet, Loewen acts as if

the documents do not exist.

Even more peculiar, Loewen apparently has determined to abandon its claim that the Mississippi judiciary intentionally discriminated against it based on anti-Canadian prejudice and bias. The United States relied on Loewen's numerous allegations on this point to demonstrate that Loewen could have filed a federal civil rights action after the Mississippi Supreme Court denied the company's application for a reduction of the full supersedeas bond. In response to the United States' argument, Loewen dismisses its own allegations of judicial discrimination as unduly "colorful." See Reply Statement of Professor Laurence H. Tribe ("Tribe Reply") at 19. While this strategy may allow Loewen to attack the United States' collateral-action argument, it greatly undermines the company's NAFTA Chapter 11 claims -- which depend, to a large degree, on Loewen's claim that it was subject to judicial discrimination.[15]

To the extent Loewen offers a substantive reply to the United States' argument that federal court review was an available remedy, it does so principally through Professor Tribe's Reply Statement. In response, the United States submits the Reply Statement of Drew S. Days, III ("Days Reply") (attached as Exhibit B), which answers in detail Professor Tribe's contentions. Professor Days' Reply, which we summarize briefly below, makes clear that Loewen has not met its burden of demonstrating that federal court review would have been obviously futile or manifestly ineffective as a means of appealing the Mississippi judgment.[16] To the contrary, as

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[15]See, e.g., Notice of Claim at ¶ 7 (discussing the relationship between Loewen's allegations of judicial discrimination and its NAFTA Chapter 11 claims).

[16]See Finnish Ship Owners, 3 R.I.A.A. at 1504-05 ("[T]he local remedy shall be considered to be ineffective only where recourse is obviously futile . . . ."); Amerasinghe at 200 ("[T]he inadequacy of the remedy for the specific object must be proven beyond reasonable doubt.").

Professor Days opines in no uncertain terms: "competent counsel acting on behalf of Loewen's interests would have considered [U.S. Supreme Court review and a stay pending review] to be realistic and practical." See Days Reply at 4.

Moreover, as we also explain below, additional documents produced by Loewen since the United States submitted its Memorial demonstrate that the company and its lawyers viewed U.S. Supreme Court review as a viable option right up until the day Loewen settled. Most significantly, Loewen has produced drafts of an application to the U.S. Supreme Court for a stay of execution of the O'Keefe judgment pending the filing of a petition for certiorari ("draft applications"). See U.S. App. at 0846-68 (Jan. 27, 1996 draft); id. at 0869-92 (Jan. 28, 1996 draft). These drafts contain arguments virtually identical to those outlined in Professor Days' initial Statement. While Loewen now contends that it had "no realistic possibility" of obtaining Supreme Court review, see Tribe Reply at 14, at the time, the company's lawyers wrote: "[t]here is a reasonable probability that [the Supreme] Court will grant certiorari . . . ." See U.S. App. at 0882 (Jan. 28, 1996 draft); id. at 0856 (Jan. 27, 1996 draft). To be sure, Loewen ultimately may try to dismiss the draft applications as "never filed," but would the company's lawyers really have spent precious time and resources, in the "desperate" days after the Mississippi Supreme Court ruled (Tribe Reply at 3), preparing petitions for relief that were doomed to fail? The answer is plain: "no."

1. Loewen's Argument That It Had "No Realistic Probability" Of Obtaining Certiorari Review Cannot Withstand Scrutiny

Professor Tribe continues to maintain that Loewen could not have obtained a stay of execution pending disposition of a petition for certiorari because: (a) Loewen would have been

required to seek a stay in the first instance from the Mississippi Supreme Court, (b) the Mississippi court would have been sure to deny its request, and (c) the U.S. Supreme Court would have accorded substantial deference to the lower court's denial. See Tribe Reply at 3-5. The problem with this argument is the premise: as Professor Days explains, Loewen could have proceeded directly to the U.S. Supreme Court with a stay request, and that Court would have been highly likely to grant it. See Days' Reply at 5-7.[17] Loewen's other federal courts expert, Professor Fried, appeared to recognize that Loewen could have proceeded directly to the U.S. Supreme Court with a stay application. See Opinion of Charles Fried at 13-14 (attached to TLGI Mem. as Tab E). Indeed, the draft applications Loewen's lawyers prepared reveal the company was planning to pursue precisely this course of action. See U.S. App. at 0869 (Jan. 28, 1996 draft).

On the question of whether the U.S. Supreme Court would have granted certiorari, Loewen advances three principal arguments. First, Loewen contends that the Due Process question it could have presented was too "fact-bound" to be certworthy. See Tribe Reply at 6-8. Second, while recognizing that the presence of punitive damages issues would have increased its chances for certiorari review, Loewen contends it could not have raised any such issues in its certiorari petition. See id. at 8-9. Third, Loewen contends that the Supreme Court's decision in

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[17]Moreover, even taking Professor Tribe's argument on its own terms, he provides no compelling reason to think the Mississippi Supreme Court would have denied a request for a stay. In fact, that court twice stayed execution of the trial judgment pending consideration of Loewen's application to reduce the supersedeas bond. See A1084 (initial stay); A1394 (stay continued en banc). Professor Tribe contends that, because the Mississippi Supreme Court ruled against Loewen on the merits of the company's motion to reduce the bond, it would have been "highly unlikely" to grant a motion for a stay. See Tribe Reply at 3. But under that logic, no court would ever stay execution pending appeal.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987), a case in which Professor Tribe represented appellant Pennzoil Company in the U.S. Supreme Court, would have cut against, not bolstered, its chances for certiorari review.[18] See id. at 9-14. Each of these contentions lacks merit.

a. Loewen's Due Process Challenge Would Not Have Been Too "Fact-Bound" For Supreme Court Review

Constitutional adjudication often is fact-intensive. Indeed, as Professor Days notes, the Supreme Court commonly takes cases to apply "broad, general constitutional principles to different factual scenarios." See Days Reply at 10 (citing cases, including in the Due Process context). In Loewen's case, the factual background "was at least sufficient for the Supreme Court to announce a rule about bonds securing punitive damage awards and whether the Due Process Clause sets any limits on appeal bonds." See id. at 11. Such a rule would have provided "important and valuable guidance for the future on due process limits applicable to appeal bonds." See id. Thus, contrary to Loewen's suggestion, the factual context of its claims would have posed no particular obstacle to Supreme Court review. See id.

Professor Tribe suggests that, because Loewen could only have challenged Mississippi's bonding requirement "as applied," the Supreme Court could not have used Loewen's case to

[18] Pennzoil was an appeal of a decision of the U.S. Court of Appeals for the Second Circuit invalidating a Texas supersedeas bond requirement (as applied to Texaco) on due process grounds. The facts and proceedings of the Pennzoil case are discussed at length in our opening Memorial and Professor Days' initial Statement. See U.S. Mem. at 60, 65-66, 73-74; Days Opening Statement at 17 n.6, 21-22. For the Tribunal's convenience, we have attached a complete set of the parties' Supreme Court briefs in Pennzoil as part of our Appendix. See U.S. App. at 0291-0313 ("Jurisdictional Statement" filed by Pennzoil); id. at 0682-0705 ("Motion to Affirm" filed by Texaco); id. at 0706-14 ("Reply To Motion To Affirm" filed by Pennzoil); id. at 0715-49 ("Brief For Appellant" filed by Pennzoil); id. at 0750-93 ("Brief Of Appellee" filed by Texaco); id. at 0314-0327 ("Reply Brief For Appellant" filed by Pennzoil); id. at 0328-0383 (transcript of U.S. Supreme Court argument).

offer "guidance to future litigants, lower courts, or the nation as a whole." See Tribe Reply at 7. But as counsel in the Pennzoil case, Professor Tribe argued that a decision holding a state supersedeas bond requirement unconstitutional "as applied" was of far-ranging significance to the nation's litigants and courts:

> The Second Circuit's adherence to a dubious due process theory which flies in the face of this Court's long-settled precedents is of more than academic interest. Texas is only one of 30 states (plus the District of Columbia) that presumptively require a supersedeas bond equal to or greater than the judgment as a condition to a stay of execution pending appeal.
>
> The threat to the orderly administration of justice in those jurisdictions posed by the judgment below requires this Court's plenary attention.

See U.S. App. at 0310-11 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Jurisdictional Statement).

Indeed, in the Pennzoil case, counsel for Texaco (Professor Tribe's opponent) made essentially the same argument that Professor Tribe makes here. In urging the U.S. Supreme Court to summarily affirm the Second Circuit's decision, Texaco argued that the Due Process holding was "narrow" and could be limited to the "unique and extraordinary circumstances of [Texaco's] case." [19] See U.S. App. at 0689; id. at 0704 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Motion to Affirm). Professor Tribe, opposing summary affirmance, countered that the

[19]To fully appreciate Texaco's argument, it is important to understand the nature of the Court's jurisdiction at the time Pennzoil was decided. As we acknowledged in our Memorial (at 65 & n.41), at the time of Pennzoil, the Supreme Court was required to review decisions of federal courts of appeals holding state statutes unconstitutional (this jurisdictional provision has since been repealed). As Professor Days explains, however, at that time, the Supreme Court also was required to entertain motions "to affirm a judgment sought to be reviewed on appeal from a federal court on the ground that it is manifest that the questions on which the decision . . . depends are so unsubstantial as not to need further argument." See Days Reply at 19 (quoting former Supreme Court Rule) (emphasis added). As noted in the text, in Pennzoil, Texaco filed such a "motion to affirm" in the U.S. Supreme Court, arguing that the Due Process and other questions decided by the Second Circuit were "unsubstantial" and not worthy of "plenary" review. See U.S. App. at 0682-0705.

Second Circuit's "as applied" ruling could not be limited to its facts, or to situations "where the required bond . . . is 'impossible' for *any* judgment debtor to obtain," or "where requiring a full bond is supposedly unnecessary to protect the judgment creditor's interests." See U.S. App. at 0708 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Reply to Motion to Affirm) (emphasis in original). Professor Tribe's arguments, as we know, successfully defeated Texaco's motion. See Days Reply at 19. Those arguments are similarly persuasive here.

Professor Tribe also argues that any petition by Loewen for certiorari would have been denied by the Supreme Court because it would have "require[d]" the Court to decide "disputed facts." See Tribe Reply at 7-8. That is not so. As Professor Days explains, the "existence of disputed facts may only be dispositive in a certiorari petition when resolution of the disputed facts is the sole objective of Supreme Court review." See Days Reply at 11. In a case like Loewen's, involving conflicting case law and substantial constitutional questions, any disputed facts "would not have detracted from the importance of the controversy over due process limits on appeal bonds." See id.

Thus, contrary to Professor Tribe's assertion, even if O'Keefe could have legitimately disputed Loewen's contentions about its ability to post a full bond,[20] the Supreme Court would not have been "require[d]" to resolve the dispute. See Tribe Reply at 8. In that situation, the

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[20]Loewen tried to prevent O'Keefe from disputing this fact. See U.S. App. at 0796 (Letter from James L. Robertson to various addressees) (Nov. 9, 1995) ("my idea would be to prepare a record based on affidavits (which would contain no cross-examination by [O'Keefe's counsel]) that I believe would be convincing to the [Mississippi] Supreme Court on a subsequent application to that Court for relaxation of the normal bonding requirements."). This strategy apparently worked until O'Keefe, at the eleventh hour, filed a "second supplemental" brief in the Mississippi Supreme Court accusing Loewen of making inconsistent statements to the investment community (and thereby committing a "fraud " on the court). See U.S. App. at 0799-0803; see also infra at 91.

Court "could have simply resolved the legal standard and then remanded for further proceedings." See Days Reply at 12 (citing cases where the Supreme Court has followed such a course). Morever (and, again, contrary to Professor Tribe), Loewen would not have presented a case where the lower court "declined to adopt [its] version of [the] facts." See Tribe Reply at 8. As is plain from the Mississippi Supreme Court's order, that court did not make any factual findings (much less reject Loewen's contentions). See A1175-76; Days Reply at 12.

Finally, we note that, in Pennzoil, the facts were not free of dispute. Specifically, in opposing Texaco's motion to affirm, Professor Tribe pointedly noted that "Pennzoil has never 'conceded' that Texaco's size makes further security superfluous." See U.S. App. at 0708 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Reply to Motion to Affirm).[21] The presence of this dispute did not prevent the Supreme Court from concluding that the Second Circuit's decision raised a substantial Due Process question meriting plenary review. See Days Reply at 12-13. There is no reason to think the Court would have concluded otherwise in Loewen's case. See id.

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[21]In a different brief, Professor Tribe argued that "the economic harms that would befall Texaco if full security were demanded are neither as drastic nor as irreversible as it assumes." See U.S. App. at 0326 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Reply Brief For Appellant). With respect to this point, even the Justices appeared to have different views about whether Texaco could have posted the full bond required under Texas state law. Compare 481 U.S. at 5 ("[i]t is clear that Texaco would not have been able to post such a bond") (opinion of the Court) with id. at 32 (". . . for Texaco to post the security required for a stay would, as the District Court found, seriously impair Texaco's ability to conduct its normal business operations and could even force the corporation into bankruptcy. Neither of these consequences, however, would necessarily prevent Texaco, or its successor in interest – possibly a bankruptcy trustee – from going forward with the appeal.") (opinion of Stevens, J., concurring in the judgment, joined by Marshall, J.) (internal footnote omitted).

b. In Its Petition For Certiorari, Loewen Could Have Raised Important Questions Relating To Punitive Damages

Loewen does not dispute the United States' argument that any petition for certiorari would have been more compelling if it could have tied its argument on the bond to the Supreme Court's then-burgeoning punitive damages jurisprudence. See U.S. Mem. at 60-62; Days Opening Statement at 24-28. Instead, Loewen argues it could not have done so, because the constitutionality of the O'Keefe jury's punitive damages award (as opposed to the constitutionality of the bond) would not have been before the Court. See Tribe Reply at 8-9. This argument misses the mark.

As Professor Days has explained:

> The question before the U.S. Supreme Court would not have been the excessiveness of the punitive damages award itself, but instead, whether full application of the Mississippi supersedeas bond requirement (which secured both the $100 million compensatory and the $400 million punitive portions of the judgment) comported with due process when it effectively rendered appeal of the punitive damages award meaningless.

See Days Reply at 13-14.[22]

The contemporaneous draft applications reveal that Loewen's attorneys were planning to make this very argument in the U.S. Supreme Court. One of the drafts states: "The denial of meaningful appellate review has increased importance in this case because the jury awarded an

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[22]Of course, the nature of the underlying judgment would not have been totally irrelevant to Loewen's Due Process argument. As Professor Tribe noted in Pennzoil, "[a]ny . . . determination [of the amount of a supersedeas bond] is inextricably intertwined with the merits of the judgment." See U.S. App. at 0325 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Reply Brief for Appellant). Thus, Loewen's draft applications refer to the "weird and outrageous" jury awards, and a trial "so infested with errors as to amount to a denial of due process of law." See U.S. App. at 0871, 0876 (Jan. 28, 1996 draft); see also id. at 0849 (Jan. 27, 1996 draft).

extraordinary punitive damages award. Enforcing an award of punitive damages without judicial review is a violation of due process of law." See U.S. App. at 0887 (Jan. 28, 1996 draft) (emphasis added); see also id. at 0860 (Jan. 27, 1996 draft) (similar). An internal memorandum from the same time period makes this point as well. See U.S. App. at 0840 (Memorandum from Sabrena Silver to Donald B. Ayer and others) (Jan. 25, 1996) ("By the same token, Mississippi's application of its appeal bond requirement also violates the due process clause. The trial court imposed a bond requirement that deprived Loewen Group of an opportunity to appeal the punitive damages award").

c. The *Pennzoil* Decisions Demonstrate That Loewen Could Have Presented A "Certworthy" Question For Supreme Court Review

The United States established in its Memorial that the decisions of the U.S. Supreme Court and the Second Circuit in Pennzoil provide strong reasons to believe Loewen could have obtained certiorari review: the U.S. Supreme Court's decision because it indicates the Court's willingness to entertain the very Due Process question Loewen could have presented; and the Second Circuit's decision because it directly conflicts with the Mississippi Supreme Court's holding. See U.S. Mem. at 59-60; Days Opening Statement at 18-24. While Professor Tribe takes issue with these assertions, see Tribe Reply at 9-14, he does not refute them.

For example, Professor Tribe contends there is no "actual conflict" between the decision of the Mississippi Supreme Court and the decision of the Second Circuit because the latter case "did not actually hold the state bond requirement [at issue in Pennzoil] unconstitutional." See Tribe Reply at 11. As Professor Days explains, however, while the Second Circuit technically

was ruling on Texaco's request for a preliminary injunction, the court "squarely recognized that mandatory application of a full bonding requirement for appeal in certain circumstances would be violative of due process." See Days Reply at 15-16. Moreover, because the Second Circuit stated that further proceedings on the merits appeared to be "unnecessary," see Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1156 (2d Cir. 1986), rev'd, 481 U.S. 1 (1987), the court's ruling was, for all practical purposes, a decision on the merits of Texaco's Due Process claim.

In fact, Professor Tribe himself characterized the Second Circuit's ruling as "conclusive" on the federal constitutional issues in a brief he filed on behalf of Pennzoil in the U.S. Supreme Court. He wrote:

> [t]he Second Circuit, by affirming the grant of a preliminary injunction against Pennzoil, has conclusively held the Texas supersedeas bond and judgment lien provisions unconstitutional as applied, leaving no federal issue to be resolved below.

See U.S. App. at 0297 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Jurisdictional Statement). Elsewhere in that same brief, Professor Tribe stated: "[a]s to the merits of Texaco's attack on the Texas lien and bond statutes, the Second Circuit concluded, in effect, that a judgment debtor has a Fourteenth Amendment right to an affordable bond, and thus 'declare[d] the Texas lien and bond provisions to be unconstitutional . . . as applied.'" See id. at 0300.

At the time of the underlying events, Loewen's lawyers certainly recognized the importance of the Second Circuit's decision to their Due Process case. In an internal memorandum, one of the company's attorneys describes it as "[t]he best case supporting our position," noting that the Second Circuit "accepted essentially the [same] argument" Loewen was preparing to advance in the U.S. Supreme Court. See U.S. App. 0843. Not unexpectedly, the

draft applications feature the Second Circuit's decision, as well as a host of other federal and state court cases. See id. at 0978-82 (Jan. 28, 1996 draft); id. at 0854-56 (Jan. 27, 1996 draft). After reviewing these decisions, the drafts conclude: "[t]here is a reasonable probability that this Court will grant certiorari in order to resolve these conflicting cases." See id. at 0882 (Jan. 28, 1996 draft); id. at 0856 (Jan. 27, 1996 draft).

Professor Tribe also attempts to minimize the importance of the U.S. Supreme Court's decision in Pennzoil. For example, Professor Tribe argues that the Supreme Court's decision would not have helped Loewen's chances for review because the majority took "great pains" to avoid reaching the Due Process question Pennzoil had presented. See Tribe Reply at 11-12. But that, of course, is the point. If the Supreme Court had decided the Due Process question in Pennzoil, then any argument here about whether Loewen could have obtained review would be moot. Instead, the Court expressly reserved the Due Process issue for another day. See Pennzoil, 481 U.S. at 17-18. As Professor Days explains, where "the Supreme Court explicitly reserves an issue, it is my view that the likelihood of certiorari being granted in the future is thereby increased." See Days Reply at 8-9 (citing Supreme Court authority).

In January 1996, Loewen's lawyers had no trouble recognizing this point. In their draft stay applications, counsel argued that Loewen presented a case:

> very similar to Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987). In Pennzoil, lower federal courts held that it was unconstitutional to cripple a business merely because it cannot meet an arbitrary bond requirement. See Pennzoil Co. v. Texaco, Inc., 626 F. Supp. 250 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 784 F.2d 1133 (2nd Cir. 1986), rev'd on other grounds, 481 U.S. 1 (1987). A majority of the Court did not reach this question, but the Justices that did discuss it were in sharp disagreement. Loewen respectfully suggests that it is time for the Supreme Court to revisit this issue.

See U.S. App. at 0872 (Jan. 28, 1996 draft); id. at 0849 (Jan. 27, 1996 draft) (similar).[23] Elsewhere, the drafts state: "Loewen requests that this court take up a question present, but unresolved, in Pennzoil: whether it comports with due process of law to condition a stay of execution on the posting of a bond that serves no purpose where the defendant below cannot obtain such a bond, and where the defendant's inability to post the bond could result in severe, irreparable harm before the defendant has the chance to obtain appellate review." See id. at 0878 (Jan. 28, 1996 draft); id. at 0854 (Jan. 27, 1996 draft) (similar).

Professor Tribe also takes issue with the United States' observation that, in Pennzoil, the Supreme Court characterized the Due Process question as a "substantial federal constitutional claim[]." See Tribe Reply at 12-13. The quote from the Supreme Court's opinion, which Professor Tribe reprints (see id. at 13), makes plain, however, that the United States' understanding is correct. Moreover, as counsel for Pennzoil, Professor Tribe expressly argued that the Due Process issue decided by the Second Circuit was substantial.

As we have explained (see supra n.19), in the U.S. Supreme Court, Texaco filed a "motion to affirm," arguing that none of the issues decided by the Second Circuit – including the Due Process issue – warranted plenary review. See U.S. App. at 0689-93 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Motion to Affirm); Days Reply at 19. In response to Texaco's motion, Professor Tribe stated: "[t]he importance and the complexity of the federal questions

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[23]Describing the Supreme Court's Pennzoil decision, Professor Tribe states that "[n]otably, the only Justices who did express a view of the Texas bonding requirement opined that it was constitutional both in general and as applied against Texaco." See Tribe Reply at 12. As the draft applications point out, Professor Tribe's analysis is wrong. Justice Blackmun, who wrote a separate opinion in Pennzoil concurring in the judgment, stated that: "I would not disturb the Court of Appeals' conclusion that Texaco's due process claim raised a 'fair groun[d] for litigation.'" See Pennzoil, 481 U.S. at 28; Days Reply at 18 n.11.

presented by this appeal are evident even from the Motion to Affirm; summary affirmance is therefore unthinkable." See U.S. App. at 0707 (Pennzoil Co. v. Texaco, Inc., No. 85-1798, Reply to Motion to Affirm); Days Reply at 19. The Supreme Court, as Professor Tribe argued it should, noted probable jurisdiction and accepted the Second Circuit's decision for plenary review. See Days Reply at 19. There simply is no reason to think the Court would not have deemed the Due Process question of similar "importance" in Loewen's case.

For all of these reasons, and those set forth at length in our Memorial and Professor Days' Opening and Reply statements, Loewen had a reasonable opportunity to obtain U.S. Supreme Court review of the Mississippi Supreme Court's decision to impose the full bond.

2. Loewen Has Offered No Explanation For The Documents Showing That It Viewed Supreme Court Review As A Reasonable Option Up Until The Day It Settled

In its brief, Loewen does not discuss (or even acknowledge) the numerous documents showing that, at the time of the underlying events, it viewed Supreme Court review as a reasonable and practical option. See U.S. Mem. at 62-65 (reviewing the documentary evidence). As discussed above, since the United States filed its Memorial, Loewen has produced even more documents from its files, including the draft applications and other internal memoranda discussed in Part B.1, supra, further demonstrating that, during the relevant time period, the company viewed certiorari as a viable means of obtaining review of the Mississippi Supreme Court's decision.

Instead of discussing the documents, Loewen offers the declaration of Wynne S. Carvill, the company's "principal outside counsel . . . in charge of coordinating the various efforts to respond to the developments in Mississippi." See Declaration of Wynne S. Carvill ("Carvill

Dec.") at ¶ 3. Mr. Carvill, who says he was "involved in and familiar with all the significant decisions related to the Company's response to the *O'Keefe* verdict," see id., acknowledges that Loewen gave "very serious consideration" to petitioning the U.S. Supreme Court for relief from the bonding requirement. See id. at ¶ 8. According to Mr. Carvill, however, after consulting with "Supreme Court specialists," he was advised of "the difficulty of obtaining such relief." See id. Indeed, Mr. Carvill states that he received advice "consistent with" the analysis set forth in Professor Tribe's initial statement. See id. That is the statement where Professor Tribe says Loewen had "no realistic prospect for Supreme Court review and . . . no plausible ground for thinking otherwise." See Statement of Laurence H. Tribe at 16 (attached to TLGI Mem. at Tab D).

With all due respect, Mr. Carvill's assertions simply do not square with the contemporaneous evidence showing that Loewen viewed U.S. Supreme Court review as a viable option. To use one notable example, in a report it filed with the U.S. Securities and Exchange Commission ("SEC ") on November 15, 1995, Loewen stated: "[i]f relief from the size of the bond is not granted [by the trial court], the Company intends to immediately file an appeal with the Mississippi Supreme Court and failing that, the federal courts, to have the size of the bond reduced."[24] See A1858 (SEC Form 10-Q) (filed Nov. 15, 1995).

This statement in a public filing with the SEC cannot be dismissed as simply a "rough

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[24]As noted in our Memorial, companies like Loewen are required to file quarterly reports with the SEC for each of the first three quarters of the fiscal year. These reports must disclose, among other things, information regarding material changes during the quarter in matters such as legal proceedings. See 17 C.F.R. § 229.103 (requiring disclosure of material pending legal proceedings); see also *Registration and Reporting Under the Exchange Act*, 956 PLI/Corp 515, 532 (1996).

and ready" evaluation of the company's post-verdict options. Minutes of Board meetings from this time period reflect that Loewen's officials took great care in crafting disclosure language relating to the Mississippi litigation.[25] At a meeting of the Board's Audit Committee held the day after the jury's punitive damages verdict:

> Management advised the Committee that disclosure in the quarterly report must be made with respect to the O'Keefe litigation matter[,] however, the Committee was also advised that this disclosure statement was still being reviewed with legal counsel and would continue to be worked on over the weekend.
>
> The Committee then discussed the necessity and importance of the accuracy of the disclosure language . . . .

See A1185 (minutes of Nov. 3, 1995 Audit Committee meeting).

Minutes of subsequent meetings show that the Audit Committee worked with counsel on disclosure language right up until the quarterly report was finalized. See A1225-26 (minutes of Nov. 6, 1995 Audit Committee meeting); A1243-44 (minutes of Nov. 13, 1995 Audit Committee meeting) (held 11:00 a.m.); A1245-46 (minutes of Nov. 13, 1995 Audit Committee meeting) (held 2:00 p.m.) (Mr. Carvill in attendance).

On December 17, 1995, Loewen made a similar assertion about the availability of U.S. Supreme Court review during a conference call with Nesbit Burns, one of its investment bankers. The purpose of the call was to sell an upcoming offering of $155 million of convertible preferred shares in the company. See A1368-73; TLGI Mem. at ¶ 143. Peter Hyndman, Loewen's chief

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[25]Loewen was keenly aware that disclosure posed sensitive questions under U.S. securities laws. See, e.g., A1269 (minutes of Nov. 14, 1995 Directors meeting). Indeed, just a few days after the O'Keefe verdict, Loewen was sued by a class of shareholders alleging the company had failed to disclose its anticipated liability in connection with O'Keefe's claims. See A1758 (SEC Form10-K) (filed Mar. 28, 1996).

legal counsel, was asked whether the company could (and/or would) appeal an adverse decision by the Mississippi Supreme Court. Mr. Hyndman stated:

> Yes, we will have an avenue to the Supreme Court of the United States, and because we are leaving no stone unturned, we have added to the Mississippi team for appellate purposes Don [Ayer] from Washington D.C., a former Deputy Solicitor-General, probably America's leading expert on US Supreme Court appeals, to ensure that all through the appeal process in Mississippi, every possible argument is preserved for use if necessary to the US Supreme Court.

A1385 (notarized transcript of conference).

Mr. Carvill also states that Loewen rejected U.S. Supreme Court review as a viable option once the Mississippi Supreme Court ruled. See Carvill Dec. at ¶ 16 ("in January of 1996, the feasible options had narrowed to bankruptcy or settlement"). Again, this appears inconsistent with the documents Loewen has produced. The Mississippi Supreme Court issued its decision on January 24, 1996. See A1175-76. Loewen's Board approved the settlement on January 28, 1996. See A1498-1500 (minutes of Jan. 28, 1996 Directors meeting) (held 1:00 p.m.); A1501-02 (minutes of Jan. 28, 1996 Directors meeting) (held 2:00 p.m.). The draft stay applications are dated January 27 and January 28, 1996. See U.S. App. at 0846, 0869. Thus, contrary to Mr. Carvill's recollection, Loewen's lawyers were actively working the certiorari option right up until the very moment the company decided to settle. Indeed, it appears they were doing so at Mr. Loewen's behest. See U.S. App. at 0845 (*Loewen's Stock Drops 23% on Court Ruling Requiring Big Bond*, The Wall Street Journal, Jan. 26, 1996) ("Ray Loewen said Loewen Group is also considering appealing to the U.S. Supreme Court.")

According to Mr. Carvill, the legal team "desperately wanted" an opportunity to appeal. See Carvill Dec. at ¶ 17. For some reason, however, Loewen did not pursue all reasonable opportunities by which it could have done so. There does not seem to be any compelling reason why Loewen could not have filed a stay application in the U.S. Supreme Court after the Mississippi Supreme Court ruled. If Professor Days is correct, then Loewen had a reasonable opportunity to obtain a stay, certiorari review, and the appeal it so "desperately" sought to take. Even assuming, however, that Loewen's stay application (or petition for certiorari) would have been denied, the company still would have had the "'bankruptcy card'" (Carvill Dec. at ¶ 16) as leverage in any settlement endgame. Of course, neither the parties nor the Tribunal will ever know precisely what would have happened if Loewen had sought U.S. Supreme Court review – because it never tried.

3. Assuming the Truth Of Loewen's Allegations That It Was A Victim Of Judicial Discrimination, It Could Have Filed A Civil Rights Action In Federal District Court

Loewen's response to our argument that the company could have challenged the Mississippi Supreme Court's bond decision by way of a collateral action in federal court is extraordinary. Loewen, through Professor Tribe, does not appear to dispute Professor Days' conclusions that: (i) there are exceptions to each of the doctrines Loewen has cited in support of its contention that a collateral attack would have been barred; and (ii) assuming the truth of Loewen's factual allegations, it could have satisfied each of the relevant exceptions and filed a collateral civil rights action based on its allegations that the Mississippi judiciary discriminated against it because of anti-Canadian bias and prejudice. See Tribe Reply at 16-21; see also Days Opening Statement at 32-51; U.S. Mem. at 67-72.

Instead of arguing the law, Loewen challenges the facts on which Professor Days' legal analysis is based – i.e., the very allegations of judicial discrimination the company has made throughout this proceeding. Dismissing as unduly "colorful" its expert's sworn statements that such discrimination occurred, see Tribe Reply at 19, Loewen now argues that its claim is based on nothing more than general "suspicions of a systematic institutional bias" in an elected judiciary against out-of-state litigants. See id.; TLGI Sub. at ¶ 61. But that is a far cry, indeed, from what Loewen has alleged until now.[26]

For example, Loewen retained Justice Richard Neely, formerly of the West Virginia State Supreme Court, for the express purpose of evaluating whether the company was a "victim[] of anti-Canadian discrimination." See Affidavit of Richard Neely at 2 ("Neely Aff."). In preparing his sworn declaration, Justice Neely reviewed the record of the underlying proceedings, and traveled to Jackson, Mississippi, where he purportedly "interviewed members of the bar and former judges of the Mississippi Supreme Court." See id. at 3.

Justice Neely's allegations of discrimination by the Mississippi judiciary truly are sensational. For example, he charges that the Mississippi Supreme Court knowingly set "an impossible bond" (Neely Aff. at 14), and that it "proceed[ed] from an intent to deny appellate review." Id. at 15 (emphasis in original). Justice Neely even goes so far as to say that the

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[26]Loewen actually tries to have it both ways. While Professor Tribe repudiates Loewen's allegations of judicial discrimination in his reply statement, see Tribe Reply at 19, Loewen continues to sound the theme in its brief. See, e.g., TLGI Sub. at ¶ 53 (arguing that "[b]ecause the Mississippi courts were so manifestly unjust to Loewen, and because the trial court proceedings were so tainted by bias, international law did not require Loewen to exhaust its remedies"); cf. id. at ¶ 61 (suggesting that Loewen had no "fair" opportunity in the Mississippi courts to challenge the bonding requirement). Loewen must make a choice: either advance these types of allegations (and do so in good faith) or drop them from its claim.

Mississippi Supreme Court:

> deliberately forced the Canadian Defendant, Loewen, into an extorted settlement and effectively foreclosed appellate review in the Supreme Court of the United States. Additionally, there is no doubt in my mind that these actions were willful and deliberate, and in no wise the product of inadvertence or poor judgment[.]

Neely Aff. at 16 (emphasis added).[27] According to Justice Neely, Loewen was "intentionally subjected" to these actions "because of its Canadian citizenship." Id. at 17.

These allegations are not confined to Justice Neely. To the contrary, Loewen has argued throughout this proceeding that it was the subject of invidious discrimination and bias at the hands of the Mississippi courts. See Days Reply at 2-3 (quoting examples).[28] Indeed, these allegations go to the very heart of Loewen's claim that the Mississippi judiciary violated NAFTA Chapter 11. See, e.g., Notice of Claim at ¶ 7.

Thus, given the statements in Loewen's most recent filing – dismissing Justice Neely's allegations as "colorful," and the United States' argument as "confus[ing] Loewen's legal claims with the wild accusations of 'conspiracy theories' found in bad political thrillers" (see Tribe

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[27]See also Neely Aff. at 17 (stating that the Mississippi Supreme Court's decision "was a willful, deliberate and intentional act" on the Court's part, "intentionally calculated to force Loewen to pay the Mississippi plaintiffs and their lawyers immediately and without benefit of an appeal.").

[28]See also Notice of Claim at ¶ 158 ("[t]he Mississippi courts thus effectively compelled Loewen to pay a coerced and excessive $175 million settlement"); id. at ¶ 167 ("the verdict and coerced settlement were the product of anti-Canadian discrimination"); TLGI Mem. at ¶ 158 (the Mississippi courts "arbitrar[ily] impos[ed]" the full bonding requirement "with the purpose and effect of foreclosing Loewen's appeal rights "); id. at ¶ 217 (in imposing "an arbitrary $625 million" appeal bond, the Mississippi courts "compelled Loewen to pay an excessive and extortionate settlement to O'Keefe"); Opinion of Professor Sir Robert Jennings at ¶ 34 ("the whole Mississippi proceeding is tainted with illegality") (attached to TLGI Mem. at Tab A).

Reply at 18-19) – the United States is at somewhat of a loss to respond. Justice Neely's affidavit, which Loewen attached to both its Notice of Claim and Memorial, was once a centerpiece of the company's NAFTA Chapter 11 claims. See, e.g., Notice of Claim at ¶ 9; TLGI Mem. at ¶ 12. Now, Loewen acts as if the United States invented Mr. Neely's allegations out of whole cloth. See Tribe Reply at 18-19.

To be clear, the United States has not repeated Loewen's allegations to lend them credence; the United States gives them no credence at all. Professor Tribe's characterizations, in fact, seem particularly apt. But the United States surely is entitled to take Loewen's allegations seriously, and assume their truth, at this preliminary stage of proceedings. Treating them as such, it seems beyond doubt that Loewen could have obtained relief in federal district court after the Mississippi Supreme Court rendered its decision to impose a full bond. See Days Reply at 20-26.

If, however, Loewen's allegations are merely the "wild accusations" of "bad political thrillers," and its discrimination claim nothing more than a general "suspicions of a systematic institutional bias" in an elected judiciary, see Tribe Reply at 19, then the United States likely would agree that Loewen could not have pursued a collateral attack like the one Professor Days has described. But, if that is so, it is hard to see how Loewen can pursue its claims of anti-Canadian discrimination under NAFTA Chapter 11 at all.

Finally, in his declaration, Mr. Carvill acknowledges that the company considered filing a federal collateral action. See Carvill Dec. at ¶ 7. Nevertheless, Mr. Carvill states that, "[p]rior to obtaining a temporary stay from the Mississippi Supreme Court," i.e., prior to November 30, 1995, the "consensus among counsel" was that a collateral action was not viable. See id. at ¶ 6.

Indeed, according to Mr. Carvill, he was "concerned that the mere filing of such a request would subject the attorney signing the pleading" to sanctions. See id. Even after the temporary stay was entered, Mr. Carvill states that "at no time did I or any other Loewen counsel to my knowledge consider collateral attack in federal district court to be a viable option." See id.

Mr. Carvill's recollection appears to be contradicted by a January 11, 1996 letter from Robert O. Wienke, Loewen's "Law and General Counsel," to Donald B. Ayer, discussing the collateral action option. Mr. Wienke states:

> We were prepared to proceed with such a filing [in Covington, Kentucky] and Jeff Cowper was also prepared to file a similar challenge in British Columbia. Jeff Cowper and I felt that there was a possibility of success, and while the results could not be assured, the consequences of a Chapter 11 filing I believe clearly warranted the effort.

See U.S. App. at 0652 (Letter from Robert O. Wienke to Donald B. Ayer (Jan. 11, 1996)). Mr. Carvill is copied on this letter.[29] See id.

Mr. Carvill also suggests that one of the reasons Loewen did not pursue a collateral attack was strategic. See Carvill Dec. at ¶ 6 ("we were concerned that any collateral attack in federal court would severely prejudice whatever chances we had for obtaining relief from the Mississippi Supreme Court, which at the time we saw as our best alternative"). It certainly was Loewen's right to make such a strategic call. But the United States cannot then be held liable for Loewen's failure to pursue this reasonably available alternative. Cf. Ambatielos Claim (Greece v. U.K.), 23 I.L.R. 306, 337 (Arb. Comm'n 1956) (decision made on the basis of "expediency" does not

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[29] Another document produced by Loewen, while undated, suggests the company was actively working on the collateral-attack option after the Mississippi Supreme Court granted a temporary stay. See U.S. App. at 0445 (describing potential arguments in federal district court, and noting that, "having presented our federal claims to the Mississippi Supreme Court, the question will have been actually litigated and determined by that court.").

excuse the failure to pursue available remedies; a claimant makes such decisions "at his own risk").

C. Loewen Could Have Proceeded, And Was Prepared To Proceed, With The Appeal Under The Protection Of The Reorganization Provisions (Chapter 11) Of The U.S. Bankruptcy Code

As the United States demonstrated in its opening Memorial, Loewen unquestionably could have pursued its appeal of the Mississippi jury verdict under the protections of Chapter 11 of the U.S. Bankruptcy Code and, in fact, was fully prepared to do so at the time. See U.S. Mem. at 72-84. What is significant about their "rebuttal" to this showing is that, beyond some empty "doomsday" rhetoric intended to mislead the Tribunal about the nature of U.S. bankruptcy law, Claimants do not (and cannot) dispute the most central facts established in our Memorial:

- Chapter 11 protection is, and was at the time of the Mississippi events, a widely-known and effective means under U.S. law by which companies may appeal large adverse judgments without the need to post a supersedeas bond;[30]
- Chapter 11 would have in fact permitted Loewen to appeal the Mississippi judgment without posting any bond at all, and without fear of execution on the judgment;
- Throughout the entirety of a Chapter 11 proceeding, Loewen would have been able to continue its core business of operating funeral homes and cemeteries without interruption;
- Chapter 11 protection would have afforded Loewen significant additional commercial benefits that companies do not otherwise have; and
- Loewen was advised by highly respected bankruptcy counsel to pursue Chapter 11 protection, which even Loewen's declarants concede "was attractive in many respects" (Carvill Dec. at 7), and which Loewen was fully prepared to pursue.

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[30]See, e.g., Analyst Says Management Shakeup May Occur, Dow Jones News Serv. (Jan. 24, 1996) ("If Loewen is forced to resort to a Chapter 11 filing, it will be following a course set by other large American companies [that] . . . used bankruptcy court to sustain themselves when faced with potentially fatal liabilities in the 1980s.") (U.S. App. at 0908).

Given these undisputed facts, Claimants fail to meet their burden of proving the obvious futility or manifest ineffectiveness of Chapter 11 protection as a means of appealing the Mississippi judgment. See Finnish Shipowners, 3 R.I.A.A. at 1504-05 ("[T]he local remedy shall be considered to be ineffective only where recourse is obviously futile . . . ."); Amerasinghe at 200 ("[T]he inadequacy of the remedy for the specific object must be proven beyond reasonable doubt.").

Ignoring their substantial burden entirely, Claimants make essentially two attempts to justify their failure to appeal the Mississippi judgments under Chapter 11 protection. First, Loewen offers a conveniently malleable description of the company's core business to suggest that, unlike countless other large companies who have successfully availed themselves of reorganization protections in similar circumstances, Loewen was uniquely unsuited to the protections of Chapter 11 at the time. See TLGI Sub. at 33-39. Second, Loewen contends that a Chapter 11 proceeding would have cost the company "at least as much as, and probably more than" the settlement it ultimately chose. Id. at 33.[31] Neither argument has merit.

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[31]Claimants also assert that, regardless of whether Chapter 11 protection was in fact an effective option for the company, Loewen's management subjectively believed that Chapter 11 was unattractive. TLGI Sub. at 42.; RLL Sub. at 17. This assertion may be summarily dispensed with, as Claimants' purported subjective understanding of the company's available options cannot, as a matter of law, control the jurisdictional question at issue in this case. As discussed supra at 35-36, it is well-established that "bad advice given by counsel or . . . the personal opinion of the individual as to the probability of success of a remedy" is no excuse for the failure to pursue it. Amerasinghe at 213. Whether Loewen's former bankruptcy counsel "failed to persuade" the company of the viability of the bankruptcy option (as Loewen now contends) or whether Loewen's assessment of that option was mistaken is thus beside the point.

1. <u>Reorganization Under Chapter 11 Was A Viable, Strategic And Reasonable Option For The Loewen Group As A Business Matter, And Would Have Afforded The Company A Critical Opportunity To Stop Its Reckless Strategy Of Aggressive Growth Through Acquisitions</u>

As noted, Loewen concedes that Chapter 11 reorganization was, as a legal matter, an effective and available option for the company to pursue its appeal of the Mississippi judgment. Instead, Loewen now argues that, as a *business* matter, Chapter 11 reorganization was not an effective option for this particular company at that particular time. The United States' Memorial and its supporting declarations already refuted the majority of Loewen's business claims in this regard. <u>See</u> U.S. Mem. at 72-81. To the extent that any question remains as to the business efficacy of the Chapter 11 option, we attach for the Tribunal's consideration the Reply Declaration of J. Ronald Trost, Esq. ("Trost Reply Dec.") (appended at Tab C), as well as the Declaration of Steven Saltzman, C.F.A., a financial analyst widely regarded as one of the leading experts on the death-care industry ("Saltzman Dec.") (appended at Tab D).

As Mr. Trost explains, Loewen's business-related arguments proceed from the false and disingenuous premise that Loewen's core business was, at the time of the Mississippi events, one of simply making acquisitions of other companies. <u>See</u> Trost Reply Dec. at 6-7. In fact, Loewen's core business was, and is, operating funeral homes and cemeteries, which would have proceeded without interruption in any Chapter 11 proceeding that Loewen would have filed in January 1996. <u>See id.</u> at 8-11. Although a Chapter 11 filing may have limited Loewen's ability to expand further through acquisitions of other death-care companies to some extent (and then only as long as Loewen chose to remain under the protections of Chapter 11), a Chapter 11 filing would not have prevented it from doing so entirely. <u>See id.</u> at 11-14; Saltzman Dec. at 22-25;

U.S. App. at 0905 (internal memorandum of Loewen's former bankruptcy counsel noting that "Loewen's investment bankers, Smith Barney, have advised that the market would have an appetite to buy Loewen equity even if it were in Chapter 11 . . . .").[32]

More important, Loewen cannot justify its decision to forego the protections of Chapter 11 on the basis of any effect Chapter 11 might have had on the company's ability to continue its aggressive acquisition program. As the United States amply demonstrated in its Memorial, Loewen's acquisition program was already fundamentally flawed and overly aggressive at the time of the Mississippi events and thus cannot excuse Loewen's failure to seek Chapter 11 protection. See U.S. Mem. at 79-81.

Loewen largely ignores this critical fact in its submission and, instead, relegates it to a brief discussion in an "addendum." See TLGI Sub. Addendum B. In that addendum, Loewen contends that its acquisition program was sound at the time of the Mississippi events, and that the company began to overpay for and over-acquire other properties only after its chief competitor, Service Corp. International ("SCI"), offered to buy Loewen in September 1996. Loewen's contention is utterly false.

As Mr. Saltzman explains in detail in his attached declaration, "many of the business practices that The Loewen Group employed before and at the time of the Mississippi settlement –

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[32]See also Nina Bernstein, Funeral Home Fights to Survive, Winston-Salem Journal (Jan. 28, 1996) at 7 (Loewen Vice-President Peter Hyndman assuring the public that "it will be 'business as usual' for the company's customers if Loewen Group files for bankruptcy protection."); id. ("'Our basic business is still very, very strong and sound,' [Hyndman] said, and any filing in U.S. Bankruptcy Court would be done so that Loewen could run its business normally.") (U.S. App. at 0928); Evening News, The Motley Fool (Jan. 29, 1996) (noting, the day after the settlement, that "the fears of bankruptcy were overdone . . . .") (U.S. App. at 0949-0950).

especially its aggressive 'growth through acquisitions' strategy – had by that time already become excessively risky, unsustainable and, if left uncorrected, would eventually have brought down the company *regardless* of whether the Mississippi litigation and out-of-court settlement had ever taken place." Saltzman Dec. at 3 (emphasis in original). Mr. Saltzman also concludes that "Loewen management knew, or reasonably should have known, of the flaws in its business practices at the time, and that Loewen management misled investors with regard to the financial condition of the company." Id. at 3-4.

As Mr. Saltzman explains, Loewen was for many years engaged in an extremely high-risk strategy of growth through acquisitions that the company increasingly funded with proceeds of sales of debt and equity. Saltzman Dec. at 5-21. The dangers of such a strategy are well-known:

> [w]here debt is used to fund such splashy deals, service of that debt tends to gobble up cash flow – [e]specially in an environment where interest rates are on the rise. That squeeze in turn inhibits the realization of the forecast economies of scale. . . . [W]here equity is used as currency in a big purchase, over the long-term it can act like a time bomb. Early on, the acquirer can grab cash flow and the illusion of performance. But sustaining those results is a huge challenge. It can dilute earnings and, particularly if the stock of the purchaser declines in value . . . the revenue multiple for a deal can quickly become excessive and write-offs can start to escalate.

Deirdre McMurdy, Shunning the "D" Word, Maclean's (June 5, 2000) (citing Loewen as one of the "notorious crash-and-burn examples" of this problem) (U.S. App. at 0947).[33] As far back as 1992, analysts were questioning the soundness of Loewen's aggressive acquisitions strategy, describing it as a "circle game" that was sowing the seeds of its own demise. See Seth Lubove, Death Stock, Forbes June 22, 1992 (U.S. App. at 0002).

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[33]The "D" in the title of the quoted article refers to "deals" (i.e., acquisitions).

By the time of the Mississippi events, Loewen had already commenced a variety of reckless business practices that rendered its aggressive acquisition strategy unsustainable in the long-term and, ultimately, destructive of shareholder value. For example, contrary to Loewen's assertion, Loewen was overpaying for its acquisitions long before the company even set foot in the Mississippi courtroom. See U.S. App. at 0002 (1992 article noting "persistent rumors in the funeral business that [Loewen has] begun to overpay for properties" and that "Loewen's aggressive acquisition strategy is said to be driving up prices."); U.S. App. at 0159 ("The buying binge was already in motion" before the SCI bid); Saltzman Dec. at 9-11.

As Mr. Saltzman explains, Loewen was able to keep its "circle game" going (for a while) only by concealing such practices from investors, creating the false impression that the company's "growth through acquisitions" strategy was actually sustainable. See Saltzman Dec. at 8-21. In light of these circumstances, Loewen cannot justify its decision to forego Chapter 11 protection on the grounds that Chapter 11 would have prevented the company from continuing to build what was, in essence, a "house of cards" already on the verge of collapse. Instead, as Mr. Saltzman explains, Loewen should have seized the "critical opportunity to step off of the dangerous acquisition 'treadmill' that it was running on at the time, and . . . correct the many business problems that threatened to (and eventually did) destroy the company's financial health in any event." Saltzman Dec. at 21-22. Loewen itself has acknowledged as much, noting that the company's prior management, under Ray Loewen's leadership, was simply "interested in growth for growth's sake, acquisitions at any cost, just to produce big numbers. . . . [S]o much damage had been done by the acquisitions binge of previous years that the damage could only be undone through Chapter 11." (U.S. App. at 204) (quoting Loewen spokesman Michael

Kolbenschlag).

Loewen's contention that a filing for Chapter 11 in late January 1996 would have been "catastrophic" for the company is thus entirely unsupportable. To the contrary, "had the company filed for Chapter 11 protection instead of settling the Mississippi litigation on the terms that it did, . . . the company would have stood a far greater chance of ultimate success and would not be in the financial straits that it is in today . . . ." Saltzman Dec. at 4.

2. Loewen's "Evidence" Of The Costs Of A Chapter 11 Proceeding Is Inaccurate And Misleading

Relying exclusively on a single, one-page document of unknown origin, Loewen contends that the costs of a Chapter 11 proceeding would have been "on par with, and in some estimates higher than, the pure financial costs of settlement or bonding . . . ." TLGI Sub. at 33. As Mr. Trost explains in his Reply Declaration, Loewen's "evidence" for this contention is wholly unsupported and vastly overstated. See Trost Reply Dec.at 15-16.

For example, Loewen's evidence assumes more than $150 million in "interest cost" on senior notes or bank debt, despite the fact that all interest on Loewen's unsecured debts (virtually all of Loewen's debt was unsecured at the time) would have stopped accruing immediately upon the filing of a Chapter 11 petition. See Trost Reply Dec. at 16. Similarly, Loewen's estimate mysteriously includes $50 million for an award or settlement of the Mississippi litigation, even though Loewen believed it was virtually certain to prevail on appeal. Id. On its face, this "evidence" is meaningless.

Moreover, Loewen's claims concerning the cost of Chapter 11 protection ignore the practical realities of how a Chapter 11 case would have proceeded and misleadingly suggest that

Chapter 11 protection would have been necessary for the entire length of the Mississippi appeal. As Loewen was well aware, the company was not likely to require the protections of Chapter 11 for a significant period of time, as Chapter 11 protection would simply have bought the company additional time to pursue other alternatives, such as continuing with its efforts to finance the full bond or negotiating further with O'Keefe. See, e.g., John Schreiner, Loewen Hopes to Post Bond, Fin. Post (Jan. 26, 1996) at 3 ("Several analysts believe Loewen might combine the options of a Chapter 11 filing and getting financial support for a bond. Ray Loewen suggested that a Chapter 11 filing would do away with the need to post a bond.") (U.S. App. at 0914).

For example, Loewen was aware that, upon the filing of a Chapter 11 petition, O'Keefe would have immediately lost nearly all of his negotiating leverage, as he would have been prevented from executing on the judgment (the very purpose of the supersedeas bond, but without the cost) and relegated to the status of merely another unsecured creditor of the company. See, e.g., David Baines, B.C. Funeral Firm Settles Suit For $85 Million, Vancouver Sun (Jan. 30, 1996) at A1 ("[T]he company said it was considering filing for protection under Chapter 11 of the U.S. Bankruptcy Code, which would relegate O'Keefe to an unsecured creditor and force him to the sidelines while the appeal was being heard.") (U.S. App. at 0932); Carvill Dec. at 9-10 ("The 'bankruptcy card' was the only credible threat we had in the final negotiations."). With this enormous increase in its own bargaining power, Loewen likely could have negotiated a settlement on terms that it found fully satisfactory or, failing a complete settlement, could have negotiated an agreement with O'Keefe to refrain from executing on the Mississippi judgment while the appeal proceeded. See, e.g., Statement of Elizabeth Warren at 13-14; Declaration of Harvey R. Miller Dec. at 9-10. Upon either occurrence, Loewen would likely have been free to

voluntarily dismiss the Chapter 11 proceeding, far sooner than Loewen's cost estimates presuppose.

Indeed, even if Loewen were unable to obtain a favorable result as quickly as it would have liked through the use of Chapter 11, Loewen would likely have been free to terminate the Chapter 11 proceeding at any point that it wished. If it chose to do so (which, as Messrs. Saltzman and Trost explain, would have been foolish in light of the commercial benefits that Chapter 11 would have afforded the company), Loewen would then have had the same range of options that it had on January 28, 1996, and could have chosen to settle on the same terms that it accepted in fact. See Saltzman Dec. at 27-28; Trost Reply Dec. at 14-15. Again, however, as Chapter 11 protection would have removed the exigencies of the company's circumstances, Loewen would likely have fared much better in such negotiations.

In any event, Loewen's claims regarding the cost of a Chapter 11 filing are irrelevant to whether the United States can be liable for the judgments that Loewen elected not to appeal. "It has been confirmed on more than one occasion that lack of pecuniary means on the part of the alien claimant . . . does not constitute a valid reason for not pursuing local remedies." Amerasinghe at 212. See also, e.g., Freeman at 434 ("[W]here an 'effective' means of appeal is open, the failure to resort to it can not be excused on the ground that the claimant was prevented from doing so by poverty . . . ."); Borchard at 824 (claimant is not relieved from pursuing appeal "by alleging his inability . . . to meet the expenses involved . . . ."). Regardless of the quality of its "evidence" of the costs of Chapter 11 protection, therefore, Loewen's failure to appeal the Mississippi judgments deprives this Tribunal of jurisdiction in this matter.

3. The Evidence That Loewen's Professed Reasons For Rejecting The Chapter 11 Option Are Mere Pretext Remains Compelling

As explained in the United States' Memorial, strong evidence suggests that Loewen's decision to forego Chapter 11 protection was made on the basis of personal considerations rather than sound business judgment. See U.S. Mem. at 81-83. The evidence in this regard is even more compelling after the Claimants' most recent submissions.

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Unlike the *post hoc* and self-serving declarations that Mr. Loewen offers in rebuttal, this fact was memorialized in a contemporaneous memorandum at that time. See U.S. App. at 609-610. It is well-settled in international arbitration, as elsewhere, that "the best evidence that can be presented in relation to any issues of fact is in almost every circumstance contained in the *documents that came into existence at the time of the events giving rise to the dispute*." A. Redfern & M. Hunter, Law and Practice of International Commercial Arbitration 329-20 (2d ed. 1991) (emphasis added); see also Howard M. Holtzmann, "Fact-Finding by the Iran-United States Claims Tribunal" in Fact-Finding Before International Tribunals 101, 110 (Richard B. Lillich, ed. 1991) (noting that Tribunal "relie[d] heavily on documents prepared in the ordinary course of business" and placed lesser value on "affidavits" and other testimonial evidence.).

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In fact, since the United States filed its Memorial, Loewen has produced additional contemporaneous evidence further establishing that Mr. Loewen's personal concerns over his own equity may have influenced the company's decision to forego Chapter 11 protection. In a production of discovery to the government just two weeks ago, Loewen included a handwritten notation of an unidentified individual, dated December 21, 1995, which states the following:

> TC Alan Miller
> (1) R. Loewen strike price is $20 – if drops below $20, his equity is gone ∴ [therefore] he'll avoid $20 (i.e. bankruptcy) *at all costs.*

U.S. App. at 0907 (emphasis added).

In addition, the declaration of Mr. Clyde Gordon Moore, which Mr. Loewen submits as a refutation of the contemporaneous evidence in this case, is itself of questionable accuracy. See Declaration of Clyde Gordon Moore (Tab E to RLL Sub.). Although Mr. Moore suggests (he does not state outright) that Mr. Loewen had no cause for concern that his bank might have made a margin call on Mr. Loewen's pledged equity if the company's stock price continued to decline, Mr. Moore, in a more candid moment, appears to have admitted precisely the opposite. As Steven Saltzman explains in his attached declaration, Mr. Moore has elsewhere acknowledged that the bank was, indeed, very much concerned about the possibility of a margin call on Mr. Loewen's pledged equity at the time of the Mississippi events, and that Mr. Moore was chastised by his superiors at the bank for having made the loans at all. See Saltzman Dec. at 34-36 (Tab

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34 **REDACTED**

D).[35]

The circumstances of the Mississippi settlement also give further grounds to question the accuracy of Mr. Loewen's assertions in this proceeding. As the contemporaneous evidence indicates, the equity that Mr. Loewen had pledged to lenders was subject to a margin call if the stock of the Loewen Group traded below $20 per share. See U.S. App. at 0609-10, 0907. On January 26, 1996, the Friday before Loewen and O'Keefe reached their settlement agreement, the company's stock closed at a price of $20.50 per share on the NASDAQ stock exchange, a mere fifty cents above the strike price under the terms of the margin loans, and was rumored to be heading lower in the coming trading days.[36] Although Loewen still had until the following Wednesday to negotiate a settlement or pursue other options before the Mississippi court's stay of execution was to be lifted, the company pushed extremely hard until the early hours of the morning of January 29, 1996, to settle the case (on terms that the company now complains were "expensive and damaging") *before* the markets could open on Monday, and before the stock could fall below the strike price of the margin loans.

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[35]Mr. Moore's declaration also does not purport to address any of Mr. Loewen's other margin loans, such as the loan from the Bank of Montreal that we identified in our Memorial. See U.S. Mem. at 83 n.53; U.S. App. at 660 (newspaper article discussing possibility of Mr. Loewen losing his yacht on the basis of a margin call by the Bank of Montreal).

[36]See, e.g, John Schreiner & Keith Damsell, Court Ruling Stuns Loewen, Fin. Post (Jan. 25, 1996) at 1 ("This stock is going to be a teenager – and who knows beyond that . . . .") (quoting Mr. Saltzman). While it appears that the U.S. stock price may have briefly dropped below $20 for one day on the Thursday after the Mississippi Supreme Court's ruling, it is unclear whether that would have been sufficient for the banks to make a margin call. See, e.g., Moore Dec. ¶8 ("The terms of the Loan Agreement were never breached during this period."). Because Mr. Loewen still refuses to produce any information concerning his margin loans, it is unclear whether the $20 strike price was based on the price of Loewen stock in the U.S. or Canadian stock markets. In the days before the settlement, the stock was trading in the low- to mid-$20s per share on the Toronto Stock Exchange.

The declarations submitted by Claimants do not overcome this contemporaneous evidence. For example, it is of no moment that, from the perspective of the Rt. Hon. John N. Turner (a Loewen Board member whose interest in defending his role in the company's management is self-evident), "the Board [of Directors] never downplayed, discouraged or rejected the bankruptcy option because of any impact that bankruptcy might have [had] on Raymond Loewen personally." Declaration of Rt. Hon. John N. Turner ("Turner Dec.") (Tab D to TLGI Sub.) at 8. It would be surprising, indeed, if Mr. Loewen had openly revealed his personal motives to the Board in this regard. See, e.g., TLGI Sub. at 41 (discussing Mr. Loewen's fiduciary duties). Because Mr. Loewen exercised such an unusual degree of control over the decisions of the company (Mr. Loewen himself asserts that "to the extent that any one person could be, Mr. Loewen *was* TLGI." Memorial of Raymond L. Loewen at 48 (emphasis in original)), it would have been enough to defeat the Chapter 11 option for Mr. Loewen merely to present the option to the Board in a negative light, the effect of which would ultimately be to protect his personal interests.

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In any event, notwithstanding his claims of independent judgment in this proceeding, Mr. Turner has conceded elsewhere that Mr. Loewen exercised undue influence over the decisions of the company's Board of Directors generally:

> Mr. Turner . . . blames poor information flow and *the power of a founder* [Ray Loewen] for slowing the process of good governance. "*The founder of a company is an awfully hard person to challenge*. It's a human nature thing. . . . Most boards are fairly effective, but *a director is a part-time job.*"

Rod McQueen, "I Never Duck," Turner Boasts: Former PM Has Bruises, But Is Still In Business

Fin. Post (Mar. 18, 2000) at D1 (quoting Mr. Turner) (emphasis added) (U.S. App. at 0943-0944).[37]

Claimants cannot overcome the contemporaneous evidence of Ray Loewen's influence over the company's rejection of the Chapter 11 option through their baseless effort to discredit the motives of the company's highly-regarded former bankruptcy counsel, Messrs. Harvey Miller and Alan Miller.[38] Indeed, Claimants' allegations in this regard are both internally inconsistent and factually implausible.

According to Loewen, the company's management rejected the strong advice of Messrs. Harvey R. Miller and Alan B. Miller to pursue Chapter 11 protection because, it now contends, "Loewen viewed their advice as improperly tainted by their law firm's financial self-interest." TLGI Sub. at 32. At the same time, Mr. Loewen asserts that "this suspicion was *not* a major factor in my decision at the time." Declaration of Raymond L. Loewen (Tab D to RLL Sub.) at 6 (emphasis added). This contradiction makes clear that Loewen's allegations are merely a disingenuous attempt to mask the effect of damaging evidence, and do not reflect the true bases for the company's decisions at the time.

Moreover, the suggestion that either Mr. Loewen or his company's management believed

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[37]Faced with this evidence of the role that Mr. Loewen's personal interests may have played in the company's rejection of the Chapter 11 option, Loewen offers only an "article" that portrayed Mr. Loewen in a positive light generally. See TLGI App. at A2290A. Although Loewen misrepresents this "article" as a publication of "the general business press," see TLGI Sub. at 36, it is in fact merely a press release issued by one of Loewen's own public relations firms at the time. See id.

[38]Mr. Saltzman's own experience with The Loewen Group suggests that this is not the first time Claimants have employed such a tactic. See Saltzman Dec. at 28-34.

Messrs. Miller's advice regarding the availability of Chapter 11 protection to be tainted by their firm's alleged self-interest is implausible on its face.[39] Loewen contends (through the declaration of Mr. Turner) that the company discharged Messrs. Miller in favor of the law firm of Jones Day Reavis & Pogue because Messrs. Miller's firm "was prominently involved in a number of . . . conflict of interest allegations . . . ." Turner Dec. at 9. Loewen and Mr. Turner ignore the fact that, just two years before the Mississippi litigation, Jones Day itself paid $51 million to settle conflict-of-interest charges in one of the largest and best-known of such cases in history. See W. Lambert, Jones Day Will Pay $51 Million To Settle Lincoln Savings Case, Wall St. J. (April 20, 1993) at B12 (U.S. App. at 0933). The suggestion that Loewen would have discharged Weil Gotshal & Manges in favor of Jones Day out of concern over the firm's alleged conflicts of interest is, quite simply, ludicrous.[40]

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We of course cannot

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[39]Indeed, even Claimants' own sources describe Harvey Miller as "the nation's foremost bankruptcy lawyer" who presides over "the country's largest and most lucrative" bankruptcy practice. See A2241A. Claimants fail to explain how or why Mr. Miller would have jeopardized his extraordinary reputation and his firm's already-brimming practice by rendering inaccurate advice to Loewen simply to generate fees in what would have been a relatively straightforward (and likely short in duration) Chapter 11 proceeding. The absurdity of such a suggestion is obvious.

[40]Indeed, Jones Day's bankruptcy practice has been charged in several instances with precisely the same type of conflict that Claimants now contend tainted Weil, Gotshal & Manges. See, e.g., Jef Feeley, Bad Day for Jones Day, Nat'l Law J. (Sept. 28, 1998) at A4 (U.S. App. at 0941); Conflict of Interest Questions Raised in Montgomery Ward Filing, 30 No. 25 Bankr. Ct. Dec. 1 (July 22, 1997) (quoting both Professors Kenneth Klee and Elizabeth Warren as highly critical of Jones Day's conduct) (U.S. App. at 0937, 0938).

know whether Mr. Loewen's disapproval in fact stemmed from concerns over his personal equity stake, or from a fundamental misunderstanding of how a Chapter 11 case would have proceeded, or from (as some have suggested) Mr. Loewen's ego. See, e.g., U.S. App. at 0156 ("[T]he acquisition rivalry between Loewen and SCI was driven more on gaining market share and ego than on sound business decisions."). Whatever the cause, the contemporaneous evidence strongly suggests that Claimants' professed reasons for foregoing the protections of Chapter 11 are mere pretext.

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5. Claimants Cannot Advance This NAFTA Claim On The Basis Of The Alleged (And Highly Speculative) Costs Of A Chapter 11 Reorganization Proceeding That Loewen Never Pursued

Claimants contend that, even if Loewen had filed for Chapter 11 protection and succeeded in having the jury verdict overturned, the United States would still be liable under the NAFTA. According to Claimants, the costs that the company would have incurred in pursuing such relief would have been attributable to the Mississippi courts, for which the United States would be responsible under NAFTA Chapter 11. See TLGI Sub. at 32-33; RLL Sub. at 22. Not so.

Like many of their contentions, Claimants provide no support whatsoever for this curious theory whereby a state may be held internationally liable for the speculative injuries that allegedly would have resulted from a course of events that never actually occurred. That is because there is no such support. As the United States has already demonstrated, NAFTA Chapter 11 requires a claimant to fully appeal a judicial decision to a court of last resort before it may state a claim for breach of an international obligation based on judicial action. See supra at 17-32. Regardless of what may have happened had Loewen elected to pursue its appeal under Chapter 11 protection, it is not what happened in *this* case. Because Loewen failed to avail itself of corporate reorganization protection – against the strong advice of the nation's foremost bankruptcy counsel – we can never know what the outcome would have been. NAFTA Chapter

11 cannot be construed to impose liability on governments on the basis of a purely hypothetical NAFTA claim that, as a result of Claimants' own choice, can never materialize. Cf. Eduardo Arechaga, Diplomatic Protection of Shareholders in International Law, IV Philippine Int'l L. J. 71, 77-78 (1965) (noting the "traditional rule of international law corroborating the inadmissibility" of claims based on "possible, but contingent and [i]ndetermin[ate] damage . . . .").

IV. THE UNITED STATES, AS A MATTER OF LAW, CANNOT BE HELD LIABLE FOR THE MISSISSIPPI COURTS' ALLEGED FAILURES TO ACT BECAUSE LOEWEN NEVER ARGUED FOR COURT ACTION ON THE GROUNDS THAT IT ALLEGES IN THIS PROCEEDING

As the United States noted in its Memorial, it is a settled rule of international law that "official inaction" can give rise to state responsibility only where "there was a duty to act." See U.S. Mem. at 88 (quoting Restatement (Third) of Foreign Relations Law § 207 cmt. c (1987)). Claimants argue that the Loewen Group adequately raised before the Mississippi courts the same substantive complaints that it makes in this proceeding and that, as a result, those courts breached their alleged duty to act. Claimants' argument is both legally and factually incorrect.

A. Neither NAFTA Chapter 11 Nor Customary International Law Imposes A Duty On Domestic Courts To Provide Protections That A Party Does Not Seek

As one scholar recently observed, "[n]ational and international decision-makers alike resist finding an affirmative duty on governments to act from customary international law or treaty without the clearest normative expression of such duty." Gordon A. Christenson, Attributing Acts of Omission to the State, 12 Mich. J. Int'l L. 312, 360 (1991). See also id. at 366 (noting that the International Court of Justice and the Iran-U.S. Claims Tribunal "require[] the most exacting standards of responsibility and of proof of official inaction before attributing

an omission to the State."). Notwithstanding this high threshold, Loewen claims to have identified an international duty of action so broad that the United States could be held responsible for the alleged inaction of the Mississippi courts "even if Loewen had stood mute throughout the trial . . . ." TLGI Sub. at 46. Loewen's claim is absurd on its face.

Loewen purports to ground this hypothetical duty to act in the language of NAFTA Article 1105, which requires that the NAFTA Parties accord "full protection and security" to investments of investors. However, far from imposing a requirement that the NAFTA Parties somehow empower their courts to, in effect, read the minds of the litigants that appear before them, the "full protection and security" clause "is not one of strict liability. Rather, the government must provide protection reasonable under the circumstances." Kenneth J. Vandevelde, United States Investment Treaties 77 (1992). The duty that Loewen would have this Tribunal impose is both patently unreasonable under the circumstances of this case (involving a trial in which Loewen was represented by numerous lawyers and law firms, including some of the largest law firms in the State of Mississippi) and is inconsistent with settled principles of international law.

Indeed, international law makes clear that "the individual must raise at the local level any arguments which he raises at an international level." C.F. Amerasinghe, Local Remedies in International Law 176 (1990).[45] This principle requires the claimant to have raised all "arguments covering contentions of fact, propositions of law, pleas and claims" on the basis of which it seeks relief from the international tribunal. Id. See also, e.g., Claim of Finnish

[45]Although this principle is often expressed in the context of the local remedies rule, it is equally applicable here.

Shipowners (Fin. v. Gr. Brit.), 3 R.I.A.A.1479, 1502 (1934) ("[A]ll the contentions of fact and propositions of law which are brought forward by the claimant . . . must have been investigated and adjudicated upon by the municipal Courts . . . ."). Where, as here, the claimant neglected to assert the rights that it now contends were violated in the domestic courts, there is no ground for an international claim. See, e.g, 1 Marjorie M. Whiteman, Damages in International Law 145 & n.352 (1937) ("Where the claimant's injuries have arisen from his own carelessness, imprudence, or noncompliance with local regulations, the claim will be disallowed.") (citing cases); State Responsibility: International Responsibility, [1958] II Y.B. Int'l L. Comm'n 54, U.N. Doc. A/CN.4/111 ("[I]t is inconceivable that the State should have an unqualified duty to make reparation if the injury is the result of acts provoked by the alien himself.").

Claimants rely heavily on the domestic law doctrine of "plain error" (which permits appellate courts to address, in exceptional circumstances, errors that were not brought to the attention of the lower court) to excuse their failure to object on the grounds they assert in this proceeding. See TLGI Sub. at 45; RLL Sub. at 26. This reliance is misplaced, as the "plain error" doctrine does not impose a *duty* on courts to address errors as to which no objection was raised, but instead merely *permits* courts to do so, and then only in exceptional circumstances. See, e.g., Miss. R. Evid. 103(d); United States v. Olano, 507 U.S. 725, 735 (1993). This permissive authority is a far cry from the "clearest normative expression of [a] duty [to act]" that international tribunals require before attributing inaction to the state for purposes of an international claim. Christenson, 2 Mich. J. Int'l L. at 360. See also DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96 (1989) (Due Process Clause of the U.S. Constitution does not impose an affirmative duty on the government to protect against harms

caused by private actors).

Moreover, even if a domestic appellate court could have reviewed the matters as to which Loewen failed to object in the lower court, this would not establish the Tribunal's authority to do so. To the contrary, international law does not recognize any such "plain error" rule that could justify a finding of state responsibility based on an alleged failure of a domestic court to protect rights that the claimant never asserted. Cf., e.g., Finnish Shipowners, 3 R.I.A.A. at 1502 ("[T]he responsibility of the State does not come into existence until the grounds upon which the claimant . . . in the international procedure base[s] [its] contention of an initial breach of international law have been rejected by the municipal courts . . . ."). To hold otherwise would permit a claimant to ignore its domestic proceeding entirely, suffer a judgment by default, and nevertheless still have a right to challenge that judgment in an international arbitration under NAFTA Chapter 11. The NAFTA, however, is not a malpractice insurance policy, and cannot be interpreted to allow so absurd a result. See e.g., Vienna Convention on the Law of Treaties, art. 32 (treaties should be interpreted to avoid results that are "manifestly absurd or unreasonable").

B. Loewen Never Objected On The Grounds Of Alienage, Race Or Class At Any Point During The Mississippi Trial

When they initiated this arbitration, Claimants alleged that the Mississippi jury verdict was the product of a seven-week trial infected by scores of improper appeals to the jury's alleged "anti-Canadian, racial, and class biases." Notice of Claim ¶4. Now, however, when pressed to support this extreme claim with facts, Claimants point to only five instances during the entirety of the trial when, it is alleged, Loewen complained on these grounds to the trial court. None of even this handful of examples provides any support for Claimants' allegations. As an

examination of the record makes clear, Loewen *never* objected on the grounds of nationality, race or class bias at any point during the trial:

(a) Loewen purports to have "unsuccessfully objected to [Mr.] Gary's efforts to prejudice the entire pool of jurors at the outset of the case." TLGI Sub. at 43. The cited reference to the transcript, however, shows exactly the opposite. Loewen's counsel did not object to any questions on the grounds that they improperly appealed to nationality, race or class biases, but instead objected only to Mr. Gary's request for a "commitment" from the prospective jurors to agree to give Loewen a fair trial. See A357.[46] In fact, Loewen's counsel expressly agreed that it was proper for Mr. Gary to inquire into whether the prospective jurors felt that "people in other places should be treated differently . . . ." Id.

(b) Loewen alleges that the trial court refused Loewen's request to remove a potential juror (who, in any event, did not participate in the trial) on the grounds that the potential juror "could not give a foreign corporation a fair trial." TLGI Sub. at 43. Again, the transcript reveals exactly the opposite. In fact, the cited reference shows the trial court *granting* Loewen's request to excuse a juror for cause on this very basis. See A488. When Loewen sought to have the court remove another prospective juror for cause, the court pointed out that Loewen had failed to question the juror sufficiently to establish cause for the juror's removal, observing with disapproval that "[e]verybody wants to . . . be rewarded for all the questions that they did not ask . . . ." A491. Despite Loewen's failure in this regard, the court offered to allow Loewen to ask the jurors additional questions on the issue, which Loewen declined to do. See A491-92

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[46]In Mississippi, as in other jurisdictions, an attorney may not seek a commitment from potential jurors to reach a particular verdict. See Miss. R. Cir. & County Ct. Practice 3.05 (setting forth rules of voir dire).

(Loewen's lawyer declined the court's offer, concluding that "[t]hey can have Mr. Bennett [the prospective juror] if they want him," and chose instead to excuse that juror with a peremptory challenge).

(c) Both Claimants rely on the fact that, even though they did not object to the court's proposed jury instruction on the issue of "bias, sympathy or prejudice," Loewen proposed an additional instruction, which the court denied as cumulative of the instruction that was to be given. See TLGI Sub. at 43-44; RLL Sub. at 24-25. As we explained in detail in the United States' Memorial, Loewen never argued (as it does now) that its proposed instruction was needed to address any "heightened risk of improper nationality-based, racial, and class bias." See U.S. Mem. at 20 & n.14 (citing to trial transcript). Instead, Loewen merely characterized its proposed instruction as "procedural" rather than "substantive," and apparently never even considered appealing the court's refusal to give it. See id.

(d) Ray Loewen alleges (without citation) that Loewen's lawyers objected to the trial court's proposal to accept only the jury's initial compensatory award of $100 million and to conduct a separate proceeding on the issue of punitive damages. See RLL Sub. at 25. This is manifestly untrue. As we noted in the United States' Memorial, Loewen expressed no objection whatsoever (let alone an objection on the grounds alleged in this proceeding) to the court's proposal to reform the verdict in this manner. See U.S. Mem. at 21 n.17.

(e) Both Claimants contend that, after the jury rendered its verdict, Loewen moved for a mistrial on the same grounds that it alleges in this proceeding. For his part, Mr. Loewen adds (again without citation) that a motion for a mistrial is "the most strenuous objection available to an attorney under American jurisprudence." RLL Sub. at 25. Quite apart from the fact that

motions for a mistrial (and the denials of such motions) are matters of mere routine in American litigation, see, e.g., T. Mauet, Trial Techniques §1.17 (4th ed. 1996), any objection is only as "strenuous" as it is made by the objecting party. As the transcript of the O'Keefe trial makes plain, Loewen's counsel moved for a mistrial in only the most perfunctory fashion. See Tr. at 5738-39.[47] Not until Loewen submitted its numerous post-trial motions on a variety of matters – fully two weeks after the jury rendered its verdict and the trial proceedings were closed – did Loewen first claim that "[p]laintiffs repeatedly and impermissibly interjected issues and matters of race, national origins, class and economic status into the case . . . ." A729.[48] Even then, Loewen failed to cite a single instance that would support this claim before the trial court. Id.

In short, the record of the proceedings makes plain that Loewen never complained at any point during the trial that O'Keefe's counsel had impermissibly appealed to the jurors' nationality, racial or class biases. Loewen's *post hoc* list of hypothetical protective steps that it contends the court should have taken – such as striking the pool of potential jurors or chastising counsel during oral argument, see TLGI Sub. p.45-46 – is thus entirely irrelevant, as Loewen never asked the court for such protections, nor did it ever assert any rights that would have required such protections. Indeed, Ray Loewen contends (in a fundamental contradiction of the Loewen Group's allegations) that "the impact that Mr. Gary's [allegedly] inflammatory conduct

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[47]Indeed, the reference to "bias, passion and prejudice" in Loewen's motion for a mistrial is no more specific than the jury instruction given by the court, which Loewen now characterizes as unacceptably "generic . . . ." Compare Tr. 5738-39 with TLGI Sub. at 43.

[48]As we noted in the United States' Memorial, litigants in common-law jurisdictions around the world (including Mississippi) are required to raise objections "contemporaneously with the allegedly improper utterance" or else the objection is waived. See U.S. Mem. at 87 (quoting, inter alia, Ivy v. General Motors Acceptance Corp., 612 So.2d 1108, 1114 (Miss. 1992)).

was having on the jury could not have been known to counsel until the jury rendered its . . . verdict." RLL Sub. at 25. Even if Loewen's failure to object could be excused on this bizarre basis, the trial court surely cannot be faulted for allegedly failing to take protective steps during the trial (for which Loewen never asked in any event). As a result, the trial court's alleged failure to act in this regard cannot constitute a government "measure" within NAFTA Article 1101. See U.S. Mem. at 86-88.

C. Loewen Never Argued That The Supersedeas Bond Should Have Been Reduced On The Grounds That Chapter 11 Reorganization Protection Was Not A Reasonable Remedy For The Company

In its most recent submission, Loewen concedes (as it must) that reorganization under Chapter 11 of the U.S. bankruptcy laws is -- and was at the time of the Mississippi litigation – a well-known and effective option in the U.S. legal system for companies seeking to appeal an adverse judgment without posting a supersedeas bond. See, e.g., TLGI Sub. at 34. Instead, Loewen contends that the peculiar characteristics of its business model at the time of the Mississippi litigation rendered Chapter 11 protection an unacceptable option for the company under the circumstances. Id. at 34-39. Because Loewen never argued for such special treatment before either the trial court or the Mississippi Supreme Court (despite the fact that O'Keefe challenged Loewen to do so in both courts), the alleged failure of those courts to depart from the supersedeas bond requirement on this basis cannot give rise to liability under NAFTA Chapter 11.

Loewen was fully aware that it bore a substantial burden of justifying a departure from the statutory bond requirement. Outside of the courtroom, Loewen and its counsel privately acknowledged that, "[a]s the unsuccessful defendants, we presently are not very well positioned

to be arguing whether the plaintiffs here are more entitled to one form of damages than another because . . . at this stage of the proceedings, plaintiffs are at least more entitled to all of their damages than we are to not having to secure plaintiffs against those damages." U.S. App. at 0895. As Loewen's counsel correctly observed, "it is less a windfall to the plaintiffs to be secured against the loss of an award the law (so far) says rightfully is theirs, than it would be a windfall to us if we are relieved of all obligation to plaintiffs to secure them against the loss of that (presently) valid judgment." Id.

Despite this recognition of the substantial burden it would have to carry in the Mississippi courts, Loewen never argued, as it does here, that Chapter 11 reorganization was not a reasonable means by which it could have pursued its appeal even if the court did not depart from the full supersedeas bond. Requiring Loewen to have done so is not a mere *ex post facto* imposition of a creative legal strategy of which Loewen could not have known at the time. To the contrary, Loewen was fully aware of the availability of Chapter 11 protection and had already set its lawyers to work to pursue it. See U.S. Mem. at 72-83.[49] Indeed, in preparing its petition to the U.S. Supreme Court, Loewen clearly acknowledged its burden to prove that Chapter 11 protection was not a reasonable alternative, even though it had not done so before the Mississippi courts. See U.S. App. at 0868, 0892 (listing "[f]acts to be proven" to the Court, including the "bad consequences of bankruptcy" and that "it would be no remedy to have the successor in bankruptcy win an appeal.").

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[49]Sir Robert Jennings, who appropriately concedes his ignorance of U.S. bankruptcy law and procedure, thus misses the point entirely when he invokes the Finnish Shipowners case to suggest that the United States may not "*ex post facto* blame the claimant for having failed to follow [a] course so helpfully provided to him after the event." Jennings Second Op. at 12.

Although the availability of Chapter 11 protection was fully known to the Mississippi courts, Loewen made no effort to persuade the courts that reorganization was an unacceptable option for this company (or, for that matter, any other). For example, during the hearing on the supersedeas bond question, the trial court, demonstrating an appropriate concern for Loewen's ability to proceed in the face of a full bond requirement, pressed O'Keefe's counsel to explain how Loewen's interests could be protected:

> [L]et's assume that . . . the judgment is either reversed or substantially reduced [by the Mississippi Supreme Court]. . . . but by then you've already moved to collect on your judgment which, if we assume again that [the Loewen defendants] are right about their financial condition, would effectively shut them down . . . . [H]ow are they then supposed to get back to where they were if the Supreme Court agrees that I was wrong or the jury was wrong . . . .? What happens to them then? How do we guard against what that could lead to?

A1058. O'Keefe's counsel responded that Loewen *"would go into Chapter 11 and in the meantime pursue us,"* id. (emphasis added), and that "[t]hey can appeal without supersedeas. They can go into bankruptcy or receivership if they have to to get straightened out, take time, and recover it, but why should these Plaintiffs suffer the risk simply because they are not in a position to make that bond[?]" A1062. Loewen said nothing on the subject of Chapter 11, leaving O'Keefe's answer to the court entirely unrebutted.

Loewen also failed to argue the point before the Mississippi Supreme Court. O'Keefe specifically argued to the Mississippi Supreme Court that a departure from the full bond was unjustified because Chapter 11 reorganization provided adequate protection to Loewen. See A1113. O'Keefe invoked the concurring opinion of two U.S. Supreme Court Justices in the Pennzoil v. Texaco case to this effect:

> In this case, Texaco clearly could exercise its right to appeal in order to protect its corporate interests even if it were forced to file for bankruptcy under Chapter 11. Texaco, or its successor in interest, could go forward with the appeal, and if it did prevail on its appeal in Texas courts, the bankruptcy proceedings could be terminated. Texaco simply fails to show how the initiation of corporate reorganization activities would prevent it from obtaining meaningful appellate review.

Id. (brief of O'Keefe, quoting Pennzoil v. Texaco, Inc., 481 U.S. 1, 22-23 (1987) (Brennan and Marshall, J.J., concurring)). Again, Loewen offered no response to this challenge, leaving O'Keefe's point entirely unrebutted.

Instead, Loewen proceeded to raise still more capital for its aggressive acquisition strategy in the debt and equity markets, despite the strong advice of its counsel to avoid any actions that would suggest to the Mississippi Supreme Court that the company had greater financial capacity to post a full bond than it had represented to the court. (U.S. App. at 439, 601, 633, 653). In the course of doing so, Loewen suggested to potential investors that it was, in fact, able to finance the full supersedeas bond, which led O'Keefe to file a brief with the Mississippi Supreme Court charging that Loewen had perpetrated a fraud on the court by claiming an inability to post the full bond. (U.S. App. at 0798).[50] The court was thus left with the impression that either Loewen could afford the full bond or, if it could not, the company would be adequately protected by a Chapter 11 reorganization filing.

Thus, like its belated allegations of improper appeals to "anti-Canadian, racial, and class biases," Loewen's claim that Chapter 11 reorganization was not a reasonable option is a mere

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[50]Although Claimants purported to include a complete copy of the relevant Mississippi "record" when they initiated this arbitration, see, e.g., A1-A19, they never provided the Tribunal or the United States with a copy of O'Keefe's "second supplemental" brief in the Mississippi Supreme Court alleging Loewen's fraud on the court. The brief first appeared in Loewen's recent production of discovery to the government on June 9, 2000.

post hoc rationalization. Because Loewen failed to raise such a claim before the Mississippi courts, there was no duty on the courts to act on that basis. The failure of the courts to depart from the full supersedeas bond therefore cannot constitute a government "measure" for purposes of NAFTA Chapter 11.

V. RAYMOND LOEWEN'S ARTICLE 1117 CLAIM MUST BE DISMISSED BECAUSE HE DOES NOT "OWN OR CONTROL" THE ENTERPRISE AT ISSUE

Mr. Loewen fundamentally misunderstands the United States' argument that he lacks standing under Article 1117 of the NAFTA. Far from being a "meaningless assertion," the United States' argument sets forth important principles of international law and NAFTA interpretation that are essential to the orderly functioning of NAFTA Chapter 11. The NAFTA Parties consented to arbitration "*in accordance with the procedures set out in [the] Agreement.*" NAFTA art. 1122 (emphasis added); Waste Management, Inc. v. United Mexican States, ARB(AF)/98/2 ¶¶ 16-17 (June 2, 2000) (Award) (describing tribunal's obligation to ensure prerequisites of NAFTA Chapter 11 are fulfilled because Parties consented to arbitration only in accordance with the procedures set forth in section B of the Chapter). The United States did not consent to arbitrate claims under Article 1117 that are brought by a private shareholder who does not "own or control directly or indirectly" the enterprise on behalf of which he or she claims.

Mr. Loewen's contention overlooks the key differences between Articles 1116, which permits a claim by an investor of a Party on its own behalf, and 1117, which permits a claim by an investor of a Party on behalf of an enterprise. Article 1116 works in conjunction with Article 1121(a), which specifies that Article 1116 permits a NAFTA investor to submit a claim for damage to an *interest* in an enterprise; Article 1117 works in conjunction with Article 1121(b)

and permits a NAFTA investor to submit a claim, on behalf of the enterprise, for damage to the *enterprise itself. See* NAFTA arts. 1116, 1117, and 1121. Thus, Article 1116 permits Mr. Loewen to submit a claim only for injury to his interest in an enterprise that is separate from the injury allegedly suffered by LGII.[51] Under international law, injury to an enterprise does not give rise to separately compensable injury to individual shareholders. "[A] wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation." The Barcelona Traction, Light and Power Company (Spain v. Belgium) [1970] I.C.J. 3, 31 ¶ 44. Therefore, Mr. Loewen's Article 1116 claim exists only to the extent he alleges an injury apart from that suffered by TLGI.[52]

The distinctions between Articles 1116 and 1117 are not contradicted by Mr. Loewen's argument that the text of the provisions permits what he terms "multiple claims." Certainly the NAFTA contemplates that more than one investor may sustain an injury to *interests* in the same enterprise, and therefore it logically permits those claims to be heard together. In some instances, an investor may even sustain a direct injury out of the same course of conduct that injured an enterprise that it owns or controls. In such cases, an investor or investment may have standing to assert claims under both Articles 1116 and 1117, so long as the recovery for those claims is not duplicative. See generally NAFTA Articles 1117(3) and 1126 (permitting consolidation of

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[51]Examples of such separate claims, which are not at issue here, might be a measure that confiscated the shares of an investor or a measure that prohibited the collection of dividends.

[52]The separate juridical existence of the corporations prevented Mr. Loewen from incurring personal liability for the obligations of TLGI and LGII; it also prohibits him from recovering for injuries suffered by the corporation.

claims in front of a single Tribunal when the claims have questions of law or fact in common).

The structure and content of Articles 1116 and 1117 affirm the United States' argument that the only proper party to bring an Article 1117 claim is the investor that owns or controls directly or indirectly the enterprise *at the time the claim is being prosecuted*.[53] This contention rests on the unassailable point that an Article 1117 claim is asserted *on behalf of* an enterprise, which itself is entitled to any recovery.[54] *See* art. 1135(2). Any alleged injury inured to the detriment of the enterprise; thus any recovery must inure to the enterprise's benefit. This construction comports with both law and logic. Mr. Loewen's interests are no longer aligned with LGII; thus, he is not entitled to assert a claim on its behalf.

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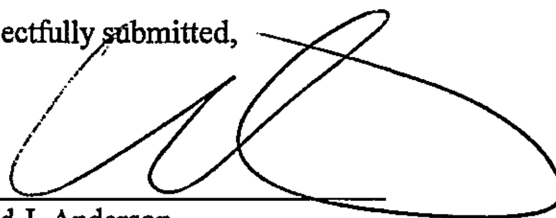
[53]Certainly Mr. Loewen's repeated assertions that he exerted extensive control over TLGI and LGII during the pendancy of the Mississippi state court litigation and immediately thereafter are amply supported by the record in this case, and the United States does not argue otherwise.

[54]The Pope & Talbot case Mr. Loewen cites does not help his argument. There is no suggestion that Pope & Talbot, Inc., the U.S. investor, does not currently own or control Pope & Talbot Ltd. through another Canadian company, Pope & Talbot International, Inc.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Memorial of the United States on Matters of Jurisdiction and Competence, the claim for arbitration in this matter should be dismissed in its entirety.

Respectfully submitted,



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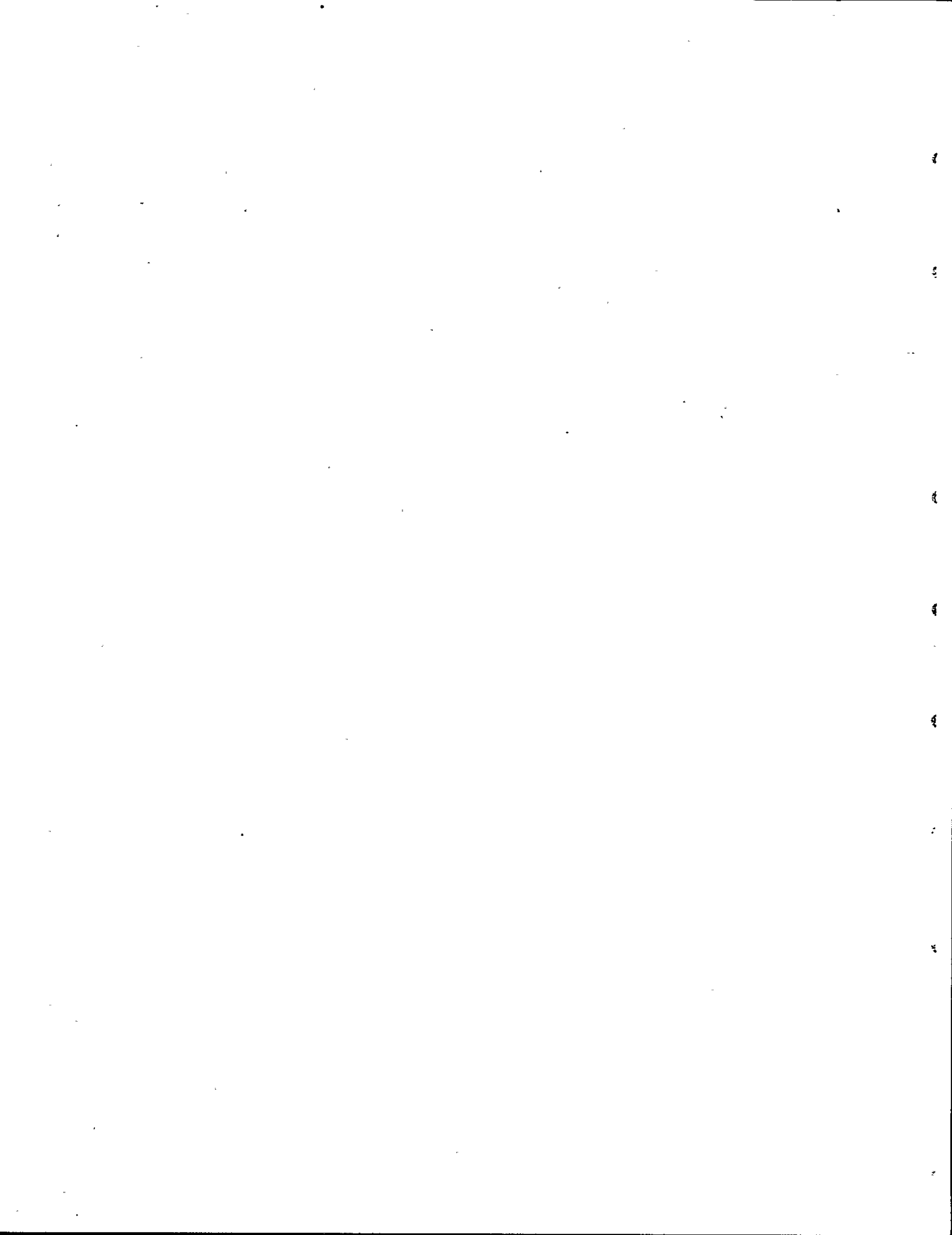

EXHIBITS

A. STATEMENT OF DAVID D. CARON

B. REPLY STATEMENT OF DREW S. DAYS III

C. REPLY DECLARATION OF J. RONALD TROST

D. DECLARATION OF STEVEN SALTZMAN, C.F.A.