Date of dispatch to the Parties: June 26, 2003

International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceeding between

The Loewen Group, Inc. and Raymond L. Loewen
(Claimants)

and

United States of America
(Respondent)

Case No. ARB(AF)/98/3

Award

Members of the Tribunal
Sir Anthony Mason
Judge Abner J. Mikva
Lord Mustill

Secretary of the Tribunal
Mrs Margrete Stevens

I. **INTRODUCTION**

1. This is an important and extremely difficult case. Ultimately it turns on a question of jurisdiction arising from (a) the NAFTA requirement of diversity of nationality as between a claimant and the respondent government, and (b) the assignment by the Loewen Group, Inc. of its NAFTA claims to a Canadian corporation owned and controlled by a United States corporation. This question was raised by Respondent's motion to dismiss for lack of jurisdiction filed after the oral hearing on the merits. In this Award we uphold the motion and dismiss Claimants' NAFTA claims.

2. As our consideration of the merits of the case was well advanced when Respondent filed this motion to dismiss and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion. As will appear, the conclusion rests on the Claimants' failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains, being matters alleged to be violations of NAFTA.

3. This dispute arises out of litigation brought against first Claimant, the Loewen Group, Inc ("TLGI") and the Loewen Group International, Inc ("LGII") (collectively called "Loewen"), its principal United States subsidiary, in Mississippi State Court by Jeremiah O'Keefe Sr. (Jerry O'Keefe), his son and various companies owned by the O'Keefe family (collectively called "O'Keefe"). The litigation arose out of a commercial dispute between O'Keefe and Loewen which were competitors in the funeral home and funeral insurance business in Mississippi. The dispute concerned three contracts between O'Keefe and Loewen said to be valued by O'Keefe at $980,000 and an exchange of two O'Keefe funeral homes said to be worth $2.5 million for a Loewen insurance company worth $4 million approximately. The action was heard by Judge Graves (an African-American judge) and a jury. Of the twelve jurors, eight were African-American.

4. The Mississippi jury awarded O'Keefe $500 million damages, including $75 million damages for emotional distress and $400 million punitive damages. The verdict was the outcome of a seven-week trial in which, according to Claimants, the trial judge repeatedly allowed O'Keefe's attorneys to make extensive irrelevant and highly prejudicial references (i) to Claimants' foreign nationality (which was contrasted to O'Keefe's Mississippi roots); (ii) race-based distinctions between O'Keefe and Loewen; and (iii) class-based distinctions between Loewen (which O'Keefe counsel portrayed as large wealthy corporations) and O'Keefe (who was portrayed as running family-owned businesses). Further, according to Claimants, after permitting those references, the trial judge refused to give an instruction to the jury stating clearly that nationality-based, racial and class-based discrimination was impermissible.

5. Loewen sought to appeal the $500 million verdict and judgment but were confronted with the application of an appellate bond requirement. Mississippi law requires an appeal bond for 125% of the judgment as a condition of staying execution on the judgment, but allows the bond to be reduced or dispensed with for "good cause".

6. Despite Claimants' claim that there was good cause to reduce the appeal bond, both the trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all and required Loewen to post a $625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. According to Claimants, that decision effectively foreclosed Loewen's appeal rights.

7. Claimants allege that Loewen was then forced to settle the case "under extreme duress". Other alternatives to settlement were said to be catastrophic and/or unavailable. On January 29, 1996, with execution against their Mississippi assets scheduled to start the next day, Loewen entered into a settlement with O'Keefe under which they agreed to pay $175 million.

8. In this claim Claimants seek compensation for damage inflicted upon TLGI and LGII and for damage to second Claimant's interests as a direct result of alleged violations of Chapter Eleven of the North American Free Trade Agreement ("NAFTA") committed primarily by the State of Mississippi in the course of the litigation.

II. THE PARTIES

9. First Claimant TLGI is a Canadian corporation which carries on business in Canada and the United States. Second Claimant is Raymond Loewen, a Canadian citizen who was the founder of TLGI and its principal shareholder and chief executive officer. TLGI submits claims as "investor of a Party" on its own behalf under NAFTA, Article 1116 and on behalf of LGII under Article 1117. Likewise, Raymond Loewen submits claims as "the investor of a party" on behalf of TLGI under NAFTA, Article 1117.

10. The Respondent is the Federal Government of the United States of America.

XVII. EVALUATION OF THE TRIAL

119. By any standard of measurement, the trial involving O'Keefe and Loewen was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers, particularly Mr Gary, were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due.

120. The trial before Judge Graves lasted some 50 days. During such a protracted period of adversarial behavior, mistakes and errors will occur; even the most even-handed judge will not be able to entirely preclude appeals to the jury's passions. Appellate courts in the United States, and indeed, in most countries in the world, have recognized that "perfect trials" are not to be expected. Doctrines of harmless error, invited error, and waiver of the right to object to prejudicial conduct are commonly invoked to sustain the results of less than perfect trials. Clearly, an arbitral tribunal applying the provisions of a treaty and of international law is even more constrained to avoid nitpicking a trial record and the rulings of a trial judge. Even when all of those limitations are applied most rigorously, the trial and its $500,000,000 verdict cannot be countenanced.

121. Respondent obviously could not defend some of the lawyer conduct and trial judge inadequacy previously referred to. Instead it argued that some of the appellate doctrines mentioned above precluded the tribunal from relying on specific flaws that were the most egregious. We need not resolve the domestic procedural disputes which arose at the trial such as the question whether Loewen was entitled to the particular instruction which it sought as to bias. The question is whether the whole trial, and its resultant verdict, satisfied minimum standards of international law, or the "fair and equitable treatment and full protection and security" that the Contracting States pledged in Article 1105 of NAFTA. This question is addressed in paras. 124-137.

122. If a single instance of the unfair treatment that was accorded Loewen at the trial level need be cited, it would be the manner in which the large and excessive verdict was constructed by the judge and the jury. As has previously been detailed, the jury originally came in with a verdict of $260,000,000, which the foreman indicated included compensatory damages of $100,000,000 and punitive damages of $160,000,000. Since Mississippi law required a separate prove up of punitive damages (which had not occurred), the judge accepted the $100,000,000
compensatory damages portion of the verdict, but conducted a further, and minimal, hearing of evidence on the punitive damages question. The jury subsequently came back with the much enhanced punitive damages award of $400,000,000, making the total verdict of $500,000,000 the largest in Mississippi history. Whether the jury interpreted Judge Graves' procedure as an invitation to increase the verdict or not, the results compounded the excessiveness of the original verdict. The methods employed by the jury and countenanced by the judge were the antithesis of due process. But we repeat this is only one instance of many.

123. In reaching the conclusion stated in the previous paragraph, we take it to be the responsibility of the State under international law and, consequently, of the courts of a State, to provide a fair trial of a case to which a foreign investor is a party. It is the responsibility of the courts of a State to ensure that litigation is free from discrimination against a foreign litigant and that the foreign litigant should not become the victim of sectional or local prejudice. In the United States and in other jurisdictions, advocacy which tends to create an atmosphere of hostility to a party because it appeals to sectional or local prejudice, has been consistently condemned and is a ground for holding that there has been a mistrial, at least where the conduct amounts to an irreparable injustice (*New York Central R.R. Co. v Johnson* 279 US 310, 319 (1929); *Le Blanc v American Honda Motor Co. Inc.* 688 A 2d 556, 559). In *Walt Disney World Co. v Blalock* 640So 2d 1156,1158, a new trial was ordered where closing argument was pervaded with inflammatory comment and personal opinion of counsel, although the offensive comments were not objected to. See also *Whitehead v Food Max of Mississippi Inc.* 163 F 3d 265, 276-278 (where a new trial was ordered on the ground that plaintiffs' counsel repeatedly "reminded the jury that [defendant] Kmart is a national … corporation … [and] contrasted that with" his and his client's status as a Mississippi resident, despite the fact that most of the objectionable comments were not objected to); *Norma v Gloria Farms Inc.* 668 So 2d 1016,1021,1023 (new trial ordered where defense counsel in closing remarks appealed to jurors' self-interest, despite plaintiff's counsel's failure to

object). In such circumstances the trial judge comes under an affirmative duty to prevent improper tactics which will result in an unfair trial (*Pappas v Middle Earth Condominium Association* 963 F 2d 534 539, 540; *Koufakis v Carvel* 425 F 2d 892, 900).

XVIII. NAFTA ARTICLE 1105

124. Article 1105 which is headed "Minimum Standard of Treatment" provides:
"1. Each party shall accord to investments of investors of another party treatment in accordance with international law, including fair and equitable treatment and full protection and security." The precise content of this provision, particularly the meaning of the reference to "international law" and the effect of the inclusory clause has been the subject of controversy.

125. On July 31, 2001, the Free Trade Commission adopted an interpretation of Article 1105(1). The Commission's interpretation is in these terms: **"Minimum Standard of Treatment in Accordance with International Law** (1) Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party. (2) The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens. (3) A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."
126. An interpretation issued by the Commission is binding on the Tribunal by virtue of Article 1131(2).

127. Although Claimants, in their written materials, submitted that the Commission's interpretation adopted on July 31, 2001 went beyond interpretation and amounted to an unauthorized amendment to NAFTA, Claimants did not maintain that submission at the oral hearing. The oral argument presented by Mr Cowper QC on behalf of Claimants was consistent with the Commission's interpretation of Article 1105(1). Mr Cowper QC submitted that, accepting that Article 1105(1) prescribes the customary international law standard of treatment of aliens as the minimum standard
of treatment to be afforded to investments of an investor of another Party, the treatment of Loewen by the Mississippi courts violated that minimum standard.

128. The effect of the Commission's interpretation is that "fair and equitable treatment" and "full protection and security" are not free-standing obligations. They constitute obligations only to the extent that they are recognized by customary international law. Likewise, a breach of Article 1105(1) is not established by a breach of another provision of NAFTA. To the extent, if at all, that NAFTA Tribunals in *Metalclad Corp v United Mexican States* ICSID Case No. ARB(AF)/97/1 (Aug 30, 2000), *S.D. Myers, Inc. v Government of Canada* (Nov 13, 2000) and *Pope & Talbot, Inc. v Canada,* Award on the Merits, Phase 2, (Apr 10, 2001) may have expressed contrary views, those views must be disregarded.

129. It is not in dispute between the parties that customary international law is concerned with denials of justice in litigation between private parties. Indeed, Respondent's expert, Professor Greenwood QC, acknowledges that customary international law imposes on States an obligation "to maintain and make available to aliens, a fair and effective system of justice" (Second Opinion, para. 79).

130. Respondent submits that, in conformity with the accepted standards of customary international law, it is for Loewen to establish that the decisions of the Mississippi courts constituted a manifest injustice. Professor Greenwood states in his Second Opinion: "the awards and texts make clear that error on the part of the national court is not enough, what is required is "manifest injustice" or "gross unfairness" (Garner, "International Responsibility of States for Judgments
of Courts and Verdicts of Juries amounting to Denial of Justice", 10 BYIL (1929), p 181 at p 183), "flagrant and inexcusable violation" (Arechaga,
["International Law in the Past Third of a Century", 159 "Recueil des Cours" (1978) at p 282]) or "palpable violation" in which "bad faith not judicial error seems to be the heart of the matter" (O'Connell, International Law, 2nd ed, 1970) p 498). As Baxter and Sohn put it (in the Commentary to their Draft Convention on the Responsibility of States for Injuries to Aliens) "the alien must sustain a heavy burden of proving that there was an undoubted mistake of substantive or procedural law operating to his prejudice".

131. In *Pope & Talbot Inc. v Canada*, Award in respect of damages, May 31, 2002 a NAFTA Tribunal considered the effect of the Interpretation of July 31, 2001. The Tribunal concluded (para. 62 of its Award) that the content of custom in international law is now represented by more than 1800 bilateral investment treaties which have been negotiated. Nevertheless the Tribunal did not find it necessary to go beyond the formulation by the International Court of Justice in *Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 76:
"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law … It is wilful disregard of due process of law, an act which shocks, or at least surprises a sense of judicial propriety."

132. Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice. Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough, even if one applies the Interpretation according to its terms.

133. In the words of the NAFTA Tribunal in *Mondev International Ltd v United States of America* ICSID Case No. ARB (AF)/99/2 , Award dated October 11, 2002,
"the question is whether, at an international level and having regard to generally accepted standards of the administration of justice, a tribunal can conclude in the light of all the facts that the impugned decision was clearly improper and discreditable, with the result that the investment has been subjected to 'unfair and inequitable treatment'."

134. If that question be answered in the affirmative, then a breach of Article 1105 is established. Whether the conduct of the trial amounted to a breach of municipal law as well as international law is not for us to determine. A NAFTA claim cannot be converted into an appeal against the decisions of municipal courts.

135. International law does, however, attach special importance to discriminatory violations of municipal law (Harvard Law School, Research in International Law, Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Persons or Property of Foreigners ("1929 Draft Convention") 23 American Journal of International Law 133, 174 (Special Supp. 1929) ("a judgment [which] is manifestly unjust, especially if it has been inspired by ill-will towards foreigners as such or as citizens of a particular states"); Adede, A Fresh Look at the Meaning of Denial of Justice under International Law, XIV Can YB International Law 91 ("a … decision which is clearly at variance with the law and discriminatory cannot be allowed to establish legal obligations for the alien litigant"). A decision which is in breach of municipal law and is discriminatory against the foreign litigant amounts to manifest injustice according to international law.

136. In the present case, the trial court permitted the jury to be influenced by persistent appeals to local favouritism as against a foreign litigant.

137. In the light of the conclusions reached in paras. 119-123 (inclusive) and 136, the whole trial and its resultant verdict were clearly improper and discreditable and cannot be squared with minimum standards of international law and fair and equitable treatment. However, because the trial court proceedings are only part of the judicial process that is available to the parties, the rest of the process, and its availability to Loewen, must be examined before a violation of Article 1105 is established. We address this question in paras. 142-157 (inclusive), 165-171 (inclusive) and 207-217 (inclusive).

XIX. THE CLAIM OF BIAS

138. Claimants' argument that Judge Graves and the jury were actually biased against Loewen is not made out. There is no direct evidence of bias on the part of Judge Graves or the jury. Nor do the jury interviews demonstrate that the jury was biased. The interviews reveal that the jury took an adverse view of Loewen's conduct based on evidence which included testimony of Loewen employees and former employees. Nor does the evidence warrant the drawing of an inference of bias against the jury, though there is strong reason for thinking that the jury were affected by the persistent and extravagant O'Keefe appeals to prejudice. Although the trial judge's conduct of the trial is explicable by reference to bias, the evidence does not support a finding that he was biased against Loewen. We take the view that the judge, for reasons which do not clearly appear, failed to discharge his paramount duty to ensure that Loewen received a fair trial.

XX. NAFTA ARTICLE 1102

139. Article 1102 bars discrimination against foreign investors and their investments. Article 1102(1) and (2) requires each Party to accord investors and investments of another Party "treatment no less favorable than it accords in like circumstances to its own investors" or their investments. With respect to a state or province Article 1102(3) requires "treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms part."
The effect of these provisions, as Respondent's expert Professor Bilder states, is that a Mississippi court shall not conduct itself less favourably to Loewen, by reason of its Canadian nationality, than it would to an investor involved in similar activities and in a similar lawsuit from another state in the United States or from another location in Mississippi itself. We agree also with Professor Bilder when he says that Article 1102 is direct only to nationality-based discrimination and that it proscribes only demonstrable and significant indications of bias and prejudice on the basis of nationality, of a nature and consequence likely to have affected the outcome of the trial.

140. A critical problem in the application of Article 1102 to the facts of this case is that we do not have an example of "the most favorable treatment accorded, in like circumstances" by a Mississippi court to investors and investments of the United States. Claimants submit that the treatment accorded O'Keefe is an appropriate comparator, that Loewen and O'Keefe were "in like circumstances" because they were litigants in the same case. But their circumstances as litigants were very different and it is not possible to apply Article 1102(3) by reference to the treatment accorded to O'Keefe. What Article 1102(3) requires is a comparison between the standard of treatment accorded to a claimant and the most favourable standard of treatment accorded to a person in like situation to that claimant. There are no materials before us which enable such a comparison to be made.

XXI. NAFTA ARTICLE 1110

141. Claimants' reliance on Article 1110 adds nothing to the claim based on Article 1105. In the circumstances of this case, a claim alleging an appropriation in violation of Article 1110 can succeed only if Loewen establishes a denial of justice under Article 1105.

XXII. THE NECESSITY FOR FINALITY OF ACTION ON THE PART OF THE STATE'S LEGAL SYSTEM

154. No instance has been drawn to our attention in which an international tribunal has held a State responsible for a breach of international law constituted by a lower court decision when there was available an effective and adequate appeal within the State's legal system.

156. The purpose of the requirement that a decision of a lower court be challenged through the judicial process before the State is responsible for a breach of international law constituted by judicial decision is to afford the State the opportunity of redressing through its legal system the inchoate breach of international law occasioned by the lower

court decision. The requirement has application to breaches of Articles 1102 and 1110 as well as Article 1105.

XXIII. ARTICLE 1121 AND WAIVER

161. Although the precise purpose of NAFTA Article 1121 is not altogether clear, it requires a waiver of domestic proceedings as a condition of making a claim to a NAFTA tribunal. Professor Greenwood and Sir Robert Jennings agree that Article 1121 "is not about the local remedies rule". One thing is, however, reasonably clear about Article 1121 and that is that it says nothing expressly about the requirement that, in the context of a judicial violation of international law, the judicial process be continued to the highest level.

162. Nor is there any basis for implying any dispensation of that requirement. It would be strange indeed if sub silentio the international rule were to be swept away. And it would be very strange if a State were to be confronted with liability for a breach of international law committed by its magistrate or low-ranking judicial officer when domestic avenues of appeal are not pursued, let alone exhausted. If Article 1121 were to have that effect, it would encourage resort to NAFTA tribunals rather than resort to the appellate courts and review processes of the host State, an outcome which would seem surprising, having regard to the sophisticated legal systems of the NAFTA Parties. Such an outcome would have the effect of making a State potentially liable for NAFTA violations when domestic appeal or review, if pursued, might have avoided any liability on the part of the State. Further, it is unlikely that the Parties to NAFTA would have wished to encourage recourse to NAFTA arbitration at the expense of domestic appeal or review when, in the general run of cases, domestic appeal or review would offer more wide-ranging review as they are not confined to breaches of international law.

163. Article 1121 may have consequences where a claimant complains of a violation of international law not constituted by a judicial act. That is not a matter which arises here.

164. For the reasons given, Article 1121 involves no waiver of the duty to pursue local remedies in its application to a breach of international law constituted by a judicial act.

XXIV. THE SCOPE AND CONTENT OF THE OBLIGATION TO PURSUE LOCAL REMEDIES

165. The question then is as to the scope and content of the obligation to pursue local remedies in a case in which the alleged violation of international law is founded upon a judicial act. In such a case the pursuit of local remedies plays a part in creating the ground of complaint that there has been a breach of international law. There is a body of opinion which supports the view that the complainant is bound to exhaust any remedy which is adequate and effective (*The Finnish Ships Arbitration Award*, May 9, 1934, 3 RIAA, 1480 at 1495; *Nielsen v Denmark* [1958-1959] Yearbook of the European Commission on Human Rights, 412 at 436, 438, 440, 444) so long as the remedy is not "obviously futile" (*The Finnish Ships Arbitration Award* at 1503-1505).

166. On the other hand, the requirement has been described as one "which is not a purely technical or rigid rule" and one "which international tribunals have applied with a considerable degree of elasticity" (*Norwegian Loans Case* (1957) ICJR 9 at 39 per Lauterpacht J). In conformity with this approach, one commentator has suggested that the result in any particular case will depend upon a balancing of factors. So in a case where it is highly unlikely that resort to further remedies will be favourable to a claimant, the correct conclusion may be that local remedies have been exhausted "if the cost involved in the proceeding further considerably outweighs the possibility of any satisfaction resulting"' (Mummery, "The Content of the Duty to Exhaust Local Remedies" (1964) 58 Am. Jo. Intl. Law 389 at 401). The same commentator favours formulation of the issue in terms of whether the local remedy "may reasonably be regarded as incapable of producing satisfactory reparation" (ibid). Although this formulation appears to be directed to a case in which the claim is based on an antecedent breach of international law, the formulation is equally appropriate to obtaining redress as to producing reparation.

167. Here, however, the question concerns the availability of the remedy rather than its adequacy or even its effectiveness. At least that is true of the appeal to the Mississippi Supreme Court. It was an adequate and fully effective appeal. The obligation of the claimant, who complains that a judicial act is a violation of international law, to afford the host State the opportunity of remedying the default in the court below, by taking the matter to a higher court, is subject to reasonable practical limitations. Thus, Sohn and Baxter, "Convention on the International Responsibility of States for Injuries to Aliens", 12th Draft (1961) 168 in their commentary on Article 19, sub-paragraph 2(b), state: "The subparagraph is intended to preclude a respondent State from maintaining that a local remedy exists when in fact resort to that remedy is a practical impossibility and to permit a claimant to introduce evidence of the practical workings of justice, as distinct from the theoretical state of the law as reflected in code, statute, decision and learned writing. (…) It may be that an alien in fact finds it difficult to employ an existing local remedy by reason of the existence of some other procedural barrier in the law, such as a requirement of posting excessive security for costs, or where the law leaves to the discretion of a court official the amount of security for costs to be posted, an order for the posting of a prohibitive amount (…). Since the purpose of the Article as a whole is to require exhaustion of a remedy only if it is reasonably available, it is important to provide not only for the case where a remedy is unavailable as a matter of law, but also for the case where a theoretically available remedy cannot in fact be utilized."

168. This passage, in our view, correctly expresses the scope and content of the principle relating to exhaustion of local remedies. It is an obligation to exhaust remedies which are effective and adequate and are reasonably available to the complainant in the circumstances in which it is situated.

169. Availability is not a standard to be determined or applied in the abstract. It means reasonably available to the complainant in the light of its situation, including its financial

and economic circumstances as a foreign investor, as they are affected by any conditions relating to the exercise of any local remedy.

170. If a State attaches conditions to a right of appeal which render exercise of the right impractical, the exercise of the right is neither available nor effective nor adequate. Likewise, if a State burdens the exercise of the right directly or indirectly so as to expose the complainant to severe financial consequences, it may well be that the State has by its own actions disabled the complainant from affording the State the opportunity of redressing the matter of complaint. The scope of the need to exhaust local remedies must be considered in the light of these considerations.

171. Whether it has been satisfied in this case depends upon an examination of events subsequent to the trial, events to which we now turn.

215. Here we encounter the central difficulty in Loewen's case. Loewen failed to present evidence disclosing its reasons for entering into the settlement agreement in preference to pursuing other options, in particular the Supreme Court option which it had under active consideration and preparation until the settlement agreement was reached. It is a matter on which the onus of proof rested with Loewen. It is, however, not just a matter of onus of proof. If, in all the circumstances, entry into the settlement agreement was the only course which Loewen could reasonably be expected to take, that would be enough to justify an inference or conclusion that Loewen had no reasonably available and adequate remedy.

216. Although entry into the settlement agreement may well have been a reasonable course for Loewen to take, we are simply left to speculate on the reasons which led to the decision to adopt that course rather than to pursue other options. It is not a case in which it can be said that it was the only course which Loewen could reasonably be expected to take.

217. Accordingly, our conclusion is that Loewen failed to pursue its domestic remedies, notably the Supreme Court option and that, in consequence, Loewen has not shown a violation of customary international law and a violation of NAFTA for which Respondent is responsible.

XXX. RESPONDENT'S ADDITIONAL OBJECTION TO COMPETENCE AND JURISDICTION

220. Subsequent to the October 2001 hearings on the merits, events occurred which raised questions about TLGI's capacity to pursue its NAFTA claims and gave rise to Respondent filing a further objection to competence and jurisdiction on January 25, 2002. TLGI had filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code, and a reorganization plan was approved by the bankruptcy courts of the United States and Canada. Under that plan, TLGI ceased to exist as a business entity. All of its business operations were reorganized as a United States corporation. In apparent recognition of the obvious problem that would be caused by a United States

entity pursuing a claim against the United States under NAFTA, TLGI, immediately prior to its going out of business, assigned all of its right, title and interest to the NAFTA claim to a newly created corporation (discreetly called Nafcanco - a play on the words NAFTA and Canada). It would appear that the NAFTA claim is the only asset of Nafcanco, and the pursuit of the claim its only business.

221. Following the filing of Respondent's objection, appropriate pleadings were filed by both sides and on June 6, 2002, the Tribunal held a hearing on the objection. Canada and Mexico again submitted their views on the issues that were raised at the hearing.

222. NAFTA is a treaty intending to promote trade and investment between Canada, Mexico and the United States. Since most international investment occurs in the private sector, investment treaties frequently seek to provide some kind of protection for persons engaging in such investment. Until fairly recently, such protection was implemented and pursued by the States themselves. When Mexico expropriated the investment of some American oil companies many years ago, the claims of the American companies were pursued by American diplomatic authorities. When the United States seized the assets of Iranian nationals during the hostage crisis of the 1970s, Iran and the United States worked out a settlement as sovereign nations.

223. Chapter Eleven of NAFTA represents a progressive development in international law whereby the individual investor may make a claim on its own behalf and submit the claim to international arbitration, as TLGI has done in the instant case. The format of NAFTA is clearly intended to protect the investors of one Contracting Party against unfair practices occurring in one of the other Contracting Parties. It was not intended to and could not affect the rights of American investors in relation to practices of the United States that adversely affect such American investors. Claims of that nature can only be pursued under domestic law and it is inconceivable that sovereign nations would negotiate treaties to supplement or modify domestic law as it applies to their own residents. Such a collateral effect on the domestic laws of the NAFTA Parties was clearly not within their contemplation when the treaty was negotiated.

224. If NAFTA could be used to assert the rights of an American investor in the instant case, it would in effect create a collateral appeal from the decision of the Mississippi courts, by definition a unit of the United States government. As was pointed out earlier, the object of NAFTA is to protect outsiders who do not have access to the political or other avenues by which to seek relief from nefarious practices of governmental units.

225. Claimant TLGI urges that since it had the requisite nationality at the time the claim arose, and, antedate the time that the claim was submitted, it is of no consequence that the present real party in interest - the beneficiary of the claim - is an American citizen. Both as a matter of historical and current international precedent, this argument must fail. In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as the *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.

240. In regard to the question of costs the Tribunal is of the view that the dispute raised difficult and novel questions of far-reaching importance for each party, and the Tribunal therefore makes no award of costs.

ORDERS

For the foregoing reasons the Tribunal unanimously decides -
(1) That it lacks jurisdiction to determine TLGI's claims under NAFTA concerning the decisions of United States courts in consequence of TLGI's assignment of those claims to a Canadian corporation owned and controlled by a United States corporation.
(2) That it lacks jurisdiction to determine Raymond L. Loewen's claims under NAFTA concerning decisions of the United States courts on the ground that it was not shown that he owned or controlled directly or indirectly TLGI when the claims were submitted to arbitration or after TLGI was reorganized under Chapter 11 of the United States Bankruptcy Code.
(3) TLGI's claims and Raymond L. Loewen's are hereby dismissed in their entirety.
(4) That each party shall bear its own costs, and shall bear equally the expenses of the Tribunal and the Secretariat.

XXXI. CONCLUSION

241. We think it right to add one final word. A reader following our account of the injustices which were suffered by Loewen and Mr. Raymond Loewen in the Courts of Mississippi could well be troubled to find that they emerge from the present long and costly proceedings with no remedy at all. After all, we have held that judicial wrongs may in principle be brought home to the State Party under Chapter Eleven, and have criticised the Mississippi proceedings in the strongest terms. There was unfairness here towards the foreign investor. Why not use the weapons at hand to put it right? What clearer case than the present could there be for the ideals of NAFTA to be given some teeth?

242. This human reaction has been present in our minds throughout but we must be on guard against allowing it to control our decision. Far from fulfilling the purposes of NAFTA, an intervention on our part would compromise them by obscuring the crucial separation between the international obligations of the State under NAFTA, of which the fair treatment of foreign investors in the judicial sphere is but one aspect, and the much broader domestic responsibilities of every nation towards litigants of whatever origin who appear before its national courts. Subject to explicit international agreement permitting external control or review, these latter responsibilities are for each individual state to regulate according to its own chosen appreciation of the ends of justice. As we have sought to make clear, we find nothing in NAFTA to justify the exercise by this Tribunal of an appellate function parallel to that which belongs to the courts of the host nation. In the last resort, a failure by that nation to provide adequate means of remedy may amount to an international wrong but only in the last resort. The line may be hard to draw, but it is real. Too great a readiness to step from outside into the domestic arena,

attributing the shape of an international wrong to what is really a local error (however serious), will damage both the integrity of the domestic judicial system and the viability of NAFTA itself. The natural instinct, when someone observes a miscarriage of justice, is to step in and try to put it right, but the interests of the international investing community demand that we must observe the principles which we have been appointed to apply, and stay our hands.