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

COUNTER-MEMORIAL OF THE UNITED STATES OF AMERICA

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at 0818 (general counsel Peter Hyndman informing investors "we have great confidence in the Mississippi Supreme Court"); id. at 0823-24 (Ray Loewen informing investors "we have much confidence that everything will be corrected . . . in the appeals court").

Of course, between the time of the underlying events and the initiation of this proceeding, Loewen has had a radical change of heart about the Mississippi Supreme Court. But that change of heart, as even Loewen admits, is based on nothing concrete, such as newly-discovered evidence. See Neely II at 6. It is based, instead, on an inference about the elected Mississippi judiciary, an inference that Mr. Carvill (rightfully) rejected as "far too simple," and that Loewen itself deems impermissible under United States law. See TLGI Final Jurisdictional Sub. at 44. There is no evidence – direct or circumstantial – that the Mississippi Supreme Court was biased against Loewen. In no event could such an unsupported inference sustain so extreme a charge as a "denial of justice" under customary international law.

3. Claimants Misconstrue Article 1105's Obligations Of "Full Protection And Security" And "Fair And Equitable Treatment"

Claimants contend that, even if the Mississippi litigation did not rise to the level of a denial of justice under customary international law, their claim nevertheless survives under NAFTA Article 1105. According to Claimants, "[b]y incorporating both the 'full protection and security' and 'fair and equitable treatment' standards, Article 1105 affords even more protection to alien investments than does the 'international minimum standard.'" TLGI Mem. at 74; see also RLL Mem. at 56. Claimants are wrong.

Article 1105(1) requires a NAFTA State Party to "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 obligation of Article 1105(1), by its plain terms, is to provide "treatment *in accordance with international law*." "[F]air and equitable treatment" and "full protection and security" are provided as examples of the customary international law standards incorporated into Article 1105(1), not as obligations more expansive than the standards they illustrate. The plain language and structure of Article 1105(1) requires these concepts to be applied as and to the extent that they are recognized in customary international law, and *not* as obligations to be applied without reference to international custom.

a. "Fair and Equitable Treatment"

Claimants' suggestion that Article 1105(1) "goes 'far beyond' the minimum protections afforded to foreign investments under international law" (TLGI Mem. at 97) is rebutted not only by the plain language of the Article, but also by the historical context of the words "fair and equitable" in the Article. The most direct antecedent to the usage of "fair and equitable treatment" in international investment agreements is the OECD Draft Convention on the Protection of Foreign Property, which was first proposed in 1963 and revised in 1967.[86] The commentary to Article 1 of the OECD Draft Convention, which incorporated the standard of "fair and equitable treatment," noted that the standard reflected the "well-established general principle of international law that a State is bound to respect and protect the property of nationals of other States":[87]

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[86]See United Nations Conference on Trade & Development, Bilateral Investment Treaties in the Mid-1990s 54 (1998) ("The use of the standard of fair and equitable treatment in BITs dates from the OECD 1967 Draft Convention on the Protection of Foreign Property.").

[87]OECD, 1967 Draft Convention on the Protection of Foreign Property, reprinted in 7 I.L.M. 117, 119 (1968).