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

Representing the First Claimant

Mr Christopher F. Dugan (until March 10, 2003)
Mr James A. Wilderotter
Mr Gregory A. Castanias
Jones, Day, Reavis & Pogue

Representing the Second Claimant

Mr John H. Lewis, Jr.
Montgomery, McCracken, Walker & Rhoads
D. Geoffrey Cowper, QC
Fasken Martineau DuMoulin (from October 11, 2001)

Representing the Respondent

Mr Kenneth L. Doroshow (until July 8, 2002)
Mr Jonathan B. New (from July 8, 2002)
United States Department of Justice

Mr Mark A. Clodfelter
Mr Barton Legum
United States Department of State

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.

III. HISTORY OF PROCEEDINGS IN THIS ARBITRATION

11. There is no occasion to set out the procedural history of this arbitration before the Tribunal delivered its Decision dated January 5, 2001, on Respondent's objection to competence and jurisdiction. The Decision fully recites that history. It will, however, be necessary to refer later to the grounds of that objection because they were not fully determined by the Decision. The Decision is attached to this Award.

12. By that Decision dated January 5, 2001, the Tribunal dismissed Respondent's objection to competence and jurisdiction so far as it related to the first ground of objection[1] and adjourned the further hearing of Respondent's other grounds of objection and joined that further hearing to the hearing on the merits which was fixed for October 15, 2001. The Tribunal made orders –

    1. Respondent to file its counter-memorial on the merits within 60 days of the date of this Decision.
    2. Claimants to file their replies within 60 days of the time limited for the filing of Respondent's counter-memorial on the merits.
    3. Respondent to file its rejoinder within 60 days of the time limited for the filing of Claimants' replies.

[1] Sir Robert Jennings in his Third Opinion misstates the Tribunal's Decision when he says that the Tribunal rejected Respondent's argument that the decisions of the Mississippi courts were not "measures' because they were not "final' acts of the United States court system.

IV. REPRESENTATION

13. First Claimant has been represented by –

Mr Christopher F. Dugan	Jones, Day, Reavis & Pogue (until March 10, 2003)
Mr James A. Wilderotter	Jones, Day, Reavis & Pogue
Mr Gregory A. Castanias	Jones, Day, Reavis & Pogue

Second Claimant has been represented by –

Mr John H. Lewis, Jr.	Montgomery, McCracken, Walker & Rhoads
D. Geoffrey Cowper, QC	Fasken Martineau DuMoulin (from October 11, 2001)

14. Respondent has been represented by –

Mr Kenneth L. Doroshow	United States Department of Justice (until July 8, 2002)
Mr Jonathan B. New	United States Department of Justice (from July 8, 2002)
Mr Mark A. Clodfelter	United States Department of State
Mr Barton Legum	United States Department of State

15. On October 10, 2001, the Government of Canada and the Government of Mexico gave written notice of their intention to attend the hearing on the merits.

16. Canada has been represented by –

Mr Fulvio Fracassi	Department of Foreign Affairs and International Trade Ottawa, Canada
Ms Sheila Mann	Department of Foreign Affairs and International Trade Ottawa, Canada

17. Mexico has been represented by –

Mr Hugo Perezcano Díaz	Secretaría de Comercio y Fomento Industrial (SECOFI), Mexico City, Mexico

V. HISTORY OF THE PROCEEDINGS SINCE THE DECISION ON COMPETENCE AND JURISDICTION

18. Respondent's Counter-Memorial was filed on March 30, 2001, pursuant to an extension of time granted on January 31, 2001.

19. Claimants' Joint Reply was filed on June 8, 2001, pursuant to an extension of time granted on May 15, 2001.

20. Respondent's Rejoinder was filed on August 27, 2001, pursuant to an extension of time granted on August 17, 2001.

21. On August 9, 2001, Respondent filed a motion for the disqualification of Yves Fortier, QC as a member of the Tribunal in circumstances arising out of the proposed merger of Mr Fortier's firm with a firm which had previously acted for Claimants in connection with their bankruptcy reorganisation under Chapter Eleven of the United States Bankruptcy Code.

22. On September 10, 2001, Mr Fortier resigned from his office as a member of the Tribunal.

23. On September 13, 2001, Sir Anthony Mason and Judge Mikva, pursuant to Article 15(3) of the ICSID Arbitration (Additional Facility) Rules consented to Mr Fortier's resignation.

24. On September 14, 2001, Lord Mustill was duly appointed by Claimants as a member of the Tribunal in place of Mr Fortier.

25. The oral hearing on the merits, incorporating the joined unresolved objections to competence and jurisdiction, took place in Washington DC on October 15, 16, 17, 18 and 19, 2001.

26. At the conclusion of the oral hearing, the Tribunal made orders granting leave to Canada and Mexico to file written submissions pursuant to NAFTA Article 1128 and to the Parties to file written submissions in reply.

27. On November 9, 2001, Canada and Mexico filed written submissions.

28. On December 7, 2001, Claimants filed a joint reply and Respondent filed a response to the written submissions of Canada and Mexico.

29. Subsequently, on January 25, 2002 Respondent filed the motion to dismiss Claimants' NAFTA claims for lack of jurisdiction, based on the reorganization of TLGI under Chapter Eleven of the United States Bankruptcy Code. An element in that reorganization was the assignment by TLGI of its NAFTA claims to a newly created Canadian corporation, Nafcanco, which was owned and controlled by LGII (re-named "Alderwoods, Inc", a United States corporation).

VI. THE CIRCUMSTANCES GIVING RISE TO CLAIMANTS' CLAIM

30. The dispute which gave rise to the litigation in Mississippi State Court related to three contracts between O'Keefe and the Loewen companies and a settlement agreement made on August 19, 1991 whereby Loewen agreed to sell an insurance company and a related trust fund to O'Keefe and to provide O'Keefe with the exclusive right to provide certain insurance policies sold through Loewen funeral homes. By the settlement agreement, for its part O'Keefe agreed to dismiss an action it had brought against Loewen relating to the three contracts, to sell to Loewen two O'Keefe funeral homes, and to assign to Loewen an option which O'Keefe held on a cemetery tract north of Jackson, Mississippi.

31. The origin of the dispute lay in competition between two funeral companies in the Gulf Coast region of Mississippi. In the Gulfport area, the Riemann brothers owned and operated funeral homes and funeral insurance companies. In the Biloxi area, O'Keefe owned and operated funeral homes and funeral insurance companies. Gulf National Life Insurance Company ("Gulf") was one such funeral insurance company owned and operated by O'Keefe.

32. Loewen, which had embarked on a grand strategy of acquiring funeral homes across North America, purchased the Riemann businesses in January, 1990. The Riemann businesses were restructured into a holding company known as "Riemann Holdings, Inc.", of which LGII became owner as to 90%, the Riemann interests holding the remaining 10%. Loewen retained the previous owners and managers as salaried

employees of Loewen. Despite the change in ownership, Riemann continued to advertise itself as locally owned – "we haven't sold out: we just have a new partner, The Loewen Group International". O'Keefe challenged Riemann's claim that it was locally owned. O'Keefe published advertisements in the Gulf Coast community, asserting that Riemann was really owned by Loewen which was a Canadian company financed by an Asian Bank. This was part of an advertising campaign designed to encourage support for the O'Keefe local business as against foreign-owned and foreign financed competition.

33. Loewen extended its Mississippi interests to Jackson, the largest metropolitan area in the State, by purchasing the Wright & Ferguson Funeral Home, the largest funeral home in Jackson. Wright & Ferguson had an association with O'Keefe dating back to 1974, when O'Keefe purchased the exclusive right to sell Gulf funeral insurance through the Wright & Ferguson Funeral Home.

34. Loewen began to sell insurance through Wright & Ferguson Funeral Homes, despite Gulf's exclusive right under the 1974 contract. O'Keefe's complaints about this breach of the contract, along with financial difficulties that O'Keefe was experiencing, led to negotiations between O'Keefe and Loewen which failed to result in any agreement. Subsequently O'Keefe began a lawsuit in connection with the breach of contract.

35. It was then that the settlement agreement of August 19, 1991 was reached. The agreement provided for completion within 120 days, time being of the essence. Prompt completion was important to O'Keefe because O'Keefe was under review by the state regulatory authority. There was evidence that Loewen was aware of O'Keefe's difficulties with the regulatory authority and of the adverse consequences for O'Keefe if the agreement were not completed in the 120 days. Moreover, the Riemanns objected strongly to the agreement, so much so that Loewen told them that the deal would not close without their approval.

36. There was a dispute over the 1991 agreement and its legal effect. While the parties were negotiating about that agreement the US Federal Bureau of Investigation seized

the Mississippi Insurance Commissioner's records relating to the O'Keefe insurance companies.

37. After the negotiations broke down, O'Keefe filed an amended complaint alleging breach of the 1991 agreement and fresh claims of common law fraud and violations of Mississippi anti-trust law. That complaint sought actual damages of $5 million.

38. In May 1992, the Mississippi Insurance Commissioner placed Gulf under administrative supervision. O'Keefe's complaint was further amended to include claims for consequential damages allegedly suffered as a result of administrative supervision.

VII. THE NATURE OF CLAIMANT'S CLAIM

39. Claimants' case is that the verdict for $500,000,000 and the decisions refusing to relax the bonding requirements are "measures adopted or maintained by a Party" relating to:

    (a) investors of another Party;

    (b) within the meaning of NAFTA, Article 1101.1.

Claimants argue that

(1) the trial court, by admitting extensive anti-Canadian and pro-American testimony and prejudicial counsel comment, violated Article 1102 of NAFTA which bars discrimination against foreign investors and their investments;

(2) the discrimination tainted the inexplicably large verdict;

(3) the trial court, by the way in which it conducted the trial, in particular by its conduct of the *voir dire* and its irregular reformation of the initial jury verdict for $260,000,000, by permitting extensive nationality-based, racial and class-based testimony and counsel comments, violated Article 1105 of NAFTA which imposes a minimum standard of treatment for investments of foreign investors, including a duty of "full protection and security" and a right to "fair and equitable treatment" of foreign investors;

(4) the excessive verdict and judgment (even apart from the discrimination) violated Article 1105;

(5) the Mississippi courts' arbitrary application of the bonding requirement violated Article 1105; and

(6) the discriminatory conduct, the excessive verdict, the denial of Loewen's right to appeal and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated appropriation of investments of foreign investors.

40. Claimants allege that Respondent is liable for Mississippi's NAFTA breaches under Article 105, which requires that the Parties to NAFTA shall ensure that all necessary measures are taken to give effect to the provisions of the Agreement, including their observance by State and provincial governments. Claimants also allege that, by tolerating the misconduct which occurred during the O'Keefe litigation, Respondent directly breached Article 1105, which imposes affirmative duties on Respondent to provide "full protection and security" to investments of foreign investors, including "full protection and security" against third-party misconduct.

VIII. THE GROUNDS OF RESPONDENT'S OBJECTION TO COMPETENCE AND JURISDICTION

41. By its Memorial on Competence and Jurisdiction, Respondent objected to the competence and jurisdiction of this Tribunal on the following grounds:

(1) the claim is not arbitrable because the judgments of domestic courts in purely private disputes are not "measures adopted or maintained by a Party" within the scope of NAFTA Chapter Eleven;

(2) the Mississippi court judgments complained of are not "measures adopted or maintained by a Party" and cannot give rise to a breach of Chapter Eleven as a matter of law because they were not final acts of the United States judicial system;

(3) a private agreement to settle a litigation matter out of court is not a government "measure" within the scope of NAFTA Chapter Eleven;

(4) the Mississippi trial court's alleged failure to protect against the alien-based, racial and class-based references cannot be a "measure" because Loewen never objected to such references during the trial; and

(5) Raymond Loewen's Article 1117 claims should be dismissed because he does not "own or control" the enterprise at issue.

IX. THE ISSUES

42. In stating the issues and in dealing with them, we have addressed the sectional and particular arguments presented by counsel. Without in any way criticizing the presentation of the arguments in that form, we emphasise that those particular arguments are designed to elucidate the one substantial question, namely whether the judgment and orders made by the Mississippi Courts against Loewen amounted to violations of NAFTA for which Respondent is liable.

43. Respondent maintains grounds (2) to (4) inclusive of its grounds of objection to competence and jurisdiction. As Respondent's substantive submissions on the merits cover much of the subject matter dealt with by the unresolved grounds of objection, we shall direct our attention in the first instance to the substantive issues.

(a) Issues concerning the Trial

44. Issues of fact and issues of law arise in connection with the trial of the action in Mississippi State Court before Judge Graves and a jury. According to Claimants, the trial resulted in a grossly excessive verdict, brought about by conduct of O'Keefe's counsel, notably Mr Gary, which was allowed by the trial judge. Claimants contend that the conduct of the trial, for which Respondent is responsible under NAFTA, involved violations of NAFTA Articles 1102, 1105 and 1110. Respondent, on the other hand, contends that Claimants' complaints about the trial are grossly exaggerated and that they do not constitute NAFTA violations. Respondent relies upon grounds (2), (3) and (4) of its objection to competence and jurisdiction as substantive defences to the claim. Respondent argues also that Claimants are not entitled to rely on the conduct constituting the alleged NAFTA violations because they did not object to that conduct at the trial. Respondent further contends that flawed decisions taken at trial by Loewen, not NAFTA violations, were the cause of the verdict.

45. The issues of fact which arise for determination, in the light of the cases presented by the Parties, may be expressed as follows:

(1) Did the trial court allow O'Keefe to engage in a strategy of exciting anti-Canadian, pro-Mississippi animus?

(2) Did the trial court allow O'Keefe to engage in a strategy of racial antagonism?

(3) Did the trial court allow O'Keefe to engage in class-based animus?

(4) Does the conduct of the trial court give rise to an inference of bias against Loewen?

(5) Was the trial flawed by other major irregularities of a kind that could result in manifest injustice?

(6) What steps, if any, did Loewen take at the trial to object to conduct of the kind described in (1), (2) and (3) above, or to protect themselves from it?

46. (1) The next question is whether the conduct of which Claimants, if established, complain tainted the verdict and whether that conduct contributed to an excessive verdict. These questions calls for consideration of the decisions taken at the trial by Loewen and for an examination of the amounts awarded for

(a) punitive damages;

(b) economic damages;

(c) emotional damages.

(2) A separate question is whether there was any legal or evidentiary basis for O'Keefe's antitrust and oppression claims.

47. Ultimately, so far as the conduct of the trial is concerned, the following questions of law arise for determination:

(1) Was the conduct of the trial so flawed as to violate NAFTA Articles 1102, 1105 and 1110 or any of them, assuming the verdict and judgment of Mississippi State Court to be a "measure adopted or maintained by a Party within the scope of NAFTA Chapter Eleven"?

(2) Did Claimants' failure to object at the trial to conduct constituting NAFTA violations disentitle Claimants from relying upon them?

(b) Issues concerning the supersedeas bonding requirement

48. Other issues concern the supersedeas bonding requirement and the refusal of the Mississippi courts to relax the requirement. Claimants make no challenge to the bonding requirement itself. Claimants argue that the refusals to relax the bonding requirement constituted independent violations of NAFTA provisions. Claimants also argue that the refusal to relax the bonding requirement effectively deprived Loewen of the prospect of appealing the verdict entered by the trial court. In this respect Claimants assert that the deprivation of the prospect of appeal satisfied the principle of finality, if such a principle is applicable to a claim under NAFTA based on the decision of a trial court. Claimants also contend that the decisions not to relax the bonding requirement in a situation in which Loewen was exposed to immediate execution on its assets subjected Loewen to economic duress. The claim of economic duress, if soundly based, would lead to a challenge to set aside the settlement agreement under which Loewen agreed to pay to O'Keefe $175 million. Yet there is no suggestion that Loewen seeks to rescind or set aside that agreement. The claim of economic duress may, however, be relevant in establishing that entry into the agreement was consequential upon violation of one or more of the NAFTA articles.

49. The issues of fact in relation to the decisions of the Mississippi courts refusing relaxation of the bonding requirement and Loewen's entry into the settlement agreement are:

(1) Were the refusals to relax the bonding requirement the result of an institutional or other bias on the part of the Mississippi judiciary against Loewen by virtue of Loewen's nationality?
(2) Did the refusals to relax the bonding requirement effectively foreclose the options otherwise available to Loewen to challenge by way of appeal or otherwise the verdict entered by the trial court?
(3) Was Loewen's decision to enter into the settlement agreement a business judgment or decision on the part of Loewen?

50. The principal questions of law which arise in consequence of the refusals to relax the bonding requirement and the entry into the settlement agreement are:

(1) Did the refusals constitute a violation of the NAFTA articles on its own or in combination with the jury's verdict?
(2) Did the refusals satisfy the principle of finality, thereby enabling Claimants to hold Respondent responsible for NAFTA violations at the trial?
(3) If entry into the settlement agreement was the result of a business decision by Loewen, does that preclude Claimants from relying on NAFTA violations?

51. The claim before the Tribunal is a claim under international law for violations of NAFTA. It is for the Tribunal to decide the issues in dispute in accordance with NAFTA and applicable rules of international law. NAFTA Article 1131.1. The Tribunal is concerned with domestic law only to the extent that it throws light on the issues in dispute and provides domestic avenues of redress for matters of which Claimants complain. The Tribunal cannot under the guise of a NAFTA claim entertain what is in substance an appeal from a domestic judgment.

52. The claim before the Tribunal relates to the conduct of the Mississippi trial court and the Mississippi Supreme Court for whose acts, if they constitute a violation of NAFTA, Respondent is responsible (NAFTA Article 105). Respondent is not responsible under NAFTA for the conduct of O'Keefe and its counsel in the Mississippi litigation, unless responsibility for that conduct can be attributed to the Mississippi courts.

53. As will appear hereafter, Judge Graves failed in his duty to take control of the trial by permitting the jury to be exposed to persistent and flagrant appeals to prejudice on the part of O'Keefe's counsel and witnesses. Respondent is responsible for any failure on the part of the trial judge in failing to take control of the trial so as to ensure that it was fairly conducted in this respect.

X. THE TRIAL

54. Having read the transcript and having considered the submissions of the parties with respect to the conduct of the trial, we have reached the firm conclusion that the conduct of the trial by the trial judge was so flawed that it constituted a miscarriage of justice amounting to a manifest injustice as that expression is understood in international law. Whether this conclusion results in a violation of Article 1105 depends upon the resolution of Respondent's submissions still to be considered, in particular the submission that State responsibility arises only when final action is taken by the State's judicial system as a whole.

55. In the succeeding paragraphs we set out the reasons for the conclusion stated in para. 54 above as well as the reasons why we conclude that, in other respects, Claimants' case must be rejected.

(a) O'Keefe's nationality strategy

56. O'Keefe's case at trial was conducted from beginning to end on the basis that Jerry O'Keefe, a war hero and "fighter for his country", who epitomised local business interests, was the victim of a ruthless foreign (Canadian) corporate predator. There were many references on the part of O'Keefe's counsel and witnesses to the Canadian nationality of Loewen ("Ray Loewen and his group from Canada"). Likewise, O'Keefe witnesses said that Loewen was financed by Asian money, these statements being based on the fact that Loewen was partly financed by the Hong Kong and Shanghai Bank, an English and Hong Kong bank which was erroneously described by Jerry O'Keefe in evidence as the "Shanghai Bank". Indeed, Jerry O'Keefe, endeavouring to justify an earlier advertising campaign in which O'Keefe had depicted its business under American and Mississippi flags and Loewen under Canadian and Japanese flags, stated that the Japanese may well control both the "Shanghai Bank" and Loewen but he did not know that. O'Keefe's strategy of presenting the case in this way was linked to Jerry O'Keefe's fighting for his country against the Japanese and the exhortation in the closing address of Mr Gary (lead counsel for O'Keefe) to the jury to do their duty as Americans and Mississippians.

This strategy was calculated to appeal to the jury's sympathy for local home-town interests as against the wealthy and powerful foreign competitor.

57. Several additional examples will serve to illustrate this strategy. In the *voir dire* and opening statements, Mr Gary stated that he had "teamed up" with Mississippi lawyers "to represent one of your own, Jerry O'Keefe and his family". Mr Gary also stated "The Loewen Group, Ray Loewen, Ray Loewen is not here to-day. The Loewen Group is from Canada. He's not here to-day. Do you think that every person should be responsible and should step up to the plate and face their own actions? Let me see a show of hands if you feel that everybody in America should have the responsibility to do that". Whilst the conduct of the *voir dire* may not in itself have been conspicuously out of line with practice in Mississippi State courts, the skilful use by counsel for Claimants of the opportunity to implant inflammatory and prejudicial materials in the minds of the jury set the tone for the trial when it actually began.

58. In the *voir dire* O'Keefe's counsel sought an assurance from potential jurors that they would be willing to award heavy damages. Once again, in their opening statements, O'Keefe's counsel urged the jury to exercise "the power of the people of Mississippi" to award massive damages. O'Keefe's counsel drew a contrast between O'Keefe's Mississippi antecedents and Loewen's "descent on the State of Mississippi".

59. Emphasis was constantly given to the Mississippi antecedents and connections of O'Keefe's witnesses. By way of contrast Mr Gary, in cross-examination of Raymond Loewen, repeatedly referred to his Canadian nationality, noted that he had not "spent time" in Mississippi and questioned him about foreign and local funeral home ownership. Jerry O'Keefe, in his evidence, pointed out that Loewen was a foreign corporation, its "payroll checks come out of Canada" and "their invoices are printed in Canada".

60. An extreme example of appeals to anti-Canadian prejudice was evidence given by Mr Espy, former United States Secretary of State for Agriculture who, called to give evidence of the good character of Jerry O'Keefe, spoke of his (Espy's) experience in protecting "the American market" from Canadian wheat farmers who exported low priced wheat into the American market with which American producers could not

compete and later, having secured a market, then jacked up the price. The tactic of thrusting prejudicial comment on to the cross-examiner was not confined to Mr Espy. It was a feature of Jerry O'Keefe's answers in cross-examination.

61. The strategy of emphasizing O'Keefe's American nationality as against Loewen's Canadian origins reached a peak in Mr Gary's closing address. He likened Jerry O'Keefe's struggle against Loewen with his war-time exploits against the Japanese, asserting that he was motivated by "pride in America" and "love for your country". By way of contrast, Mr Gary characterized Loewen's case as "Excuse me, I'm from Canada". Indeed, Mr Gary commenced his closing address by emphasizing nationalism:

> "[Y]our service on this case is higher than any honor that a citizen of this country can have, short of going to war and dying for your country." (Transcript at 5539).

He described the American jury system as one that O'Keefe

> "fought for and some died for" (Transcript at 5540-41).

Mr Gary said

> "they [Loewen] didn't know that this man didn't come home just as an ace who fought for his country – he's a fighter … He'll stand up for America and he has" (Transcript at 5544).

62. Mr Gary returned to the same theme at the end of his closing address:

> " [O'Keefe] fought and some died for the laws of this nation, and they're [Loewen] going to put him down for being American" (Transcript at 5588).

Mr Gary reminded the jury that many of O'Keefe's witnesses were Mississippians (Transcript at 5576,5578, 5589, 5591). On the other hand, Mr Gary characterized Loewen as a foreign invader who "came to town like gang busters. Ray came sweeping through …" (Transcript at 5548). Mr Gary even repeated the prejudicial evidence given by Mr Espy about the Canadian wheat farmers. Mr Gary likened Loewen to the Canadian wheat farmers. Loewen would "come in" and purchase a funeral home and "no sooner than they got it, they jacked up the prices down here in Mississippi" (Transcript at 5588). Mr Gary continued on a similar theme when he

urged the jury to award substantial damages in doing their duty as Americans and Mississippians.

63. Respondent argues that the vast majority of references to nationality during the trial were made in a context in which O'Keefe was seeking to identify the location of disputed events. This argument is without substance. The references to nationality were an element in a strategy calculated to appeal to the jury's sentiment in favour of local interests. In conformity with this strategy, O'Keefe's counsel went out of their way to make it clear that they had no quarrel with Mr John Wright and David Riemann who were Mississippians, notwithstanding that Wright and Ferguson was a defendant in the action, Mr Wright was a director of LGII and the Riemanns held 10% of the share capital of the Riemann companies.

64. Respondent also argues that the introduction of evidence with an anti-Canadian basis was caused by Loewen's plan to portray O'Keefe as "a biased and unfair competitor who had engaged in an anti-foreigner advertising campaign" with a view to taking business away from Riemann Holdings. Respondent is correct in saying that Loewen pursued that plan. It misfired. The jury appears not to have been concerned by O'Keefe's advertising campaign. But the answer to Respondent's argument is that O'Keefe's counsel in the *voir dire* and in their opening statement had already embarked on their nationality strategy before Loewen's counsel made any reference to the advertising campaign in their opening statements. In any event, the persistent pursuit by O'Keefe of the nationality strategy went far beyond a response to Loewen's plan based on the advertising campaign.

(b) O'Keefe's racial politics strategy

65. Claimants' case that O'Keefe engaged in a strategy of racial politics is largely based on the efforts of O'Keefe to suggest that O'Keefe did business with black and white people alike whereas Loewen did business with white people. This aspect of Claimants' case must be seen in a context in which both parties were endeavoring to ingratiate themselves with the African-American jurors. Both parties added to their legal teams prominent African-American lawyers. The lead counsel on each side was a prominent African-American lawyer, Mr Gary for O'Keefe, Mr Sinkfield for

Loewen. Two of the remaining four Loewen lawyers were well-known African-American members of the Mississippi state legislature. Two other O'Keefe lawyers were African-American lawyers. After the midway point of the trial had been reached, Judge Graves observed that "the race card has already been played". Significantly, Judge Graves remarked "and I know that the jury knows what's going on". In allowing an O'Keefe witness to give racially based evidence, Judge Graves acknowledged that Loewen did not start this strategy and "was going to bring up the rear" in that contest.

66. Loewen sought to counter this strategy by showing that it also did business with the black community. Loewen called evidence of its contract with the National Baptist Convention in order to show that Loewen was contributing to the economic development of the black community. O'Keefe countered by claiming that Loewen was racially exploiting the National Baptist Convention and the many black people who were members of the Convention.

67. Respondent seeks to justify O'Keefe's racial politics strategy by arguing that it was relevant to the O'Keefe anti-trust case. Respondent argues that, in order to define Loewen's market power, it was necessary to establish that the relevant markets for comparison included white funeral homes owed by Loewen and excluded African-American funeral homes with which they did not compete. Yet O'Keefe's anti-trust case was that O'Keefe and Loewen competed only in predominantly white markets. In any event, the O'Keefe racial politics strategy went well beyond defining relevant markets.

(c) O'Keefe's appeal to class-based prejudice

68. Claimants further complain that Mr Gary repeatedly portrayed Loewen as a large, wealthy foreign corporation and contrasted Jerry O'Keefe as a small, local, family businessman. There were a number of references by O'Keefe's counsel emphasizing this contrast. These references culminated in Mr Gary's closing address in which he incited the jury to put a stop to Loewen's activities. Speaking of Jerry O'Keefe, Mr Gary said:

> "He doesn't have the money that they have nor the power, but he has heart and character, and he refused to let them shoot him down."
> "You know your job as jurors gives you a lot of power … You have the power to bring major corporations to their knees when they are wrong. You can see wrong, make it right. Suffering and stop it."
> "Ray comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get to a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him. Now, they've got to be stopped … Do it, stop them so in years to come anybody should mention your service for some 50 odd days on this trial, you can say 'Yes, I was there', and you can talk proud about it."
> "1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may never get this chance again. And you're not just helping the people of Mississippi but you're helping poor people, grieving families everywhere. I urge you to put your foot down. Don't let them get away with it. Thank you, and may God bless you all."

69. Respondent seeks to justify these tactics on the basis that O'Keefe complained that Loewen exploited "its unequal financial means to oppress the Plaintiffs". The rhetoric of O'Keefe's counsel went well beyond any legitimate exercise in ventilating O'Keefe's oppression claim which, as will appear, was not submitted by Judge Graves to the jury.

70. It is artificial to split the O'Keefe strategy into three segments of nationality-based, race and class-based strategies. When the trial is viewed as a whole right through from the *voir dire* to counsel's closing address, it can be seen that the O'Keefe case was presented by counsel against an appeal to home-town sentiment, favouring the local party against an outsider. To that appeal was added the element of the powerful foreign multi-national corporation seeking to crush the small independent competitor who had fought for his country in World War II. Describing 'Loewen' as a Canadian was simply to identify Loewen as an outsider. The fact that an investor from another state, say New York, would or might receive the same treatment in a Mississippi court as Loewen received is no answer to a claim that the O'Keefe case as presented invited the jury to discriminate against Loewen as an outsider.

XI. LOEWEN'S FAILURE TO OBJECT TO O'KEEFE'S PREJUDICIAL CONDUCT AT THE TRIAL AND ITS CONSEQUENCES

71. Respondent also argues that Loewen's counsel were at fault in failing to object to O'Keefe's nationality and racial politics strategy and appeals to class prejudice. The point of this argument is to avoid attributing to the trial judge any part of the responsibility for allowing O'Keefe to engage in these strategies and appeals. If Loewen's counsel did not object, then, so the argument runs, there was no error on the part of the trial judge in failing to intervene of his own motion. For Claimants to succeed in their claim, they must establish that the trial judge permitted or failed to take steps (which he should have taken) to prevent the alleged conduct of O'Keefe's counsel and witnesses. Respondent is only responsible in international law for the conduct of the Mississippi courts.

72. The transcript discloses many occasions when Loewen's counsel did not object to comments or evidence on these matters when they could have done so. Likewise, there were occasions when they might have moved to have witness' comments deleted from the record on the ground that they were non-responsive. Mr Espy's reference to Canadian wheat farmers was an example.

73. In a jury trial, however, counsel are naturally reluctant to create the impression, by continuously objecting, that they are seeking to suppress relevant evidence or that they are relying on technicalities. So it is not to be expected that Loewen's counsel would object on every occasion when objectionable comment was made or inadmissible evidence was given. The question is whether Loewen's counsel sufficiently brought their objections to the attention of the trial judge and whether the trial judge was aware of the problem and should have taken action himself.

74. A reading of the transcript reveals that Loewen's counsel at the trial did not make any objections to evidence or comments on the ground that they were calculated to foment prejudice on the grounds of nationality, race or class. Claimants have been unable to point to any such objection. The silence of Loewen's counsel on these matters is a matter that calls for consideration in the light of the claims now pursued by Claimants.

75. With respect to O'Keefe's nationality strategy, the explanation for the absence of objection is obscure. Loewen's counsel may have considered that the risk of a verdict reflecting local favouritism was inherent in the litigation and that the best way of handling the problem was to nail O'Keefe with his unfair and misleading advertising campaign and rely on an instruction to the jury eliminating local favouritism. As it happened, Judge Graves did not give the jury the instruction sought by Loewen, a matter to which we shall come shortly. Loewen's counsel were certainly aware of the risk of local favouritism. They explored that risk with potential jurors in the *voir dire*. It may well be that the trial judge's unfavourable, dismissive, abrupt responses to their objections during the *voir dire*, reinforced by similar responses during the trial, led them to make the judgment that objections would be rejected and would result in prejudice to Loewen in the eyes of the jury.

76. With respect to the issue of race, the explanation for the absence of any objection may well be that Loewen's counsel, conscious of their own efforts to ingratiate themselves with the predominantly African-American jury, considered that the making of objections to O'Keefe's conduct would appear inconsistent and hypocritical.

77. The probable explanation for the absence of objection to class-based appeals to the jury is that Loewen's counsel regarded the problem as inherent in the litigation. Further, the making of an objection would only serve to highlight the advantage which Loewen enjoyed over O'Keefe in both wealth and power. So the giving of an appropriate jury instruction would be the best answer to the difficulty.

XII. STEPS TAKEN BY LOEWEN TO PROTECT ITS POSITION

78. In pre-trial proceedings, Loewen moved to dismiss the anti-trust, unfair competition and oppression claims on the ground that they were frivolous. These claims generated at the trial many of the appeals to prejudice. Judge Graves peremptorily dismissed this motion. Loewen also moved pre-trial to exclude evidence of special damages, including the emotional distress claim. This motion was also dismissed by Judge Graves.

79. Claimants now submit that the denial of the two motions effectively preserved the issues that prejudicial error was committed at trial by allowing evidence and arguments of counsel based on these claims. It does not follow, however, that the filing of these motions preserved Loewen's position in so far as their claim is based on prejudicial conduct and evidence.

80. In the *voir dire*, Loewen's counsel objected to Mr Gary seeking commitments from the jury panel in relation to their treatment of Loewen which he had described as "Ray Loewen and his group from Canada". The objection was overruled. Mr Gary then asked whether potential jurors would be willing "to render a verdict against Ray Loewen and his group and render a verdict for over $600 million?" An objection to that question was overruled.

81. On the first day of the trial, Judge Graves ruled in response to two objections by Loewen's counsel that character evidence would be admitted generally. Loewen counsel stated that the purpose of such evidence was to attract "sympathy and favor" from the jury. At the end of the trial, Judge Graves dismissed two motions for mistrial based on the character evidence. And, prior to the opening statements, the trial judge overruled objections to the placing before the jury panel an enlarged picture of all the members of the O'Keefe family and pictures of Jerry O'Keefe's military service.

82. Judge Graves, at the conclusion of the trial, rejected a jury instruction proposed by Loewen's counsel. The proposed instruction told the jury that they were not to be swayed by bias, prejudice, favour or other improper motive. This instruction was refused on the basis that it duplicated standard instruction "C-1". Judge Graves began his instructions to the jury with instruction "C-1", which is given in every case and addresses such general topics as the role of the jury, the court, the evidence and counsel's argument. Included in "C-1" was a short one-sentence warning against bias in general, which made no reference to nationality-based or racial bias in particular. The warning was in these terms:

> "You should not be influenced by bias, sympathy or prejudice."

83. When Judge Graves asked if there were any objections to the instructions (including C-1) which he had prepared, Loewen counsel sought a more elaborate direction on the topic. Although Judge Graves summarily rejected this objection when counsel acknowledged that there was nothing wrong with the Judge's proposed direction, it was clear that Claimant's counsel was seeking an expanded direction to fit the particular circumstances of the case.

84. Later Loewen's counsel submitted a specific instruction to address the risk of nationality-based, racial and class bias. The proposed instruction provided (App. at A2231-32):

> "The law is a respecter of no persons. All are equal in the eyes of the law without regard to race, ethnicity, national origin, wealth or social status.
>
> In deciding the issues presented in this case, you must not be swayed by bias or prejudice or favor or any other improper motive. The parties, the court and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the court, and reach a just verdict based on these two things alone, regardless of the consequences.
>
> This case should be considered and decided by you as a matter between parties of equal standing in the community, between persons or businesses of equal standing and holding the same or similar stations in life. A corporation or other business entity is entitled to the same fair trial at your hands as a private individual.
>
> The Loewen Group, Inc. is a corporation organized and having its principal place of business in Vancouver, British Columbia, Canada. Loewen Group International, Inc. is a corporation having its principal place of business in Covington, Kentucky, just across the Ohio River from Cincinnati. These parties are entitled to the same fair trial at your hands as are other parties who are residents of Mississippi such as the O'Keefes and the eight separate O'Keefe corporations that are Plaintiffs in this case. All persons and parties stand equal before the law and are to be dealt with as equals in this court of justice."

85. O'Keefe's counsel objected to this instruction as "cumulative" of the one-sentence warning. This objection was summarily upheld by Judge Graves, notwithstanding that the proposed instruction went far beyond the one-sentence warning in C-1 which was, in the light of the circumstances of this case, inadequate to counter the prejudice created by the way in which O'Keefe's case had been presented.

86. Loewen's counsel did not object to the prejudicial and extravagant appeals in Mr Gary's closing address to the jury. In the light of the trial judge's refusal of the jury instruction that had been sought, they may well have concluded that no purpose would be served by objecting.

87. Having regard to the history of the trial, and the way in which it was conducted by Judge Graves, we do not consider that failures to object on the part of Loewen's counsel amounted to a waiver of the grounds on which Claimants now contend that the conduct of the trial constituted a violation of NAFTA. There was a gross failure on the part of the trial judge to afford the due process due to Loewen in protecting it from the tactics employed by O'Keefe and its counsel. It defies common sense to suggest that Loewen's counsel by their conduct made an election not to pursue their objections to those tactics and that Loewen waived its objections to the lack of due process and to the grounds on which it now complains. Although "a State cannot base the charges made before an international court or tribunal … on objections or grounds, which were not previously raised before the municipal courts" (Judge Jiménez de Aréchaga, "International Law in the Past Third of a Century"159 "Recueil des Cours" (1978) at p 282), Claimants' grounds were sufficiently raised at trial.

XIII. THE REFORM OF THE INITIAL JURY VERDICT

88. In punitive damages cases, Mississippi law requires a bifurcated trial procedure. At the first stage, the jury determines liability and compensatory damages; at the second stage, the jury considers whether to award punitive damages. The jury cannot consider liability and punitive damages at the same time. Miss. Code Ann. §11-1-65(b-c).

89. In conformity with this provision, Judge Graves instructed the jury only on liability and compensatory damages issues. The parties did not adduce evidence or present argument on punitive damages in the first stage of the trial. Nor did Judge Graves give the jury any instructions about punitive damages.

90. In the jury *voir dire*, however, O'Keefe's counsel informed the panel of potential jurors that there was a claim for punitive damages. O'Keefe's counsel asked the

panel whether they would have any hesitation in awarding a verdict for over $600 million damages if the plaintiffs' case was proved according to law. Loewen's counsel's objection that this question amounted to seeking a commitment from the jury was overruled. In the early stages of the trial, O'Keefe's counsel made reference to the claim for punitive damages. Loewen's counsel objected but the trial judge gave no instruction to the jury in response to the objection.

91. The matters mentioned in paras. 89 and 90 may well have induced the jury to understand that they were to award both compensatory and punitive damages together if they found for O'Keefe on liability.

92. On November 1, 1995, the jury returned a verdict for O'Keefe of $260,000,000. This amount was said to be made up as follows (App. at A651-658):

(Wright and Ferguson contracts)	
Breach of three of the Wright and Ferguson contracts	31,200,000
Tortious interference with one or more of the three Wright and Ferguson contracts	7,800,000
Tortious (wilful, intentional) breach of a Wright and Ferguson contract	23,400,000
Breach of implied covenants of good faith and Fair dealing in a Wright and Ferguson contract	15,600,000
(1991 Agreement)	
Wilful and malicious breach of the 1991 Agreement	54,600,000
Tortious (wilful and intentional) breach of the 1991 Agreement	54,600,000
Breach of an implied covenant of good faith and Fair dealing in the 1991 Agreement	36,400,000
State anti-monopoly law breaches	18,200,000
Common law fraud	18,200,000
	$ 300,000,000

93. The individual amounts listed in the previous paragraph total $260,000,000 (the verdict brought in by the jury) not $300,000,000. There was no allocation in the individual amounts or in the total amount of the verdict as between compensatory and punitive damages.

94. A note written by the jury foreman to Judge Graves, after the verdict was announced, stated that the $260 million covered both compensatory damages of $100 million and punitive damages of $160 million, and that the $260,000,000 was a "negotiated compromise" between a low of $100,000,000 and a high of $300,000,000 (App. at A659).

95. How, in the light of the way the amount of $260,000,000 was calculated, the verdict was divided into $100,000,000 compensatory damages and $160,000,000 punitive damages remains a complete mystery. The way in which the verdict was constructed, including, as it did, compensatory and punitive damages, demonstrates that there was a failure adequately to instruct the jury to limit their initial award to compensatory damages.

96. Immediately after announcement of the verdict, Loewen moved for a mistrial, contending that the verdict was biased, excessive and procedurally defective because it covered punitive damages. Judge Graves denied the motion without discussion (Transcript at 5739). Judge Graves purported to reform the verdict. He informed the jury that he accepted the verdict of $100,000,000 compensatory damages but did not accept the award of $160,000,000 punitive damages. The jury may well have interpreted the rejection of this award as an indication that it was inadequate.

XIV. THE PUNITIVE DAMAGES HEARING AND VERDICT

97. Judge Graves then directed that the trial enter the punitive damages stage. It took place on November 2, 1995. Bernard Pettingill, an O'Keefe witness, testified that the net worth of Loewen was almost $3.2 billion, though he conceded that its market capitalization, based on the current value of its shares, was less than $1.8 billion. He explained the difference by saying that the market had failed to take into account the "future value" of Loewen's contract with the National Baptist Convention (Transcript at 5762).

98. On the other hand Loewen presented expert evidence that its entire net worth, as reflected in filings with the US Securities and Exchange Commission was between

$600 and $700 million (Transcript at 5771-5772) and that its market value was approximately $1.7 billion (Transcript at 5777).

99. In his closing address, Mr Gary returned to his earlier themes: "Ray Loewen is not here to-day. He's not here and I think that's the ultimate arrogance … That's the ultimate arrogance for him to think that he can do what he's doing to people like Jerry O'Keefe … and to the consumers of this stage, and he can deal with it in this fashion" (Transcript at 5794-5795). Mr Gary claimed that Loewen officials were "smiling when they charge grieving families in Corinth, Mississippi"(Transcript at 5796).

100. As he had done in his earlier closing address, Mr Gary asserted that Loewen would make "over $7.9 billion" off the National Baptist Convention Contract, an assertion unsupported by evidence. He further asserted that this profit would be made from "just selling vaults" because Loewen would not admit black people to Loewen funeral homes for burial. Again this assertion was unsupported by evidence. The closing address concluded with the exhortation:

> "1 billion dollars, 1 billion dollars … You've got to put your foot down, and you may not ever get this chance again. And you're not just helping people of Mississippi, but you're helping … families everywhere."(Transcript at 5809).

101. The jury returned a verdict for $400,000,000 punitive damages. On November 6, 1995, judgment for a total verdict of $500,000,000 was entered.

102. On that day Loewen filed a motion to reduce the punitive damages on the grounds of bias and excessiveness (App. at A1196). On November 15, 1995, Loewen filed another motion for judgment notwithstanding the verdict, or for a new trial, or for remittitur (App. at A660) on the ground that the jury's verdict exhibited bias, passion and prejudice against Loewen and on the ground that each element in the damage's award was excessive.

103. On November 20, 1995, Judge Graves denied Loewen's post trial motions.

XV. THE CLAIM THAT THE $500 MILLION VERDICT WAS EXCESSIVE

104. The total damages award of $500 million was by far the largest ever awarded in Mississippi.

105. Claimants had a very strong case for arguing that the damages awarded, both compensatory and punitive, were excessive, and that the amounts were so inflated as to invite the inference that the jury was swayed by prejudice, passion or sympathy. The initial award of punitive damages, despite the trial judge's instruction that the jury was then to confine itself to issues of liability and compensatory damages, indicates that the jury was minded to award punitive damages against Loewen without instructions from the trial judge and without evidence to support the amount of an award. Further, the initial award of damages included amounts for anti-trust oppression breaches and the fraud claim, although Mr Gary, in his closing address, had not asked for damages on those claims. The award of $100,000,000 compensatory damages was very close to the total amount of $105,852,000 which was the amount sought by Mr Gary from the jury for all claims, though it was calculated by reference to the contract and tort claims.

106. The award on the breach of the Wright and Ferguson contracts greatly exceeds the value placed on those contracts in evidence by the O'Keefe witness, $980,000 (Transcript at 2367), which was the amount sought from the jury by Mr Gary (Transcript at 5711-5712). The total amount initially awarded in respect of the various claims made in relation to these contracts, $78,000,000, allowing for what was at that stage of the case an impermissible punitive component, bore no relationship to the apparent value of the contracts. It is difficult to avoid the conclusion that there was a multiplication of damages on claims which overlapped.

107. Likewise, the damages awarded in relation to the 1991 settlement agreement appear to be grossly excessive. In his closing address, Mr Gary sought a total of $104,852,000 for the claims based on the 1991 agreement, made up of $74,500,000 for emotional distress and the remainder in economic damages, yet in the O'Keefe "Amended and Supplemental Complaint" sought $625,000 only in emotional damages for Jerry O'Keefe and his son (App. at A202). This amount was mentioned by O'Keefe's

counsel in the opening statement. The only evidence of emotional distress was given by Jerry O'Keefe and his daughter Susan. They spoke of his sleepless nights, worry and stress. There was no expert evidence, no evidence of medical or psychiatric treatment, medication, physical manifestation of distress and no evidence whatsoever relating to the son.

108. Mr Gary sought from the jury, at least by implication, an amount of $30 to $35 million in economic damages (Transcript at 5713-5715), resulting from breach of the 1991 agreement. Yet, allowing for an impermissible element of punitive damages, the jury initially awarded $145,600,000 damages for the claims on the 1991 agreement. The amount of $30 to $35 million sought by Mr Gary included $20 million in lost "future revenue" from the Family Care Company (Transcript at 4848-4864), $6 million in lost "future revenue" from Riemann Trust Funds (Transcript at 1400-1401) and $4.5 million in lost "future revenue" from the Family Care Trust Rollover (Transcript at 2366, 5566-5568). Under Mississippi law, lost future profits are recoverable as damages but lost future revenue is not recoverable (*Fred's Stores of Mississippi v M & H Drugs Inc.* 725 So. 2d 902, 914-915 (1998)).

109. The duplication of awards on the Wright and Ferguson contracts and the 1991 agreement is an obvious problem. That agreement extinguished all claims arising out of the then existing litigation between O'Keefe and Loewen. The pending lawsuit included claims for breach of the Wright and Ferguson contracts. If the 1991 agreement was enforceable, claims for breaches of the Wright and Ferguson contracts could not be maintained.

110. Again, Claimants had a strong ground for claiming that the fraud damages were excessive. As already noted, Mr Gary did not ask for these damages. The only fraud claim involved alleged misstatements about the 1991 agreement and its performance. Why the fraud claim would result in damages additional to the damages awarded on the other claims made in respect of the 1991 agreement is by no means apparent.

111. Claimants' challenge to the award on the anti-trust claims appears to misconceive the nature of the claim. It was not, as Claimants seem to suggest, confined to a claim based on loss sustained as a result of impermissible pricing below cost. The O'Keefe

case was mainly based on the unfair means by which Loewen attempted to attain its monopoly power. It was O'Keefe's case that Loewen violated the anti-monopoly laws by manipulating the 1991 agreement in bad faith in order to drive O'Keefe out of funeral home markets, thereby enabling Loewen to raise prices without fear of competition. It was also O'Keefe's case that Loewen's treatment of O'Keefe was part of a broader practice of destroying or excluding smaller competitors by unfair means. There is expert evidence before us in the form of a declaration by Mr Jack Dunbar that O'Keefe's allegations were more than sufficient to state a claim for a violation of Mississippi anti-monopoly laws. And evidence was presented at the trial to substantiate the monopolization claims. That evidence included the testimony of a credible expert Mr Dale Espich whose testimony dealt in detail with Loewen's monopolistic practices. He described Loewen's domination of various Mississippi markets, its persistent practice in raising prices, particularly in dominated markets (Transcript at 1837-1840), its tendency to cluster its purchases of funeral homes to dominate markets (Transcript at 1845-1846) and Loewen's success in excluding O'Keefe from the largest Mississippi market – Jackson. (Transcript at 1867). This testimony was not challenged in cross-examination. So Claimants' argument that there was no legal basis for the anti-trust claim appears to be without substance.

112. There is no occasion to deal with the so-called "oppression" claim. No such claim was submitted by Judge Graves to the jury and no verdict was rendered on such a claim. That O'Keefe pleaded "oppression" as a separate count is therefore immaterial.

113. The total award (even the award of compensatory damages) appears to be grossly disproportionate to the damage suffered by O'Keefe. The dispute involved three contracts valued at $980,000 and an exchange of two funeral homes worth approximately $2.5 million for a Loewen funeral insurance company valued at approximately $4 million. The jury foreman said "May be O'Keefe lost $1 million dollars. $6 million to $8 million I'd say was right …" (App. at A3079). Respondent seeks to justify the award of $500 million not by reference to the substance of the dispute but by reference to Loewen's "monopolization of funeral home markets and overcharging of grief-stricken consumers of funeral services". Granted that a

substantial award of damages on this claim might well be justified, Claimants had very strong grounds for arguing that verdict of $500,000,000 was excessive.

114. Notwithstanding the viability of the anti-trust claim, Claimants had very strong prospects of successfully appealing the damages awarded on the ground that they were excessive.

XVI. RESPONDENT'S CASE THAT EXCESSIVE VERDICT WAS CAUSED BY LOEWEN'S FLAWED TRIAL STRATEGY

115. Respondent argues that the excessive verdict was not caused by inadmissible appeals to prejudice and local favouritism but by Loewen's flawed trial strategy. First, it is said that because the foreman of the jury was formerly a Canadian, it would be wrong to impute anti-Canadian bias to the jury. This argument is based very largely on post-trial interviews with the jurors, including the foreman. We do not regard these interviews as establishing that the verdict was uninfluenced by appeals to local sentiment, racial or class-based prejudice. These influences may well have played a part in the verdict, even if there was an absence of actual bias on the part of the jurors themselves. The magnitude of the verdict suggests that the verdict was influenced by bias, prejudice, passion or sympathy.

116. Respondent's argument on this point is based on the Opinion of Professor Stephan Landsmann who has pointed to a number of strategical or tactical decisions taken by Loewen's counsel during the course of the trial, particularly in relation to the punitive damages stage of the trial. There is much to be said for the view that a number of decisions taken by Loewen's counsel, viewed with the advantage of hindsight, were unwise. Further, four individuals who had been employed by Loewen gave evidence which was very critical of Loewen's business practices. One of them testified to a policy of constant and aggressive price increases for funeral services (Transcript at 1228,1240). The same witness described communications in which O'Keefe was given misleading information or in which material information was withheld in evident breach of contract (Transcript at 1217-1223). The Riemann brothers wrote letters to Loewen complaining about the business methods of Loewen.

117. Professor Landsmann points also to four matters which would have strengthened the O'Keefe charges against Loewen. They were:

(1) the belated disclosure and production of the Riemann letters (already mentioned) which appear to support a number of significant O'Keefe allegations;

(2) the striking by the Court of the testimony of a Loewen witness, Ellis, after it was revealed that Loewen's counsel had not complied with the court's sequestration order with respect to his pre-trial preparation;

(3) frequent claims of memory failure by Raymond Loewen in direct and cross-examination, a matter commented upon by Judge Graves; and

(4) the contradiction by Loewen witnesses and by documents of Loewen's counsel's statements about the net worth of Loewen during the punitive damages stage of the trial.

118. The matters referred to in the two preceding paragraphs unquestionably strengthened the O'Keefe case against Loewen and highlighted Loewen's predatory and aggressive conduct. But these matters do not erase the prejudicial conduct at trial on O'Keefe's part or eliminate the influence it was calculated to have on the jury.

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

142. Having reached the conclusion that the trial and the verdict were improper and cannot be squared with minimum standards of fair international law and fair and equitable treatment, we must now consider the question whether, in the light of subsequent proceedings, the trial and the verdict alone or in combination with the subsequent proceedings amounted to an international wrong. We take up at this point the Respondent's second ground of objection to competence and jurisdiction which covers much of the same ground and was not resolved in the Tribunal's Decision of January 5, 2001.

143. Respondent argues that the expression "measures adopted or maintained by a Party" must be understood in the light of the principle of customary international law that, when a claim of injury is based upon judicial action in a particular case, State responsibility only arises when there is final action by the State's judicial system as a whole. This proposition is based on the notion that judicial action is a single action from beginning to end so that the State has not spoken until all appeals have been exhausted. In other words, the State is not responsible for the errors of its courts when the decision has not been appealed to the court of last resort. Respondent distinguishes this substantive requirement of customary international law for a final non-appealable judicial action, when an international claim is brought to challenge judicial action as a breach of international law, from international law's procedural requirement of exhaustion of local remedies ("the local remedies rule").

144. Respondent submits that there is nothing to show that in Chapter Eleven the Parties intended to derogate from this substantive rule of international law when judicial action is the basis of the claim for violation of NAFTA. Respondent argues that the terms of Article 1101, "adopted or maintained by a Party", incorporate the substantive rule of international law and require finality of action. Only those judicial decisions that have been accepted or upheld by the judicial system as a whole, after all available appeals have been exhausted, so the argument runs, can be said to possess that degree of finality that justifies the description "adopted or maintained".

145. Claimants' response to this argument is that Article 1121(1)(b) of NAFTA requires an arbitral claimant to waive its local remedies, not exhaust them. This Article authorizes the filing of a Chapter Eleven claim only if

> "the investor and the enterprise waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 …".

Claimants submit, first, that "the Article eliminates the necessity to exhaust local remedies provided by the host country's administrative or judicial courts". (B. Sepulveda Amor, *International Law and International Sovereignty: The NAFTA and the Claims of Mexican Jurisdiction*, 19 Houston Journal of International Law 565 at 574 (1997)). Claimants submit, secondly, that the so-called substantive principle of finality is no different from the local remedies rule and that international tribunals have reviewed the decisions of inferior municipal courts where the exhaustion requirement has been waived or is otherwise inapplicable.

146. Respondent argues that Article 1121(2)(b) is not a waiver provision and that it does not waive the local remedies rule or for that matter the requirement that the judicial process be pursued to the highest court where a judicial act constitutes the breach of international law. Respondent appears to acknowledge, however, that the Article relaxes the local remedies rule to a partial but limited extent, without defining or otherwise indicating what that extent is or may be.

147. As Professor Greenwood points out in his First Opinion, usually there are three separate issues to be considered:

(a) whether there is an act which is imputable to the respondent State;
(b) whether that act is contrary to international law; and
(c) whether the respondent State can be held responsible for that act in international proceedings until local remedies have been exhausted.

148. In this case, we are not concerned with the question whether there is an act which is imputable to Respondent. A decision of a court of a State is imputable to the State because the court is an organ of the State. This proposition was acknowledged in the

Tribunal's Decision of January 5, 2001. We are, of course, concerned with the question whether the relevant decisions of the Mississippi courts constitute violations of international law because this is not a case where the alleged violation of international law is constituted by a non-judicial act or decision.

149. The local remedies rule which requires a party complaining of a breach of international law by a State to exhaust the local remedies in that State before the party can raise the complaint at the level of international law is procedural in character. Article 44 of the latest International Law Commission (ILC) Draft Articles on State Responsibility demonstrates that the local remedies rule deals with the admissibility of a claim in international law, not whether the claim arises from a violation or breach of international law (Text provisionally adopted on 31 May, 2001, UN Doc. A/CN 4/L 602. Article 44 is identical to Article 45 of the 2000 draft referred to in the Decision of January 5, 2001, para. 67). Article 22 of the earlier draft, which had been prepared in 1975, embodied a substantive approach which was strongly criticized by governments (most notably the United Kingdom) and was not followed in *Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at para. 50. See Second Opinion of Professor Greenwood, paras 52-54).

150. Although Loewen submits, in accordance with an Opinion of Sir Robert Jennings, that the local remedies rule is essentially confined to cases of diplomatic protection, that view does not coincide with that of other commentators. See García-Amador, Sohn and Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens (1974) pp 143, 129-132; see also García-Amador's Draft Articles on State Responsibility prepared in 1960 for the International Law Commission, noting his comment at p. 79:

> "Article 21 of the draft sets forth the basis of a procedure which would enable the alien himself, once local remedies have been exhausted, to submit an international claim to obtain reparation for injury suffered by him."

See also OECD Draft Convention on the Protection of Foreign Property, 1967, Article 7(b) and Commentary (OECD Publication No. 23081 (1967) pp 36-41. Professor James Crawford SC, rapporteur on State Responsibility of the ILC has stated "the

exhaustion of local remedies rule is not limited to diplomatic protection" (UN Doc. A/CN 4/517, p 33).

151. Professor Greenwood in his First Opinion refers to "the principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice". The principle is supported by a number of decisions of the United States-Mexican Claims Tribunal (*Jennings, Laughland & Co v Mexico* (Case No. 374, 3 Moore, *International Arbitrations* (1898) p 3135); *Green v Mexico* (ibid, at p 3139); *Burn v Mexico* (ibid at 3140); *The Ada* (ibid at 3143); *Smith v Mexico* (ibid at 3146); *Blumhardt v Mexico* (ibid at 3146); *The Mechanic (Corwin v Venezuela)* (ibid 3210 at 3218). In the first of these decisions, Umpire Thornton observed (at p 3136):

> "The Umpire does not conceive that any government can thus be made responsible for the conduct of a judicial officer when no attempt has been made to obtain justice from a higher court."

152. Text writers also give support to the principle (Oppenheim's International Law, 9th ed, 1992, vol I, pp 543-545; Freeman, *International Responsibility of States for Denial of Justice*, (1938) pp 291-292, 311-312), although Freeman regards the rule as linked to the local remedies rule (at p 415).

153. The principle that a court decision which can be challenged through the judicial process does not amount to a denial of justice at the international level has been linked to the duty imposed upon a State by international law to provide a fair and efficient system of justice. Professor James Crawford SC, rapporteur to the ILC, has stated:

> "There are also cases where the obligation is to have a system of a certain kind, e.g. the obligation to provide a fair and efficient system of justice. There systematic considerations enter into the question of breach, and an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not of itself amount to an unlawful act".

(UN Doc. A/CN 4/498, para. 75). Judge Jiménez de Aréchaga took the same view of the State's responsibility, stating that it was an essential condition of a State being held responsible for a judicial decision in breach of municipal law that the decision must be a decision of a court of last resort, all remedies having been exhausted ("International Law in the Past Third of a Century", 159 Recueil des Cours (1978) at

p 282, where the judge expressed the reason for the requirement as being that States provide remedies to correct the natural fallibility of their judges). He considered that a corollary of the requirement is that "a State cannot base the charges made before an international court or tribunal … on objections or grounds which were not previously raised before the municipal courts"

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.

155. That there is a difference in the purposes served by this principle was recognized by the Iran-United States Claims Tribunal in *Oil Fields of Texas* 12 Iran-US CTR 308 at 318-319. The question there was whether a judicial decision could amount to a measure of appropriation. The decision was that of the Islamic Court of Ahwaz, which appears to have been a lower court. The Tribunal held that the order of the Court amounted to a permanent deprivation of use. The Tribunal said (at p 319):

> "In these circumstances, and taking into account the Claimant's impossibility to challenge the Court order in Iran, there was a taking of the three blowout preventers for which the Government is responsible" (p 319).

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.

157. The questions whether there was an adequate and effective municipal remedy available to Loewen and whether Loewen took sufficient steps to pursue such a remedy are questions which remain to be considered. It is convenient, first, however, to deal with Article 1121 and the problem of waiver.

XXIII. ARTICLE 1121 AND WAIVER

158. In para. 71 of the Decision of January 5, 2001, the Tribunal expressed the view that "the rule of judicial finality is no different from the local remedies rule. Its purpose is to ensure that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own judicial system".

159. This statement requires qualification in light of the preceding discussion of Article 1105, denial of justice and the local remedies rule. 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 means that this requirement and the local remedies rule, though they may be similar in content, serve two different purposes.

160. An important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so (*Elettronica Sicula SpA (ELSI) United States v Italy* (1989) ICJ 15 at 42). Such an intention may be exhibited by express provisions which are at variance with the continued operation of the relevant principle of international law.

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.

XXV. LOEWEN'S APPEAL, THE COURT DECISIONS ON THE BONDING REQUIREMENT AND THE SETTLEMENT AGREEMENT

172. On November 5, 1995, Loewen's counsel set out a timetable for future procedures. They proposed an appeal to the Supreme Court of Mississippi which was expected to take six months to two years before it was finalized. Loewen's counsel contemplated an appeal to the United States District Court, if necessary.

173. On November 6, 1995, final judgment was entered in favour of O'Keefe. On that day, Marsh & McLellan, a firm experienced in placing supersedeas bonds in appeals in civil lawsuits, began to assemble a package of parties willing to furnish a bond. By November 22, 1995, it was arranged that surety companies would underwrite a total of $625,000,000, this being the amount of the bond required by Miss. R. App. P.8(a).

By posting a bond in that amount, Loewen would have prevented O'Keefe from enforcing the judgment while Loewen's appeal was pending.

174. By about November 20, 1995, it became clear that the sureties would all require that 100% of their risk be supported by collateral in the form of bank letters of credit and that Loewen's bankers would not promise such letters. On November 25, Loewen filed an affidavit stating that it was unable to provide an appeal bond with supersedeas in the amount, form and conditions required by the Mississippi Supreme Court and the surety companies.

175. Meantime, immediately after judgment was entered, O'Keefe began to enrol it within the counties of Mississippi, enrolment being a condition precedent to execution.

176. On November 15, 1995, Loewen moved for judgment notwithstanding the verdict, and/or for a new trial and for remittitur. In these motions Loewen advanced numerous grounds, including grounds discussed in this Award, for challenging the verdict both as to liability and as to the damages awarded (compensatory and punitive). On the following day Loewen filed motions seeking a reduction of the compensatory and punitive damages awarded.

177. On November 20, 1995, the motions came on for hearing before Judge Graves. The court announced that each side would be given fifteen minutes for argument and Loewen would be allowed a further ten minutes for rebuttal. After argument, the court denied all six Loewen motions, without giving reasons.

178. On the same day, Mr Gary was reported as saying "They have ten days to post the cash bond. If they don't, my client will proceed to take over their assets. That's every funeral home they own, every insurance company, every cemetery, their corporate jet and their yacht". On November 21, 1995, Loewen's lawyers sought an assurance from O'Keefe's lawyers that they would not seek enforcement during the thirty day period for perfecting the appeal. The assurance was not forthcoming.

179. On November 27, 1995, Loewen filed an appeal of the trial court judgment with the Mississippi Supreme Court. Under Mississippi law, a party may pursue such an appeal without posting a bond.

180. On November 28, 1995, Loewen filed a motion asking the trial court to stay enforcement of its judgment on Loewen filing a conventional supersedeas bond in the penal sum of $125,000,000 and providing covenants that Loewen would maintain its financial strength and net worth. By this motion Loewen asked the trial court to reduce the bond to $125,000,000 – 125 per cent of the compensatory damages component of the judgment. The Mississippi Court Rules empower the court, for "good cause shown" and in an "appropriate" case, to grant a stay of enforcement upon a bond or upon conditions less than or other than a bond in an amount of 125 per cent of the judgment (Miss. R. App. P. Rule 8(b)). Loewen argued that security for the compensatory damages component was all that O'Keefe was entitled to, that Loewen was unable to provide more than a bond for $125,000,000 at the time, (though claiming it had the financial ability to satisfy the judgment to make for punitive damages), that its net worth was sufficient to make the judgment fully collectible. Loewen also argued that denial of the stay would cause it and innocent third parties irreparable harm and deprive it of appellate review. Loewen further argued that the appeal had strong prospects of success, in particular that the damages were grossly excessive. Loewen also stated that its major credit agreements all had cross-default clauses and agreed that an uncured default in any of their long term credit agreements would operate to vacate the stay.

181. On the same day, Loewen filed a motion in seeking a stay pending consideration by the court of the motion for a stay.

182. On November 29, 1995, the motions for a stay came on for hearing before Judge Graves in the trial court. The hearing began with Judge Graves again fixing fifteen minutes for oral argument on each side with ten minutes for rebuttal. In doing so, he exhibited resentment at statements made by Loewen's counsel in their brief that they were "stunned" by the time limits fixed for argument on the earlier motion and about the "error-infested" trial. A reading of the transcript, however, reveals that Judge Graves applied himself to the issues. He questioned O'Keefe's counsel about the

problem that would arise if execution on the judgment was not stayed and execution followed, yet on appeal the judgment was set aside or reduced. He asked whether it might not be more prudent to maintain the status quo. O'Keefe's counsel responded that there was no assurance that the status quo could be maintained, that there were other lawsuits pending against Loewen and the judgments might be bigger than the O'Keefe judgment. O'Keefe's counsel also said "they would go into Chapter Eleven [of the Bankruptcy Code] and in the meantime pursue us" and "[t]hey can appeal without supersedeas". Loewen made no response on the Chapter Eleven argument even though it had that option under consideration. In argument, Judge Graves discussed other alternatives with Loewen's counsel and finally asked whether security could be given in an amount between $125,000,000 and $625,000,000. Nothing came of this after some discussion between the parties.

183. Judge Graves then delivered judgment on the motions, dismissing them. He accepted that the court had a discretion under Rule 8(b) to reduce the amount of the bond for "good cause shown", an expression which was not defined. However, Judge Graves considered, in the light of the Mississippi Supreme Court decision in *In re Estate of Taylor* 539 So 2d 1029, that the general purpose of a supersedeas bond was to give absolute security to the party affected by the appeal and that the security was to cover the entire verdict, including the amount of punitive damages. Judge Graves concluded that, although it was arguable that a stay would not result in harm to O'Keefe,

> "the Court has no reason to believe that there are assets [of Loewen] in this case which would not dissipate or that the same assets which are subject to levy right now would still be there and subject to levy a year from now or eighteen months from now if there were an appeal allowed without the bond".

In reaching this conclusion, Judge Graves referred to matters relied upon by O'Keefe's counsel – the financial inability of Loewen to obtain the bond, the pendency of other lawsuits, that investors were looking to get out and that the price of the shares had plummeted. The critical finding in the judgment was:

> "The Court … finds that there exists no viable alternative for securing this Plaintiff's interest absent the requirement of a [$625 million] bond pursuant to Rule 8."

184. Judge Graves stressed that the Rule required that the amount of the bond was to give absolute security to the party affected by the appeal. If one accepts this interpretation of the Rules, and Judge Graves was bound by the interpretation, his decision did not reflect an error in principle. Further he took into consideration the various factors relied upon by the parties and, after weighing them, came up with a decision in favour of O'Keefe.

185. It is not a decision which we would have reached on the materials before Judge Graves. That is because we would not read the Rules as having the purpose of securing absolute security for the verdict awarded, more particularly when (a) there was a strong case for regarding the verdict as excessive and one which should be set aside, (b) the provision of absolute security was beyond the capacity of the appellant and (c) the prosecution of an appeal without a stay would work an injustice and in all probability foreclose the possibility of an appeal, eventualities rendered the more likely by the sheer size of the bond stipulated by Rule 8(a).

186. We repeat what we said earlier, that Claimants make no challenge to the bonding requirement in Rule 8(a) notwithstanding the potential harshness of its operation. That operation constitutes a very good reason for interpreting the discretion conferred by Rule 8(b) more liberally than it was construed by the Mississippi courts.

187. After this case, the Mississippi Supreme Court made changes to its Rules, in particular Rule 8, which would preclude what happened before Judge Graves, and later what happened on appeal. The changes acknowledge that Rule 8 could operate in an extreme way so as to produce an unjust result. But the challenge here is not to Rule 8(a); it is to the way Rule 8 was applied.

188. It was common ground between the parties that there is no principle of international law which requires a State to provide a right of appeal from a decision of its courts. Here the refusal to relax the bonding requirement was not a denial of the appeal. Loewen, at least in theory, could proceed with its appeal, albeit subject to the risk of execution, if it did not pursue the Chapter Eleven Bankruptcy option.

189. Claimants submit that the decisions refusing to relax the bonding requirements were a violation of Article 1105, because there was a procedural denial of justice, there was a denial of fair and equitable treatment and a denial of full protection and security. Notwithstanding the criticisms already made of Judge Graves' decision, that decision does not transgress the minimum standard of treatment mandated by Article 1105. It was at worst an erroneous or mistaken decision.

190. On November 30, 1995, the Supreme Court of Mississippi granted an interim stay of execution on the judgment, conditional on the posting of a bond in the sum of $125,000,000. On December 20, 1995, the Supreme Court extended the stay indefinitely, pending further order of the court.

191. At this time Loewen was considering raising further capital by way of equity and debt. Loewen's lawyers were examining the effect of an equity, raising on the court's appreciation of its ability to post a $625,000,000 bond.

192. On December 12, 1995, Loewen filed in the Mississippi Supreme Court an addendum to their motion for a stay, informing the court of their intention to file a preliminary prospectus for an offering of preferred securities to the public in Canada. The proceeds of the offering would be deposited with a trustee for the funding of acquisitions of funeral homes, cemeteries and related businesses. Although not available to fund a supersedeas bond, the use of the funds for acquisitions would benefit O'Keefe by increasing Loewen's underlying value.

193. While the appeal to the Mississippi Supreme Court was pending Loewen issued new stock in the Canadian equity market to fund new acquisitions and was preparing to raise an additional $200 million in a debt offering.

194. On December 17, 1995, Raymond Loewen and others conducted a conference call with financial institutions in Canada concerning an offer of some $200 million convertible preferred shares. In response to questions, Raymond Loewen stated that

> "… the Supreme Court in Mississippi has already given us one stay, and we are now waiting for the permanent stay, and the permanent reduction of the bond, and there is every reason to believe that in fact we will get that. In addition to that, our company we believe is – we are quite

> confident that with our banks and with our investment bankers we will be able to deal with the very worst case scenario".

And, in response to a question about the punitive damages owed Raymond Loewen said:

> "Obviously, we don't think that a 500 million liquidity thing will ever come, but being a responsible corporation we have the contingency plan for every possible contingency, and we've looked at that, discussed it with our bankers, and we have a plan which we believe would address that without any major long-term harm on liquidity after a brief to adjust that."

195. On January 23, 1996, Loewen's lawyers pointed out the tactical dangers of raising money to fund the existing acquisition obligations, but not the bond. They noted that Loewen's Mississippi counsel thought that this course would result in loss of credibility and could result in loss of the stay. The current settlement strategy advised by the lawyers was to get Loewen to the point where it could post the $625 million, ask the Court to be relieved of that burden and point out to O'Keefe the need for them to settle before the court acted or the bond was posted.

196. On January 24, 1996, the Supreme Court of Mississippi with two dissentients dismissed defendants' motion for stay of execution, and ordered that the interim stay entered on November 30 and extended on December 20, 1995 be dissolved with effect from 1200 pm on January 31, 1996. The Court did not give reasons for its decision. The Court's formal order simply recited:

> "The Court finds that the question before it is whether the trial court abused its discretion in refusing to lower the amount of the supersedeas bond at Appellants' request. The Court finds no abuse of discretion in the trial court's refusal to lower the amount of the supersedeas bond, and that the trial court properly followed M.R.A.P.8."

197. Whether the Supreme Court's ruling on this point was appropriate or not, it stands in the same position as Judge Graves' decision under appeal. The Supreme Court's ruling did not transgress the minimum standard of treatment under Article 1105.

198. On January 25, 1996, a memorandum was circulated within the Loewen Group reporting the decision of the Mississippi Supreme Court, and informing readers that the Group was currently pursuing three alternative avenues:

(1) securing funds to finance the bond;

(2) negotiating a reasonable settlement;

(3) filing for Chapter Eleven Bankruptcy protection without posting a bond.

Chapter Eleven was considered to be by far the least desirable but would be utilised if absolutely necessary.

199. On January 25, 1996, plaintiffs' lawyers wrote to defendants' lawyers advising that they would start execution on all Loewen's property in Mississippi and other states at noon on January 31, adding:

> "… we are willing to give you a second chance to resolve this case and avoid bankruptcy. However, I am renewing my offer to resolve this case for four hundred and seventy-five million dollars".

Respondent suggests that Loewen would have discounted O'Keefe's threats to levy execution on the judgment because O'Keefe would have been deterred by the potential liability for damages it would face if, ultimately, the judgment was set aside. In our view, Loewen was entitled to treat the threat of prompt execution on some of its assets in Mississippi as real and as having adverse consequences for market perceptions of Loewen.

200. On January 27 and 28, 1996, Loewen's lawyers were drafting and redrafting an application to the Hon Justice Scalia, as Circuit Justice for the Fifth Circuit, for a stay of execution pending the filing of a petition for writ of *certiorari*. The petition invited the court to take up a question unresolved in *Pennzoil v Texaco, Inc.* 481 U.S.1 (1987) whether it comports with due process of law to condition a stay on execution on the posting of a bond that serves no purpose where the defendant 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.

201. During the night of January 27/28, 1996, an informal agreement was reached and recorded, in a handwritten document, which was not signed formally until February 1, 1996. On January 29, 1996, Loewen announced the settlement in a press release:

> "We are confident of a successful appeal, but it would have meant several years of financial uncertainty at significant cost to the Company … After analysing the financial and other alternatives we determined that, at this time, a settlement is in the best interests of the Company and its shareholders."

202. On February 1, 1996, the formal settlement agreement was executed. On the same day the parties executed an Absolute Release with Indemnity Agreement and Covenants.

203. On February 2, 1996, on the joint motion of all parties, the Supreme Court of Mississippi dismissed Loewen's appeal with prejudice, revesting the Circuit Court with jurisdiction to consummate a release, settlement and dismissal of the suit on the terms described in the parties' joint motion to dismiss. The order of January 24, 1996 was vacated and dissolved, *nunc pro tunc*, so that the amount of the required bond reverted to $125 million. The order was conditional on the performance of the monetary part of the agreed settlement.

204. On February 2, 1996, Judge Graves ordered:

(i) that the bond be released and discharged; and

(ii) that (subject to performance of the settlement agreement) the judgment of 6 November 1996 was satisfied and cancelled.

XXVI. DOES THE SETTLEMENT AGREEMENT OPERATE TO RELEASE ALL CLAIMS AGAINST RESPONDENT?

205. It is convenient to deal here with an argument based on a release of claims provided for by the settlement agreement. Respondent submitted that, on its true construction, the settlement agreement operated to release all claims by Loewen, including the NAFTA claims in issue in this arbitration, against Respondent, notwithstanding that Respondent is not a party to the agreement. The argument is based on the release executed by Loewen which forms part and is exhibited as "Exhibit C" to the settlement agreement. The release is a release by Loewen of all claims whatsoever that Loewen may have against the O'Keefe interests and persons affiliated with the O'Keefe interests. The release incorporates the accord and satisfaction of "all claims and causes of action as against the Releases and all other persons, firms, and/or corporations having any liability in the premises". The instrument further provides that the release extends and applies to future claims. The release is expressed to be governed by the law of Mississippi.

206. Respondent relies on the "intent" rule of construction in force in Mississippi. Respondent's argument is that, according to this rule in determining whether a person falls within the class of persons intended to take the benefit of a release, a relevant factor to be taken into account is that the person is not a stranger to the agreement and has given consideration. Respondent submits that the State of Mississippi was not a stranger and gave consideration in that it dismissed the appeal and made judicial orders as requested by the parties. The answer to Respondent's submission is that when the settlement agreement and the release are read in their entirety and in context, we do not regard them as releasing Loewen's NAFTA claims. They lie outside the ambit of the claims dealt with.

XXVII. DID LOEWEN PURSUE AVAILABLE LOCAL REMEDIES?

207. In the light of the conclusions reached in para 156, the next question is whether the appeal to the Mississippi Supreme Court was an available remedy which Loewen should have pursued before it could establish that the verdict and judgment at trial constituted a measure "adopted or maintained" by Respondent amounting to a violation of Art. 1105. Respondent argues that confronted with the adverse bonding decision by the Mississippi Supreme Court, Loewen should have (i) pursued its appeal despite the risk of execution on its assets; or (ii) sought protection under Chapter Eleven of the Bankruptcy Code which would have resulted in a stay of execution against Loewen's assets; or (iii) filed a petition for *certiorari* and sought a stay of execution in the Supreme Court of the United States.

208. The first alternative suggested by Respondent raises the question whether the appeal is "a reasonably available remedy", having regard to the risk of execution against Loewen's assets if the bond was not posted. Here, the bonding requirement is attached, not to the right of appeal, but to the stay of execution. Granted the distinction, the practical impact of the requirement had severe consequences for Loewen's right of appeal. Without posting the bond, Loewen's right of appeal could be exercised only at the risk of sustaining immediate execution on Loewen's assets in Mississippi, to be followed by execution against Loewen's assets in other States, with the inevitable consequence that Loewen's share price would collapse. In this respect, we reject Respondent's contention that the risk of execution was remote and

theoretical. It is possible that O'Keefe may have exercised some restraint in relation to execution lest it might ultimately lose the appeal and suffer financial consequences by reason of executions which could not be justified. But this possibility does not persuade us that the risk of immediate execution was other than real. In these circumstances, if exercising the right of appeal, at the risk of immediate execution on Loewen's Mississippi assets, was the only alternative available to Loewen, it would not have been, "a reasonably available remedy" to Loewen.

209. Filing under Chapter Eleven of the Bankruptcy Code would have resulted in a stay of execution. In this respect, Chapter Eleven would have enabled Loewen's appeal to proceed without generating all the consequences that would have flowed from execution. Chapter Eleven results in re-organization not in liquidation, so that a company can continue to conduct its business under Court supervision. Although Court supervision would not necessarily bring to an end Loewen's acquisitions program, Court supervision could be expected to restrict and moderate the program. Quite apart from that consequence, a Chapter Eleven filing may have had an effect on the public market perception of Loewen with a detrimental impact on its share price. The question then is whether, in these circumstances, the need to pursue local remedies extends to requiring a claimant to file under Chapter Eleven in order to ensure that a right of appeal remains effective and reasonably available. No doubt there are some situations in which it would be reasonable to expect an impecunious claimant to file under Chapter Eleven in order to exercise an available right of appeal. Whether it was reasonable to expect Loewen to file under Chapter Eleven depends at least in part on the reasons why Loewen elected to enter into the settlement agreement in preference to exercising other options, a matter examined in paras. 214-216 (inclusive).

210. The third alternative is the petition for *certiorari* coupled with the application for a stay. There is a conflict of opinion about the prospects of success of such an application between Professor Drew S. Days III (former United States Solicitor-General) and Professor Tribe. Professor Days is of the opinion that Loewen would have had "a reasonable opportunity" of obtaining review by the Supreme Court of the United States of the application of the Mississippi bonding requirement on the ground that it prevented, inconsistently with due process, appellate review of the Mississippi

trial court judgment. Professor Tribe is of a contrary opinion. He bases his opinion on a number of grounds. First, the case was fact-intensive and the Court is very unlikely to review a fact-intensive case. Secondly, there was a dispute between the parties as to whether the bonding requirement precluded judicial review of the judgment. The Mississippi Supreme Court did not make such a finding and did not adopt Loewen's version of the facts. Thirdly, the presence of a substantial punitive damages award was irrelevant to the issues which the Supreme Court would have been called upon to decide.

211. This Tribunal is not in a position to decide whether the opinion of Professor Days or that of Professor Tribe is to be preferred. Nor is the Tribunal in a position to decide which of their conflicting opinions is to be preferred on a related question, namely whether collateral review was available in the Federal District Court. But the Tribunal notes that Professor Days does not assert that either the Supreme Court or the Federal Court would grant the relief suggested. It is fair to say that, on his view, there was a prospect, at most a reasonable prospect or possibility, of such relief being granted.

212. The decision not to relax the bonding requirement, an act for which Respondent is responsible in international law, generated the risk of immediate execution with its attendant detrimental consequences for Loewen. In this situation, was either the *certiorari* petition or the collateral review option a reasonably available and adequate remedy? The pursuit of either remedy, more particularly the Supreme Court remedy, if it resulted in a failure to obtain a stay, would worsen Loewen's position and reinforce adverse market perceptions about Loewen. So, the absence of any certainty about the outcome of either option is a significant consideration in deciding whether either option involved an adequate remedy which was reasonably available to Loewen.

213. Entry into the settlement agreement no doubt reflected a business judgment by Loewen that, of the various options then open, settlement was the most attractive, in all probability because it provided certainty. Other alternatives involved financial consequences which would not have been easy to predict.

214. Respondent argues that, because entry into the settlement agreement was a matter of business judgment, Loewen voluntarily decided not to pursue its local remedies. That submission does not dispose of the point. The question is whether the remedies in question were reasonably available and adequate. If they were not, it is not to the point that Loewen entered into the settlement, even as a matter of business judgment. It may be that the business judgment was inevitable or the natural outcome of adverse consequences generated by the impugned court decision.

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.

XXVIII. A PRIVATE AGREEMENT IS NOT A GOVERNMENT MEASURE WITHIN THE SCOPE OF NAFTA CHAPTER ELEVEN

218. Respondent argues that a private agreement to settle litigation out of court is not a "government measure" within the scope of NAFTA Chapter Eleven (ground 3 of

Respondent's objection to competence and jurisdiction). The argument may well be correct as a general proposition. But the Claimants' case rests on the judgment and judicial orders made by the Mississippi trial court and the Mississippi Supreme Court. Claimants' case is that these judicial acts are the relevant government measures within NAFTA Chapter Eleven, not that the settlement is such a measure. This ground of objection is overruled.

XXIX. THE JURISDICTIONAL OBJECTION TO MR RAYMOND LOEWEN'S CLAIMS

219. This objection is dealt with together with the Respondent's additional objection to competence and jurisdiction.

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*.

226. Claimants' first argument strand is that NAFTA itself, in Articles 1116 and 1117, require nationality only to the date of submission. However, those articles deal only with nationality requirements at the *dies a quo*, the beginning date of the claim. There is no language in those articles, or anywhere else in the treaty, which deals with the question of whether nationality must continue to the time of resolution of the claim. It is that silence in the Treaty that requires the application of customary international law to resolve the question of the need for continuous national identity.

227. Nor does the recent arbitral decision in the *Mondev case* help Claimants in any way. In that case, the Tribunal dealt with the issue of whether the investment itself had to remain of the claimant's identity. Significantly, the reasoning of the Tribunal implicated other sections of NAFTA, namely Articles 1105 and 1110. The investment in *Mondev*, some Boston real estate, had been foreclosed on by an American mortgage holder. Even though it denied Mondev's claim on the merits, the Tribunal appropriately found that the loss of the investment through foreclosure of the mortgage could not be the basis for denying Mondev's right to pursue its remedies under NAFTA. It pointed out that such a set of events could occur quite often to indenters and that the whole purpose of NAFTA's protection would be frustrated if such disputes could not be pursued. It said:

> "Secondly the Tribunal would again observe that Article 1105, and even more so Article 1110, will frequently have to be applied after the investment in question has failed. In most cases, the dispute submitted to arbitration will concern precisely the question of responsibility for that failure. To require the claimant to maintain a continuing status as an investor under the law of the host State at the time the arbitration is commenced would tend to frustrate the very purpose of Chapter 11, which is to provide protection to investors against wrongful conduct including uncompensated expropriation of their investment and to do so throughout the lifetime of an investment up to the moment of its "sale or other disposition" (Article 1101(2)). On that basis, the Tribunal concludes that NAFTA should be interpreted broadly to cover any legal claims arising out of the treatment of an investment as defined in Article 1139, whether or not the investment subsists as such at the time of the treatment which is complained of. Otherwise issues of the effective protection of investment at the international level will be overshadowed by technical questions of

> the application of local property laws and the classification of local property interests affected by foreclosure or other action subsequent to the failure of the investment."

228. In sum, neither the language of the Treaty, nor any of the cases decided under it answers the question as to whether continuous nationality is required until the resolution of the claim. Respondent correctly contends that Article 1131 requires the Tribunal to decide the issues in dispute in accordance with "applicable rules of international law".

229. There is only limited dispute as to the history of the requirement of continuous nationality to the end of any international proceeding. When investment claims were negotiated and resolved only at a governmental level, any change in nationality of the claimant defeated the only reason for the negotiations to continue. The claiming government no longer had a citizen to protect. This history has changed as the nature of the claim process has changed. As claimants have been allowed to prosecute claims in their own right more often, provision has been made for amelioration of the strict requirement of continuous nationality. But those provisions have been specifically spelled out in the various treaties that TLGI cites as proof that international law has changed. Thus, in the claims settlement agreement between Iran and the United States arising out of the hostage crisis, the requirement of continuous nationality was specifically altered in the agreement. Many of the bilateral investment treaties, the so-called "BITs", contain specific modifications of the requirement. But such specific provisions in other treaties and agreements only hinder TLGI's contentions, since NAFTA has no such specific provision.

230. As with most hoary international rules of law, the requirement of continuous nationality was grounded in comity. It was not normally the business of one nation to be interfering into the manner in which another nation handled its internal commerce. Such interference would be justified only to protect the interests of one of its own nationals. If that tie were ended, so was the justification. As international law relaxed to allow aggrieved parties to pursue remedies directly, rather than through diplomatic channels, the need for a rigid rule of *dies ad quem* also was relaxed. But as was previously noted, such relaxations came about specifically in the language of the treaties. There is no such language in the NAFTA document and there are

substantial reasons why the Tribunal should not stretch the existing language to affect such a change.

231. We address at this stage an aspect of the problem which might well puzzle a private lawyer. Such a lawyer would of course be familiar with the inhibitions which can stand in the way of the enforcement of liabilities when changes in corporate status, or in the proprietorship of the claims, intervene after the proceedings to enforce the claim have commenced. Insolvency or judicial administration or a moratorium may affect one of the parties so that under the relevant domestic law the liability ceases to be enforceable for a while, or is compulsorily transferred to a third party, or entirely changes its juristic character, or may become a right to share in the proceedings of a winding up. Equally, the lawyer would recognise the potential for difficulties in enforcing a liability after a voluntary transfer to a third party, when the right to pursue the complaint may be enforceable only by the transferee, or only in the name of the transferor for the benefit of the transferee; and he could well foresee that particular difficulties could arise when, under an arbitration agreement between A and B, the former begins an arbitration, and afterwards transfers the right to C, a stranger to the arbitration agreement. These are no more than examples. These procedural difficulties are of a kind which many domestic systems of law have confronted.

232. The same lawyer might well, however, have much more difficulty in visualising the outcome in the quite different situation where, through subsequent events of the kind indicated above, a vested claim, already the subject of valid proceedings, simply ceases to exist, together with the breach of obligation or delict which have brought it into being. True, it is possible to imagine that a change of identity with a consequent change of nationality by the enforcing party might deprive a tribunal of territorial jurisdiction under its domestic rules of procedure. This is not the present case. If the submissions of the United States are right, the fatal objection to success by the Claimants is that a NAFTA claim cannot exist or cannot any longer exist, once the diversity of nationality has come to an end, so that the Tribunal cannot continue with the resolution of the original dispute, there being no dispute left to resolve. The private lawyer might well exclaim that the uncovenanted benefit to the defendant would produce a result so unjust that it could be sustained only by irrefutable logic or compelling precedent, and neither exists. The spontaneous disappearance of a vested

cause of action must be the rarest of incidents, and no warrant has been shown for it in the present context.

233. Such a reaction, though understandable, in our opinion, would be, wholly misplaced. Rights of action under private law arise from personal obligations (albeit they may be owed by or to a State) brought into existence by domestic law and enforceable through domestic tribunals and courts. NAFTA claims have a quite different character, stemming from a corner of public international law in which, by treaty, the power of States under that law to take international measures for the correction of wrongs done to its nationals has been replaced by an ad hoc definition of certain kinds of wrong, coupled with specialist means of compensation. These means are both distinct from and exclusive of the remedies for wrongful acts under private law: see Articles 1121, 1131, 2021 and 2022. It is true that some aspects of the resolution of disputes arising in relation to private international commerce are imported into the NAFTA system via Article 1120.1(c), and that the handling of disputes within that system by professionals experienced in the handling of major international arbitrations has tended in practice to make a NAFTA arbitration look like the more familiar kind of process. But this apparent resemblance is misleading. The two forms of process, and the rights which they enforce, have nothing in common. There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states. If the effects of a change of ownership are to be ascertained we must do so, not by inapt analogies with private law rules, but from the words of Chapter Eleven, read in the context of the Treaty as a whole, and of the purpose which it sets out to achieve.

234. TLGI urges some equitable consideration be given because it was the underlying Mississippi litigation which brought about the need for it to file bankruptcy in the first place. We have already rehearsed our view of the inequities that befell TLGI in that litigation, and a chancery court would certainly take such claims into account in assessing damages. But this is an international tribunal whose jurisdiction stems from and is limited to the words of the NAFTA treaty. Whatever the reasons for TLGI's decision to follow the bankruptcy route it chose, the consequences broke the chain of nationality that the Treaty requires.

235. Claimants also seek to rely on provisions of the Convention establishing the International Centre for Settlement of Investment Disputes (ICSID). It claims that under ICSID, there are different nationality rules that should be applied in this case. First, it must be noted that neither Canada nor Mexico are signatories of ICSID and it would be most strange to apply provisions of that Convention to a NAFTA dispute. The only relevance of ICSID to this proceeding is that the Parties have elected to function under its structure. That election cannot be used to change or supplement the substance of the Treaty that the three nations have entered into. Whatever specificity ICSID has on the requirement of continuous nationality through the resolution of the dispute only points up the absence of such provisions in NAFTA. Claimants have not shown that international law has evolved to the position where continuous nationality to the time of resolution is no longer required.

236. TLGI further contends that the International Law Commission issued a report which proposed eliminating the continuous nationality rule even in cases of diplomatic protection, a field that would seem more nationality oriented than the protection of investors. The report itself met with criticism in many quarters and from many points of view. In any event, the ILC is far from approving any recodification based on the report.

237. Article 1109 fully authorizes transfers of property by an investor. TLGI contends that such provision for free assignment somehow strengthens its position. The assignment from TLGI to Nafcanco is not being challenged, except as to what is being assigned. By the terms of the assignment, the only item being assigned was this NAFTA claim. All of the assets and business of TLGI have been reorganized under the mantle of an American corporation. All of the benefits of any award would clearly inure to the American corporation. Such a naked entity as Nafcanco, even with its catchy name, cannot qualify as a continuing national for the purposes of this proceeding. Claimants also urge that TLGI remains in existence, since its charter remains in existence. The Tribunal is being asked to look at form rather than substance to resolve a complicated claim under an international treaty. Even if TLGI has some kind of ethereal existence, it sought to place any remaining NAFTA marbles in the Nafcanco ring. Claimants insist that Respondent is asking the Tribunal to “pierce” the corporate veil

of Nafcanco and point out the legal complications involved in such a piercing. The Tribunal sees no need to enter into that thicket. The question is whether there is any remaining Canadian entity capable of pursuing the NAFTA claim.

238. Claimants state that there were good and sufficient business reasons for reorganizing under an American corporate character including pressure from TLGI's creditors. The Tribunal has no reasons to doubt the legitimacy of those reasons but the choices made clearly had consequences under the Treaty. There might have been equally compelling reasons for the Loewen interests to choose a United States mantle when it first commenced doing business. NAFTA does not recognize such business choices as a substitute for its jurisdictional requirements under its provisions and under international law.

239. Raymond Loewen argues that his claims under NAFTA survive the reorganization. Respondent originally objected to Raymond Loewen's claims on the ground that he no longer had control over his stock at the commencement of the proceeding. The Tribunal allowed Raymond Loewen to continue in the proceeding to determine whether he in fact continued any stock holding in the company. No evidence was adduced to establish his interest and he certainly was not a party in interest at the time of the reorganization of TLGI.

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.

Done at Washington, D.C.

(signed)
…….
Sir Anthony Mason
President of the Tribunal
Date: 19.06.03

(signed)
……
Judge Abner J. Mikva
Arbitrator
Date: June 25, 2003

(signed)
……
Lord Mustill
Arbitrator
Date: 17.06.03