**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| In the Matter of the Arbitration between<br><br>Raymond L. Loewen,<br><br>Petitioner,<br>and<br><br>The United States of America,<br><br>Respondent. | 1:04-CV-02151 (RWR)<br><br>Judge Richard W. Roberts |

**REPLY TO UNITED STATES' OPPOSITION TO PETITIONER'S MOTION TO VACATE AND REMAND ARBITRATION AWARD**

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## I. INTRODUCTION

The U.S. Opposition to Mr. Loewen's Motion to Vacate and Remand would be a compelling document, if only it were based on the facts. The Opposition ignores the fact that it was the United States itself that in 2003 decided to continue the ICSID arbitration proceedings, delaying the final Award until 2004. Mr. Loewen's Petition here was thus timely.

Similarly, the United States pretends that the Tribunal issued a ruling on the central legal issue – whether, as an objective matter, the Loewen Group ("TLGI") had any reasonably available legal remedies at the time of the Mississippi debacle. The U.S. pretends that the Tribunal held that TLGI had presented "insufficient evidence" on the objective standard. In fact, the Tribunal unequivocally refused to rule on the issue, stating it "was not in a position to decide."[1] That abdication of duty manifestly ignored the controlling law and resulted in an incomplete award.

Finally, by conflating the substance of the 2003 and 2004 Decisions, the United States pretends that the Tribunal fairly considered the Carvill and Turner Declarations in 2003. In fact, the Tribunal completely missed those Declarations in 2003. In 2004, the Tribunal, determined to justify and defend its deeply flawed 2003 Decision, refused to fairly consider the overlooked evidence.

Such misconduct requires this Court to vacate the award and remand it to a new tribunal, which this Court unquestionably has the power to do.

## II. FACTUAL ISSUES

### A. Agreed Facts

Although the United States and Mr. Loewen disagree on some of the Mississippi events, there are critical facts upon which the parties concur:

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[1] Award, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (June 26, 2003), at ¶ 211 (hereinafter "2003 Decision").

- The United States never challenged Mr. Loewen's Article 1116 claim on jurisdictional grounds.[2]
- Respondent's objection to the Tribunal's jurisdiction and the Tribunal's findings in that respect only extended to Mr. Loewen's Article 1117 claim.[3]
- The Tribunal failed to mention Mr. Loewen's Article 1116 claim explicitly in the 2003 Decision, and it never states that this claim was dismissed on the merits.[4]
- All of TLGI's claims and Mr. Loewen's 1117 claim were dismissed on jurisdictional grounds.[5]
- The legal standard for exhaustion of remedies is whether there exists an adequate, effective and reasonably available remedy.[6]
- The legal standard for exhaustion of local remedies is objective.[7]
- The Carvill and Turner Declarations relate to the subjective state of mind of the TLGI Board.[8]

### B. Misstated Facts

The U.S. version of what happened in Mississippi is interesting, but not particularly faithful to the actual history. While not necessarily relevant to this Court's determination, an accurate recounting of the Mississippi events demonstrates how badly Mr. Loewen was treated by both the Mississippi courts and NAFTA Tribunal.

For example, the United States—relying solely on its own submissions in the arbitration—characterizes the O'Keefe funeral insurance business as a successful combination of companies.[9] In fact, O'Keefe's business was teetering on the edge of bankruptcy.[10]

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[2] Mot. to Vacate and Remand Arbitration Award at 14-15 (hereinafter "Mot. to Vacate"); Opp'n to Petitioner's Mot. to Vacate and Remand Arbitration Award at 14 (hereinafter "Opp'n").
[3] *See* Opp'n at 13-14; 2003 Decision at ¶ 239; Award on Jurisdiction, *The Loewen Group, Inc. and Raymond L. Loewen v. United* States, ICSID Case No. ARB(AF)/98/3 (Jan. 5, 2001), at ¶¶ 32, 77; Decl. of Raymond L. Loewen (May 24, 2000); Submission of Raymond L. Loewen Regarding Competence and Jurisdiction, Exhibit D, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (May 25, 2000), at ¶ 11; Memorial of Raymond L. Loewen, *The Loewen Group, Inc and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Oct. 18, 1999), at ¶ 206; Article 58 Submission As To Raymond Loewen's Article 1116 Claim, *The Loewen Group, Inc and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Sept. 19, 2003), at ¶ 10 ("In the present case, the Claimant, Raymond Loewen, filed a claim pursuant to Article 1116 in respect of the shares he held in the company: approximately 15% of the issued shares of the parent public company.")(hereinafter "Article 58 Submission").
[4] Mot. to Vacate at 11, 15, 17, 19; Opp'n at 16, 17, 24, 27.
[5] Mot. to Vacate at 4, 9, 11, 16; Opp'n at 13.
[6] Mot. to Vacate at 21-23; Opp'n at 15-16, 26, 31.
[7] Mot. to Vacate at 21-25; Opp'n at 29, 32.
[8] Mot. to Vacate at 26, *et seq.*; Opp'n at 16.
[9] Opp'n at 4.

Similarly, the United States depicts the Mississippi proceeding as an ordinary jury trial that, while suffering from a few reviewable mistakes of law and fact, resulting in essentially the right outcome. It is worth recalling that the Tribunal concluded that "the trial . . . was a **disgrace[,]** . . . **the tactics of O'Keefe's lawyers** . . . were **impermissible**[,] . . . the trial judge failed to afford [TLGI] the process that was due[,] [and] 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."[11]

The United States tries to dismiss in one footnote the O'Keefe's lawyers' inflammatory tactics—the jingoism, baseless allegations of racial prejudice, and injurious references or allusions to social status that was left unchecked by the trial judge.[12] Further, by alleging similar references on the part of TLGI's trial counsel, the United States tries to paint Mr. Loewen with the same brush as O'Keefe.[13] The Tribunal recognized, however, that "Loewen did not start this strategy and 'was going to bring up the rear' in that contest."[14]

The United States also insinuates that TLGI misrepresented to the Mississippi courts its ability to post the $625 million *supersedeas* bond,[15] claiming that this misrepresentation ultimately persuaded the Mississippi Supreme Court to refuse to reduce the bond. The facts are otherwise. First, as the Tribunal notes, TLGI conscientiously informed the Mississippi Supreme Court in a

(...continued)

[10] The Tribunal acknowledged "the financial difficulties that O'Keefe was experiencing," which led the Mississippi Insurance Commissioner, the state regulatory authority, to place the O'Keefe insurance business under "administrative supervision," the insurance equivalent of bankruptcy. 2003 Decision at ¶¶ 34, 36.
[11] 2003 Decision at ¶ 119.
[12] Opp'n at 6-7, n. 1.
[13] S*ee id.*; 2003 Decision at ¶ 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 favor of local interests.").
[14] 2003 Decision at ¶ 65.
[15] Opp'n at 7.

timely manner of its efforts to raise capital to fulfill its contractual obligations.[16] Secondly, as the Tribunal also notes, the decision of the Mississippi Supreme Court refusing to reduce the bond was issued **without reasons**.[17] The Mississippi Supreme Court merely observed that it did not find any abuse of discretion in the lower court's refusal to reduce the amount for the *supersedeas* bond.[18] The U.S. claim is thus without a scintilla of support.

The United States uncritically repeats a serious error in the Tribunal's findings of fact.[19] The Tribunal found that **all** of TLGI's NAFTA claims had been assigned to Nafcanco, a Canadian subsidiary of the now-U.S.-based parent, as part of the Chapter 11 restructuring of TLGI.[20] But the evidence before the Tribunal was that while 75% of TLGI's NAFTA claim was indeed transferred to Nafcanco, a 25% interest in NAFTA claims was transferred to a Canadian trust to be held for the benefit of TLGI's unsecured creditors. Just as the Tribunal missed critical witness declarations, legal claims, and expert opinions, it missed this important fact as well.[21]

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[16] 2003 Decision at ¶¶ 191-93.
[17] 2003 Decision at ¶ 196.
[18] *Id.*
[19] *See* Opp'n at 13; Mot. to Vacate at 42, n. 102.
[20] 2003 Decision at ¶ 220.
[21] *See* Counter-Memorial of the Loewen Group, Inc. on Matters of Jurisdiction and Competence, *The Loewen Group Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (Mar. 29, 2002), at 50-79. In addition to misstating the facts, the United States also misrepresents the law. The United States argues that NAFTA Article 1116, like 28 U.S.C. § 1331 (federal question jurisdiction), is merely jurisdictional in nature. Opp'n at 24-25 ("Articles 1116 and 1117 provided no claim that a violation of NAFTA had occurred; rather, like section 1331, they merely provided the jurisdictional means for presenting substantive claims."). As with its description of the facts and the Tribunal's holdings, the U.S. misstates the nature of Article 1116. Unlike section 1331, Article 1116 creates a private right of action. *See, e.g., White v. Paulsen,* 997 F. Supp. 1380, 1383 (E.D. Wash. 1998). ("§ 1331 is a pure jurisdictional statute that does not, on its own, create a private right of action for all violations of federal law"). Statutory or treaty provisions that create substantive rights like private rights of action are not merely jurisdictional in nature. **More importantly**, the precise nature of Article 1116 is irrelevant. The critical point is that the 2003 Decision was incomplete, because the predicate of the U.S. Request was that the Tribunal failed to decide Mr. Loewen's Article 1116 claim. The United States asked "the Tribunal [to] issue a supplementary decision clarifying its disposition of that claim" as "the Award does not expressly recite its disposition of Raymond Loewen's Article 1116 claim." U.S. Request for Supplementary Decision, The Loewen Group, Inc. and Raymond L. Loewen v. United States, ICSID Case No. ARB(AF)/98/3 (Aug. 11, 2003), at 2 (hereinafter "U.S. Request for Supplementary Decision"). Because the United States has already recognized that Mr. Loewen's Article 1116 claim is separate and independent from his claims under NAFTA Articles 1102, 1105, and 1110, the United States cannot now assert that he has no claim under Article 1116.

## III. MR. LOEWEN'S NOTICE OF PETITION TO VACATE WAS TIMELY FILED BECAUSE THE 2003 DECISION WAS NOT FINAL

### A. Under the ICSID Rules and NAFTA, the 2003 Decision Was Not a Final Award

By signing NAFTA, the United States consented to arbitrate under the ICSID Additional Facility Arbitration Rules ("ICSID Rules").[22] These Rules, together with NAFTA Chapter 11, govern the determination of the finality of the 2003 Decision.[23]

After the issuance of the 2003 Decision, the United States had a choice of requesting the Tribunal to interpret it, to correct it, or to issue a supplementary decision. Under Article 55 of the ICSID Rules, the U.S. could "obtain from the Tribunal an interpretation of the award." Under Article 56, the United States could "obtain from the Tribunal a correction in the award of any clerical, arithmetical or similar errors." Finally, under Article 57, the United States could request the Tribunal "to decide any question which it had omitted to decide in the award." Articles 55, 56, and 57 establish a common filing deadline (45 days after the award) for such requests, and they **expressly provide** that Articles 52 and 53, which set forth the procedural requirements for final awards, are equally applicable to interpretations, corrections, and supplementary decisions.

However, the ICSID Rules specify that corrections do not affect the finality of awards in the same manner as interpretations and supplementary decisions. The Rules state that interpretations and supplementary decisions, respectively, "shall form part of the award" and "shall become part of the award."[24] Significantly, there is no equivalent statement with respect to corrections. The Rules recognize that interpreting an award, or issuing a supplementary decision, affects and changes the substance of awards. In contrast, corrections, in particular corrections of "clerical, arithmetical or

[22] NAFTA, art. 1120 (attached as Exhibit 1).
[23] *Id.*
[24] ICSID Rules, art. 55 and 57 (attached as Exhibit 2).

similar errors," have **no** effect on the substance of awards. For this reason, the Rules specifically provide for the incorporation only of interpretations and supplementary decisions into awards.

ICSID Articles 52 and 53 further provide that until the interpretations and supplementary decisions are incorporated into the award, the award cannot be considered "final and binding." Article 52 requires awards to include "the decision of the Tribunal on every question submitted, together with the reasons upon the decision is based."[25] The award cannot be considered final until **all questions** have been decided. It is only at that point that the award becomes "final and binding" under the ICSID Rules.[26]

Recall that the finality requirements of Articles 52 and 53 are applicable to supplementary decisions. Under the plain language of the ICSID Rules, a request made pursuant to Article 57 establishes by definition that the threshold requirements for finality under Article 52 have not been met, for **not all questions have been decided**. Under Article 52, the initial award must be considered incomplete because it does not include "the decision of the Tribunal on every question submitted." Because the award is incomplete, the initial award cannot be considered "final and binding" until the issuance of the supplementary decision and its incorporation into the award.

NAFTA reinforces the finality requirements of the ICSID Rules. Under Article 1136, "[a] disputing party **may not seek enforcement of a final award until[,]** in the case of a final award under the ICSID Additional Facility Rules[,] . . . three months have elapsed from the date the award was rendered **and no disputing party has commenced a proceeding to revise**, set aside or annul **the award**."[27] Thus, NAFTA establishes that once a party "commences a proceeding to revise" the

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[25] *Id.,* art. 52(1)(i).
[26] *Id.*, art. 52(4).
[27] The NAFTA provides as follows:
**Article 1136: Finality and Enforcement of an Award**
2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
3. A disputing party **may not seek enforcement of a final award until**:

(continued...)

award, the award cannot be considered final until the conclusion of the revision proceeding. A request for supplementary decision under Article 57 of the ICSID Rules is a request to revise the award under NAFTA Article 1136. An Article 57 request is premised on the existence of an incomplete award, and seeks to revise (and complete) the award by asking the Tribunal to answer the outstanding question. Especially for NAFTA arbitrations, an Article 57 request for a supplementary decision thus renders the contested award incomplete until the tribunal issues a decision on the request.

The United States had a choice under the ICSID Rules, and it chose to file a request under Article 57. In doing so, it explicitly recognized the incomplete nature of the 2003 Decision, conceded that the 2003 Decision had "omitted to decide" a substantive question, and delayed the completion of the arbitration until the issuance of the supplementary decision and its incorporation into the Award. If the United States regarded the flaw in the 2003 Decision as merely ministerial, technical, or superficial, the United States could have filed a request under Article 56. Similarly, if the flaw was an ambiguous term or holding, the United States could have sought an interpretation. Instead, the United States sought a supplementary decision. By choosing to file under Article 57, the United States conceded that the flaw was not a trivial error or ambiguity, but instead a substantive question that remained unanswered in the 2003 Decision.

The plain language of the ICSID Rules and NAFTA makes clear that until the Tribunal issued its 2004 Decision, the arbitration was ongoing with respect to the outstanding question—Mr. Loewen's Article 1116 claim. As such, the 2003 Decision was not a "final and binding" award. It was only upon the issuance of the 2004 Decision, and its incorporation into the 2003 Decision,

(...continued)

> (b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules
> (i) three months have elapsed from the date the award was rendered **and no disputing party has commenced a proceeding to revise**, set aside or annul **the award**, or
> (ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal (emphasis added).

that—pursuant to ICSID Article 57—the Award became final (and thus subject to a motion to vacate).[28]

Tellingly, even as the United States argues that the 2004 Decision is not part of the Award, it frequently relies on the substance of the 2004 Decision in order to rebut Mr. Loewen's arguments. For example, the United States cites to the 2004 Decision to justify the Tribunal's purported analysis of the Turner and Carvill Declarations in the 2003 Decision.[29] By so frequently relying upon the 2004 Decision, the United States concedes that the 2004 Decision addresses the substantive question that the Tribunal "omitted to decide" in the 2003 Decision, that the 2004 Decision forms an integral part of the Award, and that only the three decisions **together** disposed of all the questions presented to the Tribunal.

Moreover, contrary to the U.S. argument, the 2004 Decision did, in fact, alter the 2003 Decision. As is discussed in detail below, only the 2004 Decision purports to analyze the evidence concerning TLGI's subjective reasons for settling. There was no such consideration or analysis in the 2003 Decision because the Tribunal, embarrassingly, had missed all the relevant evidence. Accordingly, under the ICSID Rules and NAFTA, the Award only became final in 2004.

### B. Under U.S. Law, the 2003 Decision Was Not a Final Award

Under U.S. law, because the United States requested a **substantive** supplementary decision, it continued the arbitration. Because the United States itself chose to continue the proceedings, the

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[28] The United States also argues that a decision denying a request for a supplementary decision does not become part of the Award, and that even if the 2004 Decision formed part of the Award, it would not change the effective date of the Award. Opp'n at 20-21. First, the nature of a supplementary decision does not affect its incorporation into a final award. Article 57(3) does not distinguish between affirmative and negative supplementary decisions, but instead provides that all supplementary decisions "shall become part of the award." Second, Article 57 not only makes the 2004 Decision part of the Award, but also makes Article 53 applicable to supplementary decisions. Article 53(2) states: "The award shall be deemed to have been rendered on the date on which the certified copies are dispatched."[28] The ICSID Secretariat dispatched certified copies of the 2004 Decision to the Parties on September 13, 2004. Reading Articles 57 and 53(2) in combination, the 2004 Decision became part of the Award, and the Award was rendered on September 13, 2004.

[29] Opp'n at 39.

2003 Decision was not a final award, and Mr. Loewen could not have moved to vacate the Award prior to the issuance of the 2004 Decision.

This Court, like many others, has recognized that parties may only move to vacate an arbitration award once it becomes final. In *KenAmerican Res., Inc. v. Int'l Union, United Mine Workers of America*, several coal mining companies moved for a preliminary injunction against a union, seeking to halt their ongoing arbitration.[30] At the time the motion was filed, the arbitrator had already issued an "interim decision" in favor of the union, but "[t]he award . . . [allowed] for further negotiation and/or arbitration the precise remedies by which the award would be implemented."[31] This Court denied the coal companies' motion, holding that they could not seek to vacate an interim award: "They have the right to move to vacate the award **when it becomes final**. Their concern about the prospect that they may be required to take detrimental action in response to the arbitrator's interim award is **premature**."[32]

Similarly, in *New York Typographical Union No. 6 v. Volk & Huxley, Inc.*, the Southern District of New York was confronted with an employer's motion to vacate the interim award.[33] The court held it had no power to rule on the motion, citing a decision by New York's highest court under the parallel state statute, upon which the FAA was originally based: "[B]efore the court may intervene or even entertain a suit seeking court intervention, there must be an 'award' within the meaning of the statute. **The 'awards' of arbitrators which are subject to judicial examination** under the statute - and then only to a very limited extent - **are the final determinations made at the conclusion of the arbitration proceedings.**"[34] The court also cited one of its previous decisions for the

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[30] 911 F. Supp. 19, 19-21 (D.D.C. 1996).
[31] *Id.* at 21.
[32] *Id.* at 23.
[33] No. 82-Civ. 1483, 1982 WL 2068, at *1 (S.D.N.Y. July 13, 1982).
[34] *Id.* at *4 (quoting *Mobil Oil Indonesia, Inc. v. Asamera Oil (Indonesia) Ltd.*, 43 N.Y.2d 276, 401 N.Y.S.2d 186 (1977)) (emphasis added).

proposition that a party to an arbitration "could not properly have brought its motion to vacate the interim decision at any time before the final award in the dispute was rendered."[35] Based on this precedent, the court held that because there was no final arbitration award, both the union's motion to confirm and the employer's motion to vacate were untimely and premature.[36]

The rule is clear: parties to ongoing arbitration proceedings may not move to vacate interim awards.

The caselaw suggests a simple test for determining whether or not an award is "final" (such that it can be subject to a motion to vacate): are the arbitration proceedings ongoing, or have they been completed? In *KenAmerican Res.* and *New York Typographical Union No. 6*, this Court and the Southern District of New York, respectively, determined that the award was not final because it provided for further substantive proceedings. Because the arbitration proceedings had not yet been completed, this Court and the Southern District of New York both held that the respective motion to vacate in each case was premature.

Here, the arbitration proceedings were intentionally continued by the United States when it filed its Request for Supplementary Decision. It was only after the Tribunal issued the 2004 Decision that the arbitration proceedings were finally and definitely completed, and the Award—comprising the 2002, 2003, and 2004 Decisions—became final.

The United States attempts to cast into doubt the timeliness of Mr. Loewen's filing, in particular by citing cases in which movants argued that the 90-day limit began running from the date of a minor correction or technical modification to an arbitration award. However, all of the cases cited in the U.S. Opposition either support Mr. Loewen's position or are inapplicable.

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[35] *Id.* at *3-4 (quoting *Iolkos Compania Naviera, S.A. v. Gen. Prod. Tankers, Inc.*, No. 70-1216, slip op. (S.D.N.Y. Nov. 7, 1980)).

[36] *Id.* at *5. The court further emphasized that applications for relief from interim awards only wasted time and incurred needless delay in proceedings that were meant to be speedy and efficient. *Id.* at *4-5.

In *Olson v. Wexford Clearing Servs. Corp.*, an investor arbitrating against a number of entities sought to vacate the arbitration panel's decision dismissing one of the defendants, Wexford.[37] On February 18, 2001, the chairman of the arbitration panel dismissed the investor's claim against Wexford, but the investor asked the panel to reconsider its decision.[38] As the court explained, the investor's "reason was largely technical: the panel's disposition was rendered by the chair alone, and not the full three-member panel required by the NASD rules."[39] The panel reheard arguments on the dismissal on April 15, 2002, and issued an order the same day dismissing Wexford from the arbitration.[40] Subsequently, the investor sought to file a second amended statement of claim, but the panel denied it on July 29, 2002.[41] On October 24, 2002, the investor filed a motion in federal court to vacate the arbitral decision.[42] The court stated: "The question . . . is whether the statute [of limitations] began running on April 15, or whether it was triggered only when the panel denied [the investor's] request to file a second amended complaint on July 29."[43] The court determined that "[t]here [was] nothing incomplete about the order issued on April 15,"[44] thus the April 15 order constituted a final award with respect to Wexford under the NASD rules.

*Olson* actually supports Mr. Loewen's position. The original decision on Wexford's motion to dismiss was issued on February 18. For all intents and purposes, this would have been the final award but for the investor's request for reconsideration. Once the investor filed its request for reconsideration, the limitations period did not begin to run until the panel denied the request for reconsideration on April 15.[45] The court expressly held that the statute of imitations began running

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[37] 397 F.3d 488 (7th Cir. 2005); *see also* Opp'n at 20.
[38] 397 F.3d at 489.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 490.
[44] *Id.* at 491.
[45] *Id.* at 491-92.

on April 15. The court did not even consider the possibility that the 90-day period could have begun running on February 18.

The United States cites *Olson* as standing for the proposition that "the request for a supplementary decision does not alter the Award and is not itself an award,"[46] but *Olson* actually stands for the opposite proposition. The language discussed above demonstrates that the denial of the request for reconsideration was incorporated into the original dismissal to form one single award, with the statute of limitations beginning to run only upon the denial of the request for reconsideration. The United States completely ignores this language, relying instead on that portion of *Olson* dealing with the panel's denial of the investor's motion to file a second amended statement of claim. But the dismissal of Wexford from the arbitration constituted a separable, independent and final award, and the denial of the investor's motion to amend did not change that status.

Importantly, the request for reconsideration in *Olson* only involved, in the court's words, a "technical" issue. In contrast, the 2004 Decision involved a substantive question, namely Mr. Loewen's Article 1116 claim. If the court in *Olson* was willing to start the limitation period only when a "technical" motion for reconsideration was denied, surely the limitation period here did not begin to run until the Tribunal ruled on the United States' request for a supplementary decision.

In *Fradella v. Petricca*, the court considered whether the correction of an award should toll the statute of limitations.[47] On December 18, 1997, the arbitration panel issued its award.[48] Pursuant to one party's request, the award was corrected on February 23, 1998, to reflect the fact that the award was made in accordance with Massachusetts law, not New York law.[49] One of the parties moved to

[46] Opp'n at 20.
[47] 183 F.3d 17, 18 (1st Cir. 1999); *see also* Opp'n at 20.
[48] 183 F.3d at 18.
[49] *Id.*

vacate the award on March 25, 1998.[50] The court determined that the award became final on December 18 because it resolved the dispute and "[the movant] [did] not contend that it left any other 'claim' unresolved."[51]

Importantly, the court suggested that the statute of limitations would not have begun to run if the award had left open any arbitrable claims:

The one remaining question is whether either the erroneous signature page and/or its subsequent amendment on February 23 cast doubt upon the arbitrators' intention that the December 18 award resolved all "claims" submitted to arbitration. Since the choice-of-law issue itself in no sense constituted an arbitrable "claim," as distinguished from a subsidiary determination regarding the legal regimen under which the securities "claim" was to be decided, we conclude that the December 18 arbitral award finally resolved the only "claim" Petricca submitted to arbitration—i.e., the securities claim—because there is no suggestion that any counterclaim or affirmative defense remained undecided.[52]

As with *Olson*, *Fradella* actually supports Mr. Loewen, in two aspects. The U.S. Request for a Supplementary Decision, as well as Mr. Loewen's own request for reconsideration, were both based on an unresolved arbitrable claim, specifically Mr. Loewen's Article 1116 claim, that had not been dealt with in the 2003 Decision. Indeed, the United States asked "the Tribunal [to] issue a supplementary decision clarifying its disposition of that claim" as "the Award does not expressly recite its disposition of Raymond Loewen's Article 1116 claim."[53] Second, the U.S. Request was for a supplementary decision, not for a mere correction or interpretation of the 2003 Decision. Indeed,

[50] *Id.*
[51] *Id.* at 19.
[52] *Id.*
[53] U.S. Request for Supplementary Decision, at 2.

the ICSID Rules provides for such corrections and interpretations, but the United States filed its request under Article 57, precisely because the unresolved claim was a substantive matter.

In *Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers*, a company moved to vacate an arbitration award rendered on April 30, 1984, which provided that "the Arbitrator will retain jurisdiction for 90 days to resolve any remaining or unforeseen issues as to relief."[54] On June 11, 1984, the company filed a request for reconsideration, which the arbitrator denied on September 5, 1984.[55] On February 8, 1985, the company moved to vacate the award.[56] The court noted that the motion to vacate was filed nine months after the arbitrator made his award and five months after the arbitrator denied the company's request for reconsideration.[57] The company argued that the motion to vacate was timely filed because the arbitrator retained jurisdiction for 90 days after the request for reconsideration was denied, and the FAA's three-month time limit did not begin to run until the 91st day.[58] The court characterized this argument as "absurd."[59]

Importantly, the *Dreis* court held that parties should not be required or allowed to contest interim awards: "[T]he party who has lost the arbitration should not be required, and perhaps not permitted either, to bring suit to set aside the award **until the award is in some sense final, definitive; until it becomes such, the 'loser' really hasn't been hurt and his quarrel with the arbitrator is undefined**."[60] This case is thus consistent with the cases discussed above, wherein courts concluded that parties could not move to vacate awards that were not final. The court in *Dreis* concluded that the reservation of jurisdiction did not affect the finality of the award, so it did not delay the start of the limitation period.

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[54] 802 F.2d 247, 249 (7th Cir. 1986); *see also* Opp'n at 20.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 249-50.
[58] *Id.*
[59] *Id.* at 250.
[60] *Id.* (emphasis added).

The court in *Dreis* considered two issues: (1) whether the motion, if filed within 90 days after the request for reconsideration was denied, would have been timely, and (2) whether the arbitrator's reservation of jurisdiction delayed the start of the limitation period. First, the court expressed doubts about whether a request for reconsideration should delay the start, but these comments were mere *dicta* because, as the court itself recognized, the motion "wasn't filed till five months after the request for reconsideration was denied" (and thus the issue was moot).[61] Furthermore, even as it expressed these doubts, the court recognized that in another context - the appellate review of administrative decisions - the Seventh Circuit had held, based upon the practice of its sister circuits, that a request for reconsideration delayed the start of the limitation period.[62]

Second, the *Dreis* court held that "[t]he only thing that could save the timeliness of the suit would be if the arbitrator's reservation of jurisdiction had somehow deprived the award of its finality."[63] The court determined that the reservation of jurisdiction did not affect the finality of the award, primarily because all of the claims were resolved by the award and the only remaining task was a "ministerial" calculation of backpay that did not require "an exercise of judgment or discretion."[64]

The court in *Dreis* did not address directly whether the statute of limitations would run from the denial of the request for reconsideration, but the language of the decision supports Mr. Loewen's position. As the U.S. Request itself demonstrates, the 2003 Decision was not final or definitive with respect to Mr. Loewen's Article 1116 claim, thus any motion to vacate filed after the 2003 Decision would have been premature.

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[61] *Id.*
[62] *Id.* (citing *Arch Mineral Corp. v. Director, Office of Workers' Comp. Programs*, 798 F.2d 215, 216-20 (7th Cir. 1986)).
[63] *Id.* at 250-51.
[64] *Id.*

In *Int'l Associations of Bridge, Structural and Ornamental Iron Workers, Shopmen's Local Union 501 v. Burtman Iron Works, Inc.*, an arbitrator rendered a substantive award on or about March 27, 1995, and a subsequent ministerial award on back pay on June 21, 1995.[65] On July 28, 1995, the employer moved to vacate the award.[66] The court stated: "The issue before the court, then, is whether an action . . . to vacate an arbitration award accrues even though the arbitrator specifically retains jurisdiction to determine the amount of back pay."[67] The court held that the arbitrator's retention of jurisdiction did not affect the finality of the award: "The complete arbitration rule, however, does not mean that **the mere possibility** that an arbitrator may need to take further action renders an award nonfinal."[68]

*Burtman* is inapplicable here. The issue in *Burtman* is whether a subsequent ministerial award, or "the mere possibility" of one, should delay the start of the limitation period. Here, there is not only a supplementary decision, but also a substantive one, as the U.S. Request under ICSID Article 57 demonstrates.

In *Arch Dev. Corp. v. Biomet, Inc.,* an arbitration award was issued on September 12, 2002, and a party **filed** a motion to vacate on December 12, 2002.[69] However, the movant did not serve the other party with notice of the motion to vacate until March 2003.[70] If the movant had merely served the motion on the same day that it filed the motion with the court, the motion would have been considered timely. Importantly, the court noted that the motion was not served within 90 days from

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[65] 928 F. Supp. 83, 84-85 (D. Mass. 1996).
[66] *Id.*
[67] *Id.* at 86.
[68] *Id.*
[69] No. 02 C 9013, 03 C 2185, 2003 WL 21697742, at *2-3 (N.D. Ill. July 30, 2003); *see also* Opp'n at 20.
[70] *Arch Dev. Corp.*, 2003 WL 21697742, at *2-3.

the date on which the award was modified in October, which suggests that the court might have accepted service as meeting the FAA's requirements if it had occurred within that timeframe.[71]

Here, there is no dispute that Mr. Loewen timely filed and served his Notice of Petition to Vacate within 90 days of the 2004 Decision; instead, there is only a dispute over whether the 90-day statute of limitations runs from the date of the supplementary decision, an issue that *Arch Dev. Corp.* does not address directly. Furthermore, the suggestion in *Arch Dev. Corp.* that the court would have accepted service if it had occurred within 90 days of the October modification suggests some support for Mr. Loewen's position here.

The cases cited by the United States share a few common characteristics. All of them involved relatively minor corrections or technical modifications to awards, which the movants relied upon to attempt to delay the start of the 90-day limit. None of these cases (with the possible exception of *Olson*) involved arbitrators considering substantive claims on reconsideration, as the Tribunal did here by addressing Mr. Loewen's Article 1116 claim in its 2004 Decision. Furthermore, the motion to vacate in each of these cases (again, except *Olson*) was filed more than 90 days after the last substantive decision.

The United States would have the Court believe that the 2004 Decision was merely ministerial, technical, or superficial in nature, but this argument is belied by the substantive nature of the 2004 Decision. The 2004 Decision addressed the outstanding claim identified by the U.S. Request and required the submission of a new round of pleadings. Moreover, the Tribunal required more than a year to complete its consideration of the U.S. Request, and the U.S. Opposition is littered with references to the 2004 Decision that implicate the substance of the Award.

[71] *Id.* ("Here, Biomet's petition to vacate was first served on ARCH more than six months after the September Award was filed and more than four months after it was modified in October.").

### C. As a Matter of Equity, This Court Should Deem Mr. Loewen's Notice of Motion to Vacate to Be Timely Filed and Served

As an equitable matter, this Court should find that Mr. Loewen's Notice of Petition to Vacate was timely filed because the United States, by filing its Request for Supplementary Decision, effectively precluded Mr. Loewen from moving to vacate. The U.S. Request asked the Tribunal to reconvene and consider its decision on Mr. Loewen's Article 1116 claim. The Tribunal accepted the U.S. Request and continued the arbitration proceedings to reconsider Mr. Loewen's Article 1116 claim. Mr. Loewen filed his own request for reconsideration, and the Tribunal accepted additional pleadings on this issue. Until the Tribunal issued its 2004 Decision, the arbitration proceedings were ongoing with respect to Mr. Loewen's Article 1116 claim.

Mr. Loewen's Motion to Vacate and Remand was (and is) based entirely on the Tribunal's decision (or lack thereof) on his Article 1116 claim. If Mr. Loewen had moved to vacate the Award with respect to his Article 1116 claim prior to the date on which the Tribunal issued its 2004 Decision, the United States undoubtedly would have objected that it was premature, and most courts would have agreed. Furthermore, moving to vacate after the United States had submitted its Request risked the possibility of parallel proceedings, which would have frustrated the very purpose of arbitration (as a speedy and efficient alternative to litigation). As an equitable matter, the United States should not be permitted to effectively preclude Mr. Loewen from filing his Motion to Vacate, and then benefit from the argument that the Motion to Vacate is now untimely.

## IV. THERE IS NO BASIS FOR JUDICIAL DEFERENCE WHEN AN ARBITRAL TRIBUNAL MANIFESTLY DISREGARDS THE LAW, ISSUES AN INCOMPLETE AWARD, OR ENGAGES IN MISCONDUCT

Consistent with the strong federal policy favoring the enforcement of arbitral awards, U.S. courts have long deferred to the decisions of arbitral tribunals. The United States urges this Court to do the same. However, the strong presumption of deferral does not apply where the arbitrators have acted in manifest disregard of the law, where the award is incomplete, or where there is arbitral

misconduct. The circumscribed review of arbitral awards is based on the expectation that the arbitrators will respect the integrity of the arbitral process. Where the arbitrators have not upheld their side of the bargain, the principle of arbitral autonomy must yield to judicial review.

The United States either misunderstands or improperly conflates Mr. Loewen's argument when it characterizes it as "the Tribunal manifestly disregarded the law by improperly applying subjective evidence to decide the objective test for exhaustion of local remedies."[72] Mr. Loewen's argument is that the Tribunal manifestly disregarded the law and issued an incomplete award when it expressly stated that it was "not in a position to decide" whether, as an objective matter, there were legal remedies other than settlement "reasonably available" to TLGI. Instead of deciding that controlling question, the Tribunal based its decision on the subjective standard – whether TLGI believed another remedy was available. In effect, the Tribunal, instead of answering the objective question of "what options were reasonably available?," answered the subjective question of "why did the TLGI Board decide to enter into settlement rather than file a petition for writ of certiorari or enter into bankruptcy?" By applying this subjective standard, the Tribunal ignored the controlling legal principle, and thus acted in manifest disregard of the law and issued an incomplete award.

Moreover, even as it applied a subjective standard, the Tribunal engaged in further misconduct by first ignoring the Turner and Carvill accounts of the Board's actual mindset, and then, when it at last considered them in the 2004 Decision, failing to consider them fairly and carefully, because of the Tribunal's embarrassment over its previous blunders.

Either ground is sufficient to vacate the Award.

[72] Opp'n at 28.

### A. The Tribunal Manifestly Disregarded the Objective Standard

As noted in Section IIB, Mr. Loewen and the United States agree that the legal standard for the exhaustion of remedies is objective,[73] and that the legal standard measures whether there exists, as an objective matter, an adequate, effective and reasonably available local remedy.[74]

The description in the U.S. Opposition of what the Tribunal actually did with respect to the objective standard is excellent creative writing, but unsound legal analysis. According to the United States, "the Tribunal found the evidence from Mr. Loewen's perspective **insufficient** to establish that neither the Supreme Court nor bankruptcy options were reasonably available."[75] In fact, the Tribunal expressly stated without equivocation that it had not and would not decide this question: "**This Tribunal is not in a position to decide** whether the opinion of Professor Days or that of Professor Tribe is to be preferred."[76]

Two conclusions can be drawn from the Tribunal's express statement. First, no amount of linguistic contortion can convert the phrase "not in a position to decide" into an arbitral holding that "there was insufficient evidence as to the objective standard." The U.S. argument is creative, but that is simply not what the Tribunal said or held – the Tribunal expressly refused to decide the controlling question.

Second, it is apparent that the Tribunal missed yet another piece of critical evidence – the expert opinion of Professor Charles Fried, who clerked for the U.S. Supreme Court, served as Solicitor General of the United States and as an Associate Justice of the Massachusetts Supreme Judicial Court, and continues to work as a professor at Harvard Law School. According to Professor Fried, "consideration of [TLGI's] claims in the Supreme Court of the United States was

[73] Mot. to Vacate at 21-25; Opp'n at 29, 32.
[74] Mot. to Vacate at 21-23; Opp'n at 15-16, 26, 31.
[75] Opp'n at 39 (emphasis added).
[76] 2003 Decision at ¶ 211.

practically unavailable to [TLGI]."[77] Just as the Tribunal missed Mr. Loewen's Article 1116 claim, and the Turner and Carvill Declarations, it completely missed Professor Fried's opinion. Not even the credentials of so distinguished a panel such as the Tribunal can justify such glaring errors.

In opposition to the expert opinion of Professors Tribe and Fried, the United States presented the expert opinion of Professor Drew Days. Whereas Professor Fried concluded that Supreme Court review was "practically unavailable," and Professor Tribe concluded that "as a practical matter, Supreme Court review was unavailable,"[78] Professor Days opined that "[TLGI] **could** have sought and would have had a **reasonable opportunity** to obtain Supreme Court review of the Mississippi Supreme Court's decision."[79] This is curious wording. Professor Days did not opine that TLGI's petition was likely to be granted, or even that review was reasonably possible. Indeed, every certiorari petition provides an "opportunity" for review, because the Supreme Court seriously evaluates most, if not all, such petitions. Thus, Professor Days' phrasing was hardly an enthusiastic endorsement of TLGI's chances of obtaining a remedy. Moreover, the phrase "reasonable opportunity" has a hollow ring in light of the statistics on obtaining Supreme Court review—only 87, or 1.3%, of the 6685 petitions for writs of certiorari considered during the 1996 term were granted.[80]

As the United States concedes, "it is after all the arbitrators . . . who are 'charged with the duty of determining what evidence is relevant and what is irrelevant.'"[81] Here, the Tribunal failed to fulfill its duty. Not only was it self-evidently "in a position" to decide the objective standard, it was

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[77] Op. of Charles Fried, at 1.
[78] Statement of Laurence Tribe (Oct. 18, 1999), at 2. Professor Tribe also stated: "I do not believe that [TLGI] could have had any basis for believing that a petition for certiorari would have been granted or would indeed have stood a non-negligible **chance** of being granted."; *Id.* at 24.
[79] Statement of Drew S. Days III (Feb. 15, 2000), at 3 (emphasis added).
[80] *The Supreme Court, 1996 Term: The Statistics*, 111 Harv. L. Rev. 431, 431 (1997).
[81] Opp'n at 43 (quoting *Fairchild & Co. v. Richmond, Fredericksburg & Potomac R.R. Co.*, 516 F. Supp. 1305, 1314 (D.D.C. 1981)).

**required** to decide it. By failing to do so, the Tribunal acted in manifest disregard of the law, and rendered an incomplete decision.

### B. The Tribunal Did Not Fairly Consider the Turner and Carvill Evidence

By conflating the 2003 and 2004 Decisions, the United States implies that the Tribunal considered the Carvill and Turner Declarations **before** it issued the 2003 Decision. It is useful to recall again the precise language of the Tribunal in 2003: "[**TLGI] 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," and "**we are simply left to speculate** on the reasons which led to the decision to adopt that course rather than to pursue other options."[82] Again, those are the words of a Tribunal that has never seen or considered the relevant evidence.

To be sure, the Tribunal did consider the Carvill and Turner Declarations in the 2004 Decision, but it did not consider them fairly. The Declarations were unquestionably sufficient to establish the subjective motivations of the Board in entering into the settlement agreement, especially given the United States' complete failure to counter the Declarations with any direct evidence of its own.

The United States argues that the Turner and Carvill Declarations are not uncontradicted. However, the only evidence that the United States cites in support of that argument is the existence of a draft petition that TLGI's law firm prepared in case the Board chose to file a petition for writ of certiorari. The United States misstates the significance of this draft. The Board had an extremely short amount of time within which to decide how to deal with the Mississippi crisis. In desperate situations, it is routine for companies to prepare for different contingencies. Here, one possible contingency was a petition to the U.S. Supreme Court, hopeless as it might be. That a petition was drafted does not in any way contradict the opinion of TLGI's counsel—which was conveyed to Mr.

[82] 2003 Decision at ¶¶ 215-17 (emphasis added).

Carvill and the TLGI Board—that the chances of the petition's success were "extremely remote"—i.e., not reasonably available.[83]

Simply put, when the Tribunal was confronted with incontestable evidence of its 2003 mistakes, it determined to rule against Mr. Loewen, despite the clear and uncontested evidence. That was not an honest or judicious reaction, and surely not a decision the Tribunal can be proud of. It was, instead, "misconduct by which the rights of [Mr. Loewen] have been prejudiced," precisely the type of arbitral misconduct that the FAA requires this Court to remedy.[84]

## V. THIS COURT HAS THE POWER TO REMAND THE CASE TO A NEW TRIBUNAL

Mr. Loewen has asked this Court to remand the case to a new tribunal. In response, the U.S. argues that the Court has no such power. In its Opposition, the United States singles out three cases cited by Mr. Loewen. Notably, the United States completely ignores the many decisions cited in the Motion to Vacate and Remand from other courts of appeal in which the courts either declined to enforce incomplete and contradictory awards or remanded awards to one or more arbitrators.[85]

First, the United States attempts to distinguish *Office and Prof'l Employees Int'l Union, Local 2 v. Washington Metro. Area Transit Auth.* by arguing that the Award is not ambiguous.[86] However, if a court has the power to remand an ambiguous award to a new tribunal, it surely has the power to do the same with an incomplete award.

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[83] Decl. of Wayne S. Carvill (May 24, 2000), at ¶¶ 6-8, 12-14; *see also* Submission of the Loewen Group, Inc. Concerning the Jurisdictional Objections of the United States, *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, ICSID Case No. ARB(AF)/98/3 (May 26, 2000), at ¶¶ 59-62.

[84] 9 U.S.C. § 10. The United States argues that Mr. Loewen's claims are "misplaced" because the Tribunal was composed of highly credentialed individuals. Lest the Court or the United States forget, it was the **United States** itself that first pointed out the deficiencies of the 2003 Decision. It was the United States, not Mr. Loewen, that filed the Request for Supplementary Decision, requesting "that the Tribunal issue a supplementary decision clarifying its disposition of that claim" as "the Award does not expressly recite its disposition of Raymond Loewen's Article 1116 claim." Request for Supplementary Decision at 2. The United States cannot credibly point to the obvious flaws in the Award and then extol the credentials of the Tribunal.

[85] *See, e.g.,* Mot. to Vacate, fn. 92, 98.

[86] Civ. A. No. 89-1264 (OG), 1990 WL 174892 (D.D.C. Oct 25, 1990).

Second, the U.S. claims that Mr. Loewen "heavily relies" on *Application of McMahon* for the proposition that courts routinely decline to enforce incomplete awards. To clarify, the cases cited in footnote 90 of the Motion to Vacate and Remand offer equal or greater support for this proposition.[87]

As to *Application of McMahon*, Mr. Loewen's argument is based not only on the legal principle *McMahon* articulates,[88] but also on the facts of *McMahon*, which are remarkably similar to the facts here. Like the arbitrator in *McMahon*, the Tribunal did not decide one of the questions submitted to it. Like the undecided claims in *McMahon*, Mr. Loewen's Article 1116 claim was the subject of testimony (e.g., Carvill) and argument by counsel, and was never withdrawn or abandoned. The United States attempts to distinguish *McMahon* based on the arbitrator's admission that he had failed to decide one of the claims. Here, the U.S. Request serves the same purpose, for it is conclusive evidence that the Tribunal failed to decide Mr. Loewen's Article 1116 claim.

Third, the United States argues that Mr. Loewen's reliance on the decision in *The United Mexican States v. Metalclad Corp.* is "misplaced."[89] The United States seeks to distinguish *Metalclad,* in which the British Columbia Supreme Court partially set aside and remanded a NAFTA Chapter 11 award to the tribunal for reconsideration, based on the applicable law (Canadian law) and the

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[87] *Smart v. Int'l Bhd. of Elec. Workers, Local 702*, 315 F.3d 721, 725 (7th Cir. 2002) (holding that the FAA renders unenforceable "an arbitration award that is either incomplete in the sense that the arbitrators did not complete their assignment (though they thought they had) or so badly drafted that the party against whom the award runs doesn't know how to comply with it."); *IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.*, 266 F.3d 645, 651 (7th Cir. 2001) (holding that "the question for the district court and for us is not whether the arbitrators' reasoning is incomplete in the sense that a syllogism would be incomplete if it lacked its major or its minor premise but whether the award itself, in the sense of judgment, order, bottom line, is incomplete in the sense of having left unresolved a portion of the parties' dispute"); *ConnTech Dev. Co. v. Univ. of Conn. Educ. Props., Inc.*, 102 F.3d 677, 686 (2d Cir. 1996) (holding that "[a]n award is mutual, definite and final if it 'resolve[s] all issues submitted to arbitration, and determine[s] each issue fully so that no further litigation is necessary to finalize the obligations of the parties'"); *Michaels v. Mariforum Shipping, S. A.*, 624 F.2d 411, 413-14 (2d Cir. 1980) (holding that an award was incomplete because it "did not finally dispose of any of the claims submitted, since it left open the question of damages on the four counterclaims of Owner that it sustained and reserved decision on the fifth")

[88] 187 Misc. 247, 250 (N.Y. Sup. Ct. 1946) ("[W]hile his award may not, of course, go beyond the scope of the submission, it must, nevertheless, embrace all the matters referred to him for decision with a positive adjudication upon each. In other words, it is a fundamental requisite of an award that it shall be co-extensive with the submission.").

[89] 89 B.C.L.R. (3d) 359 (S.C.), 2001B.C.S.C. 664 (attached as Exhibit 3).

existence of different facts. Any two cases cited in a U.S. judicial decision are likely to have different facts and different governing laws (i.e., New York law vs. Louisiana law), thus the U.S. arguments lack any merit. Furthermore, U.S. courts, including the U.S. Supreme Court, routinely cite to foreign legal authority in support of their decisions.[90] The United States is correct that the *Metalclad* decision is not binding on this Court, but the United States fails to rebut its persuasive authority. The British Columbia Supreme Court held that arbitral misconduct required part of the award to be set aside and remanded to the tribunal. The situation is no different here. Thus, this Court should follow the British Columbia Supreme Court's example and vacate the Award with respect to Mr. Loewen's Article 1116 claim, and remand these claims to a new tribunal.

## VI. CONCLUSION

Mr. Loewen moves the Court to vacate the Award and remand the outstanding issues – the determination of his Article 1116 claim, the application of the objective legal standard to the exhaustion issue, and the consideration of the Turner and Carvill affidavits and other relevant evidence – to a new arbitral tribunal.

Dated: April 8, 2005

Respectfully submitted,

/s/

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[90] *See, e.g., Roper v. Simmons*, 125 S. Ct. 1183, 1198-1200 (2005); *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003).