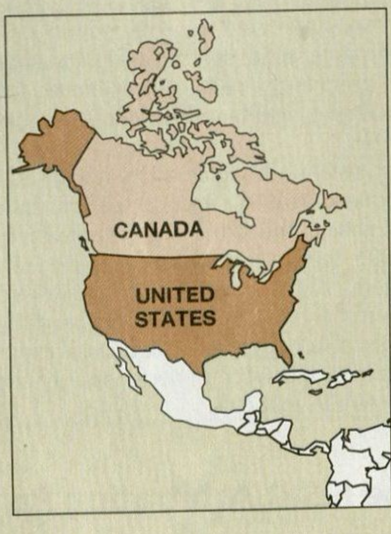
Centre for Settlement of Investment Disputes (ICSID Additional Facility Rules). Note new rules of UNCITRAL and ILM article.

Several important Article 11 NAFTA arbitrations have taken place under ICSID rules. Case 3-2 illustrates that private investors from Canada, Mexico, or the United States may bring claims against a foreign government on issues of national treatment and expropriation, and that the judgments of municipal civil juries may create grounds for such claims.

CASE 3-2 In the Matter of the Loewen Group Inc. and Raymond L. Loewen, Claimants/Investors v. United States of America Respondent/Party

International Center for the Settlement of Investment Disputes ICSID Case No. ARB (AF)/98/3



MAP 3.2

The United States and Canada

Background

The Loewen Group (Loewen) is a Canadian-based funeral conglomerate that has acquired more than 1,100 funeral homes across Canada and the U.S. The Loewen NAFTA case arose in the context of increasing consolidation in the U.S. funeral home market, as a handful of conglomerates have acquired a number of small, independent firms. This phenomenon has drawn public attention because of subsequent consumer abuses and several high-profile investigations of anti-competitive business practices. A 1996 *Time Magazine* investigation into the funeral industry charged that "Loewen and a handful of other large death-care companies are racing to buy up as many independent funeral homes as possible—not out of any desire to share the resulting economies of scale and cut the cost of funerals—but rather to boost prices still higher."[58]

In 1994, Biloxi businessman Jeremiah O'Keefe sued Loewen in Mississippi state court, alleging that Loewen had committed unlawful, anti-competitive acts intended to drive O'Keefe's local funeral and insurance companies out of business. After a trial a Mississippi jury agreed with O'Keefe, and rendered a verdict of $260 million. According to one juror, "The Loewen group . . . clearly violated every contract it ever had with O'Keefe. . . . If there was ever an indefensible case, I believe this was it." Because the jury decided on an amount in the judgment phase of the trial and not the penalty phase, Loewen could accept the jury's verdict or go back to the same jury for the penalty phase. Loewen chose to go back to court, but this time the jury upped the damages to $500 million.

[58]"Fight to the Death: A Battle Between Rival Funeral Homes Dynasties Puts the Spotlight on a Vast But Quiet Transformation in the Way We Bury our Dead," *Time*, December 9, 1996.

Loewen decided to appeal the jury verdict to a higher court, but wanted to be exempt from posting a bond worth 125% of the damages owed. Posting a bond on appeal is fairly standard practice in U.S. state court. The purpose of this rule is to prevent defendants from using the lengthy appeals process to hide assets or otherwise evade liability. To buy a bond, a defendant will typically put forward 10% of the bond requirement in cash and pledge the rest in collateral. Loewen's request to be exempt from the rule was rejected, and Loewen appealed the issue to the Mississippi Supreme Court. In 1996 the Mississippi Supreme Court rejected Loewens' demand. Rather than post the large bond or pursue other legal avenues, Loewen decided to settle the case with O'Keefe, and on January 29, 1996, the company settled for approximately $150 million, 30% of the jury verdict.

On October 30, 1998 Loewen filed suit against the United States in ICSID under Chapter Eleven of the NAFTA. Although Loewen only paid out a fraction of the original jury award, the company demanded $725 million in compensation from the U.S. government, arguing that the verdict (including the punitive damages) and the bond requirement violated its rights as an investor under Article Eleven of NAFTA. The company claimed that the judge allowed the plaintiff's attorney to appeal to the "anti-Canadian, racial and class biases" of a Mississippi jury in violation of national treatment rules in NAFTA Article 1102. The company also claimed that the bond requirement effectively forced Loewen to settle, denying its right to appeal in violation of Article 1105 (requiring fair and equitable treatment). Finally, Loewen argued that "the excessive verdict, denial of appeal, and coerced settlement were tantamount to an uncompensated expropriation in violation of Article 1110 of NAFTA."

Loewen represented the first instance in which a jury ruling has been challenged under NAFTA. In March 1999, ICSID formed a NAFTA panel to hear the case consisting of Anthony Mason (Australia), L. Yves Fortier (Canada), and former Congressman and U.S. federal court judge Abner J. Mikva. On January 9, 2001, the panel issued an interim decision rejecting a variety of U.S. arguments, including the argument that a jury decision in private contract litigation did not constitute a governmental measure under NAFTA. Instead, the panel found NAFTA jurisdiction, and placed no limits on what types of court action or decision it considers covered by NAFTA rules. This ruling opens up the possibility that all court decisions, even those of the U.S. Supreme Court, are now open to review by NAFTA tribunals.

The Judgment of the ICSID Arbitration Panel

In its award on the merits, the tribunal concluded "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."[59] The tribunal faulted the trial judge for allowing several different kinds of prejudicial behavior: repeated references to Loewen's Canadian nationality,[60] suggestions that Loewen did business only with white people,[61] and appeals to class-based prejudice.[62] Article 1105(1) provides: "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." Although Loewen did not establish that the judge or jury was actually biased against it, the tribunal concluded that "bad faith or malicious intention" was not required. "Manifest injustice in the sense of a lack of due process leading to an outcome which offends a sense of judicial propriety is enough. . . . "[63] Applying this standard, the tribunal said that "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."[64]

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[59]*Loewen Group, Inc. v. United States*, ICSID Case No. ARB(AF)/98/3 (NAFTA Ch. 11 Arb. Trib. June 26, 2003), para. 54. Publicly released documents on all NAFTA disputes are available online at www.naftalaw.org. A pdf of this case can be found at http://www.state.gov/documents/organization/22094.pdf.

[60]*Id.* paras. 56–64.

[61]*Id.* paras. 65–67.

[62]*Id.* paras. 68–70.

[63]*Id.* para. 132.

[64]*Id.* para. 137.

Yet the tribunal rejected the Loewen's Article 1105 claim because it had failed to exhaust its domestic remedies in the U.S. judicial system. LG had failed to pursue its domestic remedies, noting that Loewen should have taken the judicial process to the highest level before resorting to a NAFTA-ICSID tribunal. If this were not true, the tribunal noted, "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. . . . 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.[65] "The central difficulty in Loewen's case," the tribunal concluded, was that "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. . . . "[66]

The tribunal did offer an explanation as to why it had declined to correct what it saw as a clear miscarriage of justice. Emphasizing the limits of review in Chapter 11 cases, the tribunal stated: "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. . . . 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."[67]

Casepoint

Investors based in Canada, Mexico, or the United States may bring Chapter 11 investment protection claims to ICSID or UNCITRAL arbitration alleging failure of the host government to provide national treatment or failure to expropriate in accordance with international law standards. Challenges can be brought not only for legislative acts, but also for acts of judicial bodies. However, the claimant must completely exhaust domestic judicial remedies before resorting to an arbitral tribunal.

Provisional Measures and Awards An ICSID tribunal has the power to recommend provisional measures to preserve the respective rights of the parties (Article 47) and to issue binding awards (Article 53).

Awards issued by an ICSID tribunal are binding but not final. The tribunal itself can review an award either to interpret it (Article 50) or to revise it (Article 51). Appeal is also allowed to an *ad hoc* committee that has the power to annul an award.[68] An annulment proceeding was instituted in the *AMCO Asia Case* following a decision by the tribunal to award AMCO U.S. $2,472,490. The *ad hoc* committee determined that the evidence showed losses by AMCO of only $983,992, and it accordingly annulled the "award as a whole."[69]

Enforcement ICSID awards are binding on the parties to an arbitration, and the states parties to the Washington Convention agree to comply with them. The courts of the states parties (including the courts of the state that was a party to the arbitration) are forbidden to review the award (Article 53), and the states themselves are obliged to enforce the pecuniary provisions of the award as if it were

[65] *Id.*, para. 162.

[66] *Id.* para. 215.

[67] *Id.* para. 232.

[68] *Id.*, Article 52. The *ad hoc* committee consists of three persons appointed from the Panel of Arbitrators by the chairman of the Administrative Council (i.e., the president of the World Bank). Appeals to such a committee are allowed on the grounds "(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based." *Id.*

[69] *AMCO Asia Corp. et al. (United States) v. Indonesia (Annulment), International Legal Materials*, vol. 26, p. 467 (1987).