

IN THE MATTER OF:

**THE LOEWEN GROUP, INC. and  
RAYMOND L. LOEWEN,**

Claimants/Investors,

v.

**THE UNITED STATES OF AMERICA,**

Respondent/Party.

ICSID Case No. ARB(AF)/98/3

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**RESPONSE OF THE UNITED STATES OF AMERICA  
TO THE JUNE 27 AND JULY 2, 2002 SUBMISSIONS OF  
THE GOVERNMENTS OF CANADA AND MEXICO  
PURSUANT TO NAFTA ARTICLE 1128**

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## ARGUMENT

On June 27 and July 2, 2002, pursuant to NAFTA Article 1128, the Governments of Canada and Mexico respectively submitted their views on certain matters of the interpretation of the NAFTA that have arisen in the present arbitration (hereinafter the “Can. Submission” and “Mex. Submission”). The United States offers the following brief responses to those submissions:

I. AS CANADA’S AND MEXICO’S SUBMISSIONS CONFIRM, THE NAFTA PARTIES ARE NOT BOUND TREATIES NOT IN FORCE BETWEEN THEM

During the course of the hearing on competence of June 6, 2002, it became apparent that Loewen’s position was founded on a novel approach to the sources of international law: Loewen asserted that the NAFTA Parties were bound by a purported rule established in treaties – the ICSID Convention and various bilateral investment treaties – that were not, and have never been, in force between or among them. At the hearing, the United States noted the lack of support for Loewen’s theory.<sup>1</sup> The submissions of Canada and Mexico confirm the error that underlies Loewen’s arguments.

A. The ICSID Convention Cannot Supply The Applicable Law Here

The United States and Canada agree with Mexico that,

it is elementary in international law that a non-signatory to a treaty gains no rights and no obligations from that treaty. This principle, stated in Article 34 of the Vienna Convention on the Law of Treaties, that a ‘treaty does not create either obligations or rights for a third state without its consent’ is well established.

Mex. Submission ¶ 22; accord Can. Submission ¶¶ 6-9. The United States agrees with Canada and Mexico that, for this reason (among others), Loewen’s arguments based on

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<sup>1</sup> See June 6, 2002 Transcript at 295.

the ICSID Convention (and the BITs) must fail. The ICSID Convention is not in force between or among the NAFTA Parties.<sup>2</sup> The mere fact that Article 1120 allows for the possibility that the ICSID Convention may, at a future date, come into force between some or all of the NAFTA Parties does not mean that the Parties have “recognized” that convention in any legally relevant sense. See Mex. Submission ¶ 22-23; Can. Submission ¶ 9. In accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties, this agreement among the three NAFTA Parties as to the proper interpretation of Article 1120 “shall be taken into account” for purposes of interpreting the NAFTA.<sup>3</sup>

Mexico’s Article 1128 submission further confirms the United States’ position that, even if the ICSID Convention were in force between or among the NAFTA Parties, the NAFTA itself resolves the question currently before this Tribunal. As Mexico correctly states, “Section B . . . requires continuous nationality throughout the prosecution of the claim until the matter is finally disposed of under Article 1136.” Mex. Submission ¶ 19. This limitation on the scope of arbitrable disputes governs all Chapter Eleven cases regardless of which arbitral rules apply under Article 1120. Thus, while Article 25 of the ICSID Convention establishes the limits of the *Centre*’s jurisdiction, the continuous nationality requirement embodied in Section B (in addition to other requirements enumerated in Section B) prescribes the competence of a *NAFTA tribunal*. See U.S. Reply at 42 n.29. The text of the ICSID Convention confirms that the

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<sup>2</sup> See Can. Submission ¶ 18 (“[N]o BIT is enforceable as between the NAFTA Parties.”); Mex. Submission ¶ 32 (“[T]hese purely conventional obligations are binding only on the contracting States and do not purport to bind other States.”).

<sup>3</sup> See Vienna Convention on the Law of Treaties, art. 31(3)(a) (“There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions[.]”).

“jurisdiction of the Centre” and “the competence of the Tribunal” are not the same. ICSID Convention, art. 41(2).

In sum, the ICSID Convention does not supply the applicable law here.

B. The BITs Supply No Rule Of Customary International Law Relevant Here

The United States agrees with Canada and Mexico that, contrary to Loewen’s contention, no rule of customary international law relevant to this NAFTA proceeding is established by the various bilateral investment agreements between States not parties to the NAFTA. See Canada Submission ¶¶ 11, 13; Mex. Submission ¶¶ 32-33. Two elements must be established for a rule of customary international law to be established: State practice and *opinio juris*.

The United States agrees with Canada and Mexico that a provision of a treaty cannot create a new rule of customary international law unless, in the first place, the relevant practice of States is uniform and widespread.<sup>4</sup> There is no dispute that treaties are a form of State practice that may be taken into account in assessing the existence and content of a rule of customary international law under appropriate circumstances. However, as Canada correctly observes, “the conditions for finding that a treaty provision has become a customary international rule are stringent.” Can. Submission ¶ 11; accord Mex. Submission ¶ 34. The United States concurs that the judgment of the International Court of Justice in North Sea Continental Shelf presents a seminal statement of the requirements for a rule stated in a treaty to become customary international law. For the reasons the United States has previously stated at some length (see U.S. Reply at 46-52),

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<sup>4</sup> See Can. Submission ¶ 16; Mex. Submission ¶¶ 33, 36.

Loewen has not come close to a showing that would satisfy the requirements stated in that judgment.

In addition, Canada and Mexico conclusively reject Loewen’s argument that the BITs evidence the existence of a new rule concerning the nationality of investor-State claims. See Can. Submission ¶ 18 (“The variation of terms, and specifically the differences in the scope and nature of access to international arbitration makes it impossible to find a consistent practice.”); Mex. Submission ¶ 39 (“[I]t is impossible to infer from the existence of a large number of BITs alone that any particular provision therein represents a rule of customary international law merely by reason of its commonality.”). As the United States has demonstrated, Mexico and Canada’s investment treaty practice in this area deviates from that in many BITs and, instead, comports with Article 1117(4) of the NAFTA: none of the agreements cited to this Tribunal to which Mexico or Canada is a party allows for claims by a foreign-owned or controlled enterprise that is incorporated or otherwise organized under the laws of the respondent State. Thus, there is no evidence before this Tribunal to establish the requisite participation by Mexico and Canada in the purported treaty-based rule that Loewen advances. Their lack of participation is particularly relevant here because, in the words of the I.C.J. in North Sea Continental Shelf, Canada and Mexico are “States whose interests [are] specially affected” by the purported rule.<sup>5</sup>

The United States also concurs with Canada and Mexico that, in order to evidence a new rule of customary international law, uniform and widespread State practice must

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<sup>5</sup> North Sea Continental Shelf, 1969 I.C.J. 3 (Feb. 20) ¶ 73 (“With respect to the other elements usually regarded as necessary before a conventional rule can . . . become a general rule of international law . . . , a very widespread and representative participation in the convention might suffice of itself, provided it

stem from a sense of legal obligation to act. See Can. Submission ¶ 23 (“without the psychological element proving that the State considers itself legally bound, any act of that State cannot amount to evidence of a rule of customary international law”); Mex. Submission ¶¶ 36-37 (“there must be *opinio juris* . . . the requirements for establishing a rule of customary law illustrates the error underlying the proposition that the mere existence of different BITs gives rise to a ‘world-wide web’ of new customary international law obligations”).

Loewen, however, has not established the *opinio juris* necessary to demonstrate the existence of a rule of customary international law. Indeed, the requisite *opinio juris* to support the new rule Loewen advances does not exist. To the contrary, the State members of the Sixth Committee of the United Nations General Assembly very recently expressed

strong support . . . for the retention of the customary rule, i.e. that diplomatic protection could only be exercised on behalf of a national of the plaintiff State, and that the link of nationality must exist from the first to the last moment of the international claim.<sup>6</sup>

The Committee repeatedly referred to this rule as the current rule, e.g., “the rule in its current form,” “an established norm of customary international law,” “the continuous nationality rule,” and “the traditional rule.”<sup>7</sup> Moreover, in addition to recommending the retention of the customary rule in the ILC’s draft articles on Diplomatic Protection, the

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included that of States whose interests were specially affected”); see also Mex. Submission ¶ 37 (“The alleged rule’s existence must be judged against the conduct . . . of non-parties.”) (emphasis in original).

<sup>6</sup> Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During Its Fifty-Sixth Session Prepared by the Secretariat, U.N. Doc. A/CN.4/521, at 11 ¶ 74 (2002) (emphasis added).

<sup>7</sup> Id. at 11-12.

Committee considered the Special Rapporteur’s report as a proposal “to amend the rule.”<sup>8</sup> These statements and actions supporting the United States’ position on the content of the customary rule dispel any notion that there exists the *opinio juris* necessary to establish that a purported new rule exists.

In short, Loewen has not established any evidence of *opinio juris* sufficient to prove the replacement of the traditional rule. Thus, as Mexico correctly noted, this Tribunal should decline “to accede to arguments that would require [it] to make law.” Mex. Submission ¶ 5.

Finally, the United States agrees with Canada and Mexico that the recent award on damages of the tribunal in Pope & Talbot Inc. v. Canada erred in suggesting – without any consideration of *opinio juris* – that various bilateral investment treaties could be seen as establishing a rule of customary international law.<sup>9</sup>

## II. AS MEXICO DEMONSTRATES, THE TEXT OF THE NAFTA REQUIRES THAT THE CLAIM RETAIN ITS NATIONAL CHARACTER UNTIL ITS RESOLUTION

The United States agrees with Mexico that “the nationality link set out in Articles 1116 and 1117 must continue to the end of the arbitration.” Mex. Submission ¶ 13. The United States further agrees that the prospect of claimants “invok[ing] Chapter Eleven against their own governments” is one “that clearly offends the plain wording of Section B and the structure of Chapter Eleven.” Id. ¶ 11.

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<sup>8</sup> Id. at 11 ¶ 74.

<sup>9</sup> For a more complete statement of the United States’ views on the recent Pope & Talbot award, the United States respectfully refers the Tribunal to its submission on that award in the case of ADF Group Inc. v. United States, which is included in Volume XV at Tab 541 of the U.S. Legal Sources Collection submitted herewith and also available at <<http://www.state.gov/documents/organization/11662.pdf>>.

As the United States has demonstrated, this conclusion is compelled by the text of Article 1117(4), which unequivocally bars an investment from making a Chapter Eleven claim. See U.S. Mem. at 17; U.S. Reply at 16-18 & n.5; June 6, 2002 Transcript at 8, 86-90. The use of the general word “make” in Article 1117(4) rather than the time-specific word “submit” – which is used elsewhere in Article 1117 – connotes a continuing prohibition on an investment bringing a claim against its own government. If, as Loewen contends, Article 1117(4) only prohibits an investment from submitting a claim, the provision would be mere surplusage because Articles 1116(1) and 1117(1) make clear that only an investor of another party may submit a claim. Such an interpretation runs counter to the principle that treaties should be interpreted to give effect to each of their provisions.<sup>10</sup>

The United States concurs with Mexico that Article 1136 and the definition of “disputing party” in Article 1139 further confirm that Chapter 11 requires the nationality link to continue throughout the arbitration. See Mex. Submission ¶¶ 12, 14-19; accord U. S. Mem. at 16-18.

In addition, Mexico is correct that Article 1109 has no bearing on any issue before this Tribunal. See Mex. Submission ¶ 20. That article simply does not speak to the nationality of a Chapter Eleven claim. Article 1109 states that the NAFTA Parties “shall permit all [transfers] relating to an investment of an investor” of one NAFTA Party in the territory of another “to be made freely and without delay.” NAFTA art. 1109(1). It thus

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<sup>10</sup> See Territorial Dispute (Libya v. Chad), 1994 I.C.J. 6 ¶ 51 (Feb. 3) (collecting authorities supporting “one of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, namely that of effectiveness”); accord Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4, 24 (Apr. 9) (“It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort, occurring in a special agreement, should be devoid of purport or effect.”).

addresses the movement of any remittances derived from or relating to an investment covered by Chapter Eleven – e.g., “profits,” “dividends,” “returns in kind,” “proceeds,” and “payments” – between the Party host to the investment and other countries, including the Party home to the investor.<sup>11</sup> Id. art. 1109(1)(a). In sum, Article 1109 imposes no obligations on the NAFTA parties with respect to transactions of the sort by which TLGI assigned its NAFTA claims against the United States to a U.S.-owned enterprise.<sup>12</sup> Article 1109 is irrelevant to the argument at hand.

### III. AS MEXICO DEMONSTRATES, THE ESTABLISHED RULES OF DIPLOMATIC PROTECTION APPLY TO INVESTOR-STATE ARBITRATIONS UNDER THE NAFTA

Finally, the United States agrees with Mexico that there is no basis for Loewen’s attempt to “jettison” “the established rules and principles of diplomatic protection . . . on the rationale that they are ‘old’ and investor-State arbitration is ‘new.’” Mex. Submission ¶ 25. Mexico is correct that “the right of direct access conferred by Section B of the NAFTA does not in any way alter the interpretation of the Treaty’s substantive rights and obligations, which exist at the international plane between the States *inter se*.” Id. ¶ 28. The principles of international law applicable to claims between States based on those rights and obligations – including the rule of continuous nationality of claims – remain fully applicable to claims under Section B of Chapter Eleven. See id. ¶ 31. In addition, the United States agrees with Mexico that the principles that are the foundation for the

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<sup>11</sup> See also NAFTA Implementation Act, U.S. Statement of Administrative Action, H.R. Rep. No. 103-159, Vol. 1, at 593 (1993) (“Article 1109 requires each NAFTA government to permit transfers relating to an investment covered by Chapter Eleven to be made freely and without delay, including transfers of profits, royalties, sales proceeds and other remittances relating to an investment.”).

<sup>12</sup> Moreover, to the extent, if any, that the continuous nationality rule advanced by the United States conflicts with the terms of Article 1109, the purported “date-of-submission” rule advanced by Loewen conflicts as well.

continuous nationality rule are, and remain, “settled rules of customary international law.” Id. ¶ 51.

### CONCLUSION

For the foregoing reasons, the United States respectfully submits that the Tribunal should favorably consider the views of Canada and Mexico in their respective submissions under Article 1128. For the reasons stated in those submissions, and in the United States’ written and oral pleadings, the United States respectfully submits that the Tribunal should dismiss the claims of TLGI on the grounds that they are not within the competence of this Tribunal.

Respectfully submitted,

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