

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

**RESPONSE OF THE UNITED STATES OF AMERICA TO THE
NOVEMBER 9, 2001 SUBMISSIONS OF THE GOVERNMENTS OF
CANADA AND MEXICO PURSUANT TO NAFTA ARTICLE 1128**

Mark A. Clodfelter
Barton Legum
Laura A. Svat
Alan J. Birnbaum
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
Suite 5519
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037

Steven F. Fabry
J. Carol Williams
OFFICE OF THE U.S. TRADE
REPRESENTATIVE
600 17th Street, N.W.
Washington, D.C. 20508

David J. Anderson
Vincent M. Garvey
Kenneth L. Doroshov
Craig M. Blackwell
David O. Buchholz
Jonathan B. New
U.S. DEPARTMENT OF JUSTICE
Civil Division
901 E Street, N.W., P.O. Box 883
Washington, D.C. 20530
Tel: (202) 514-4263
Fax: (202) 616-8202

Attorneys for Respondent
United States of America

Dated: December 7, 2001

On November 9, 2001, pursuant to NAFTA Article 1128, the Governments of Canada and Mexico submitted their views on certain matters of interpretation of the NAFTA that have arisen in the present arbitration (hereinafter the "Can. 1128 Submission" and "Mex. 1128 Submission"). The United States offers the following brief responses to those submissions:

I. The Governing Law

The Government of Mexico submits that, as provided in NAFTA Article 1131(1), the Tribunal must decide this matter in accordance with the terms of the Agreement and applicable rules of international law. The United States agrees with Mexico and submits, respectfully, that this point is an important one.

Unlike common-law courts, an international tribunal is not authorized to make law or otherwise to rely on considerations that are not recognized rules of international law. Rather, as Mexico correctly observes, a tribunal constituted under NAFTA Chapter Eleven may apply as the rule of decision only the terms of the Agreement and applicable rules of international law. A rule may be considered to form part of customary international law only where the existence of the rule is established by general and consistent practice of States followed by them from a sense of legal obligation.¹ If there is no widespread or substantial uniformity of State practice with regard to the rule in question, then that rule cannot be regarded as one of customary international law and, therefore, cannot govern the resolution of the dispute.

¹See Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987). In other words, a customary international law rule is established by two elements: "a concordant practice of a number of States acquiesced in by others; and a conception that the practice is required by or consistent with the prevailing law (the *opinio juris*)." Clive Parry, John P. Grant, Anthony Parry & Arthur D. Watts, *Encyclopaedic Dictionary of International Law* 82 (1986).

A. The Free Trade Commission's July 31, 2001 Interpretation

Both Mexico and Canada observe correctly that, pursuant to NAFTA Article 1131(2), the July 31, 2001 Interpretation of the Free Trade Commission (“FTC”) is part of the governing law in this case and that the FTC’s interpretation is binding on this and other tribunals constituted under NAFTA Chapter Eleven. Although claimants previously argued (without merit) in their written submissions that the FTC’s interpretation may be disregarded as an “impermissible amendment” and an “intrusion” into an ongoing arbitration proceeding, claimants appear to have abandoned that argument at the hearing on the merits of this case on October 15-19, 2001, and now accept – as they must – that the FTC’s statement is binding on this Tribunal.² Accordingly, the United States rests on its submissions already made in the case with regard to this issue.

B. Other Sources of Governing Law

The Government of Mexico observes correctly that customary international law is determined by international custom "as evidence of a general practice accepted as law," and offers comment on several sources of international law and their varying degrees of authoritativeness. The United States agrees with Mexico that customary international law is defined by State practice and that only those rules that have gained widespread acceptance as law may be considered as part of customary international law.

The United States also agrees that the writings of publicists may be considered in determining the content of international law under certain circumstances, but with one further qualification: Mexico asserts that “the writings of qualified publicists who provide a passive appraisal of law are to be preferred over those who prescribe views as to what the law should

²See, e.g., Merits Hearing Transcript, Vol. 1 (Oct. 15, 2001) at 231-32, 242.

be.” Mex. 1128 Submission at 5. The United States respectfully submits that the writings of publicists – even the most highly qualified publicists – that state views as to what the law should be (rather than what the law actually is) are not merely subject to a lesser degree of preference, but are instead entitled to no weight whatsoever in the search for the content of customary international law.

The decision of the International Court of Justice in the North Sea Continental Shelf cases is instructive in this regard. (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3 (Feb. 20). There, one of the parties had argued that an article in a multilateral convention proposed by the International Law Commission – a body made up of publicists and other recognized experts in international law – reflected an established or emerging rule of customary international law. The Court reviewed the history of the article, and concluded that the Commission had proposed it “on an experimental basis [and it] was at most *de lege ferenda*, and not at all *de lege lata* or an emerging rule of customary international law.” *Id.* at 38.³ The Court therefore declined to consider the rule stated in the article to be one of customary international law.

Mexico also comments on the significance of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("ILC Draft Articles"). Mexico is correct that the ILC Draft Articles address only secondary rules of State responsibility and, therefore, do not address the content of the substantive obligations – the so-called "primary rules" of State responsibility – at issue in this case. As the United States has shown, however, the comments of governments on those Draft Articles often include statements regarding the

³See Clive Parry, *et al.*, *supra* n.1, at 214 ("*Lex ferenda* imports . . . the law as it 'ought' to be. *Lex lata* imports the law which is presently in force.>").

content of such primary rules; for example, the views of the United Kingdom and the United States that a lower court decision cannot amount to an internationally wrongful act until that decision becomes the final expression of the court system as a whole, i.e., until there has been a decision of the court of last resort available in the case.⁴ Such government comments – which, unlike the ILC Draft Articles themselves (unless and until they are adopted by States with a sufficient degree of universality), indeed evidence State practice – may properly be considered in determining the content of the substantive rules of customary international law.

The United States also agrees with Mexico that the Tribunal should not rely on the Partial Award rendered in CME Czech Republic B.V. (The Netherlands) v. Czech Republic, UNCITRAL Award (Sept. 13, 2001), which claimants first discussed at the October 15-19, 2001 hearing. As Mexico observes, the CME case was decided under a different treaty than the NAFTA (indeed, no NAFTA Party was a party to the treaty at issue there) and did not involve any challenge to judicial action or claims of denial of justice. CME is thus irrelevant to the present case and, moreover, appears to be unsound in certain substantive respects.

CME, which was decided over an extraordinarily bitter dissent, reached the opposite conclusion of another tribunal under virtually identical facts in a parallel proceeding. See Ronald S. Lauder v. Czech Republic, UNCITRAL Final Award (Sept. 3, 2001). One participant in those arbitrations commented that this fundamental inconsistency "brings the law into disrepute, it brings arbitration into disrepute – the whole thing is highly regrettable."⁵ Indeed, according to

⁴See U.S. Rejoinder at 88-90, 107-11.

⁵M. Rushton, Clifford Chance Entangled in Bitter Lauder Arbitrations, Legal Business (Oct. 2001) (quoting Clifford Chance partner Jeremy Carver) (appended hereto at Tab 1).

recent reports, the Czech Republic will soon be filing an action in the Swedish courts to challenge the CME tribunal's decision, thus further calling into question the relevance of the decision to the present case.⁶

The CME tribunal's decision is questionable in other respects as well. For example, as Mexico observes, the CME tribunal's two-member majority erroneously suggested in *dicta* that the local remedies rule did not apply to the investment dispute in the absence of contrary language in the treaty, even though the Czech Republic did not raise a defense based on the local remedies rule.⁷ The CME tribunal's suggestion, however, contradicted the settled international rule – fully recognized by this Tribunal – that "an important principle of international law should not be held to have been tacitly dispensed with by an international agreement, in the absence of words making clear an intention to do so."⁸

Similarly, the CME majority dismissed as "speculation" whether the investor could have obtained redress through the domestic courts before proceeding to international arbitration.⁹ This portion of the CME majority's decision is inapposite, however, as CME did not involve any challenge to judicial action or claims of denial of justice. As the United States has shown, when (as here) a claimant alleges that actions by a domestic court constitute a breach of an international obligation, established rules of customary international law require the claimant to

⁶See, e.g., CzechRep to file complaint against CME Arbitration–Zelinka, Czech News Agency, 2001 WL 30025494 (Dec. 3, 2001).

⁷Mex. 1128 Submission at 12 (quoting CME at ¶ 417).

⁸Loewen, Decision on Competence and Jurisdiction (Jan. 5, 2001) at ¶73 (citing Eletronica Sicula SpA (ELSI) (U.S. v. Italy), 1989 I.C.J. 15 at 42).

⁹CME at ¶ 521.

pursue domestic appeals to finality before any breach can be found, "however contingent and theoretical these remedies may be" ¹⁰ What the CME majority dismissed as "speculation" – i.e., "[t]he possibility that . . . [the Respondent's] law courts would [have] grant[ed] sufficient relief . . ." ¹¹ – is therefore a fundamental element of the present claim, and which claimants bear the heavy burden of disproving.

II. The Tribunal's Role in Review of Judicial Acts and Domestic Law

The United States agrees with Mexico that customary international law recognizes distinctions between acts of the judiciary and acts of other organs of the state and accords great deference to judicial acts. As the United States has shown, all evidence of State practice that is before this Tribunal demonstrates that the rules of customary international law in this respect are well-established:

- a claimant in an international proceeding cannot base its complaint on grounds that it did not previously raise, but could have raised, before the municipal courts;
- a denial of justice claim is an extreme charge that cannot be met by a showing of error – even an error with extreme consequences – by the municipal court, but instead requires a showing of bad faith or flagrant and inexcusable disregard of law;
- unless the rules governing the conduct of trials and appeals are indicted at the international level, their application in the normal course by municipal courts must be respected by international tribunals;
- a lower court decision cannot amount to an internationally wrongful act until that decision becomes the final expression of the court system as a whole, i.e., until there has been a decision of the court of last resort available in the case; and

¹⁰Norwegian Loans Case, 1957 I.C.J. Rep. 9, 39 (separate opinion of Judge Lauterpacht). See also U.S. Response on Jurisdiction at 32-37.

¹¹CME at ¶ 521.

- an appealable judicial decision may be deemed to have been rendered by a court of last resort only where the claimant meets its burden of proving that an appeal from the decision would have been *manifestly* ineffective or *obviously* futile.

With respect to NAFTA Article 1121, the United States agrees with Mexico that claimants' "suggestion that the local remedies rule is an antiquated customary international law rule that does not belong to modern treaty practice is incorrect." Mex. 1128 Submission at 9. As the United States has shown, there is no support for claimants' suggestion "as to the irrelevance of international claims law in general or the local remedies rule in particular." U.S. Rejoinder at 93. The United States continues to maintain, however, that whether or to what extent NAFTA Article 1121 waives the local remedies rule is irrelevant to the merits of this (or any other) NAFTA Chapter Eleven dispute, as Article 1121 is a jurisdictional provision only. *Id.* at 88-90.

III. NAFTA Article 1102: National Treatment

The United States shares Mexico's and Canada's view that the standard set forth in Article 1102, unlike that in Article 1105, is a relative one that is measured solely by reference to the Respondent's treatment of its own nationals "in like circumstances." The United States also agrees that the proscribed denial of national treatment must be proven on the basis of *actual* treatment and should not be premised on speculation as to how a hypothetical measure might have applied to domestic investors in an imagined setting. It is for this reason that claimants' burden in this context (e.g., to prove that the Mississippi courts would have treated Loewen more favorably if, all other things being equal, it had been a Mississippi-owned company) is exceptionally heavy and, on the record of this case, impossible to meet.

As the record of this case makes clear, the Mississippi courts treated all of the defendants

in the O'Keefe litigation – including local Mississippi defendants Riemann Holdings, John Wright, and the Wright & Ferguson Funeral Home – equally.¹² The "measures" at issue thus did not afford treatment to claimants any "less favorable" to those U.S. investors "in like circumstances" and, therefore, could not violate NAFTA Article 1102.

IV. NAFTA Article 1105: Minimum Standard of Treatment

Mexico correctly observes that, "[a]t customary international law, in order to make out a denial of justice, the legal system as a whole must fail." Mex. 1128 Submission at 15. Thus, as Professor James Crawford noted in his 1999 report to the International Law Commission, "an aberrant decision by an official lower in the hierarchy, which is capable of being reconsidered, does not itself amount to an unlawful act."¹³

Moreover, where an appeal is legally available, a judicial decision is "capable of being reconsidered" unless the claimant can prove that an appeal would have been *manifestly* ineffective or *obviously* futile. Although claimants suggest that a lesser standard should apply here, all evidence of State practice in situations where the availability of appeals is in question – such as duress claims or cases involving application of the local remedies rule – makes clear that "the test is obvious futility or manifest ineffectiveness, not the absence of reasonable prospect of success or the improbability of success, which are both less strict tests."¹⁴ Because it is State practice alone that gives content to customary international law, claimants can prevail here only

¹²See, e.g., U.S. Rejoinder at 102-06.

¹³James Crawford, Special Rapporteur, Second Report on State Responsibility, Int'l L. Comm'n, 51st Sess., U.N. Doc. A/CN.4/498 (1999) at ¶ 75.

¹⁴C.F. Amerasinghe, Local Remedies in International Law 195 (1990). See also, e.g., U.S. Counter-Mem. at 76-79; U.S. Rejoinder at 87 & n.100.

by meeting their burden of proving that continuing the appeal from the O'Keefe judgment would have been *manifestly* ineffective or *obviously* futile. As the United States has already shown, claimants cannot come close to meeting this standard on the facts of this case.

Mexico is also correct that "the settled litmus test for a denial of justice at customary international law requires an outrage or flagrant disregard of law." Although there was some discussion at the hearing as to similarities between the international standard and the concept of "due process of law" under United States law,¹⁵ the United States agrees with Mexico that an international tribunal's "angle of examination" is necessarily more deferential to judicial decisions than is the standard of review applied by domestic courts. While the United States' constitutional standard of due process is indeed high and difficult to meet, an international tribunal's review of domestic government action must be further constrained by a proper regard for the sovereign right of nations to regulate affairs within their own borders, subject only to treaty obligations and the dictates of international law. As Mexico observes, this deference is particularly appropriate where, as here, the actions under review are those of the judiciary.

V. NAFTA Article 1103

The United States agrees with Canada's observation that claimants cannot base their Article 1105 claims on a supposed violation of NAFTA Article 1103. As the FTC's July 31, 2001 interpretation made explicit, "[a] determination that there has been a breach of another

¹⁵For example, Judge Mikva inquired as to the relationship between the international minimum standard of treatment and "notions of American due process of law." Merits Hearing Transcript, Vol. 4 (Oct. 18, 2001) at 908. Although one of the United States' counsel offered his "personal opinion" that "the international minimum standard of treatment of aliens and the concept of due process as expressed in the United States Constitution" are "very similar, if not identical," *id.*, the position of the United States is that the two standards are different, and that the international standard is necessarily more difficult to satisfy.

provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)." Indeed, claimants appear to have conceded as much at the October 15-19 hearing.¹⁶ Moreover, as the United States has already explained, claimants' last-minute effort to add a free-standing claim under Article 1103 is both procedurally and substantively flawed and should be rejected out of hand.¹⁷

Respectfully submitted,

Mark A. Clodfelter
Barton Legum
Laura A. Svat
Alan J. Birnbaum
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
Suite 5519
2430 E Street, N.W.
Suite 203, South Building
Washington, D.C. 20037

Steven F. Fabry
J. Carol Williams
OFFICE OF THE U.S. TRADE
REPRESENTATIVE
600 17th Street, N.W.
Washington, D.C. 20508

Dated: December 7, 2001

David J. Anderson
Vincent M. Garvey
Kenneth L. Doroshov
Craig M. Blackwell
David O. Buchholz
Jonathan B. New
U.S. DEPARTMENT OF JUSTICE
Civil Division
901 E Street, N.W., P.O. Box 883
Washington, D.C. 20530
Tel: (202) 514-4263
Fax: (202) 616-8202

Attorneys for Respondent
United States of America

¹⁶See Merits Hearing Transcript, Vol. 1 (Oct. 15, 2001) at 239-40.

¹⁷See Response of the United States of America to Claimants' Submission of September 12, 2001, Concerning the NAFTA Free Trade Commission's July 31, 2001 Interpretation (Oct. 11, 2001) at 9-12.