

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

**REPLY OF THE UNITED STATES OF AMERICA
SUPPORTING ITS REQUEST FOR A SUPPLEMENTARY DECISION**

TABLE OF CONTENTS

	<u>Page</u>
I. The United States' Request For A Narrow Supplementary Decision Clarifying The Award Is Appropriate	1
II. Raymond Loewen Impermissibly Seeks Reconsideration, Not A Supplementary Decision	4
III. Mr. Loewen's Request For Reconsideration Is Baseless In Any Event.....	6
IV. Procedural Issues.....	9
Conclusion.....	9

In accordance with the Tribunal's letter of November 27, 2003, respondent the United States of America respectfully submits this response to claimant Raymond L. Loewen's September 19, 2003 submission.

Raymond Loewen's submission does not seek a supplementary decision. Instead, it impermissibly seeks reconsideration of an issue already decided. The substantive changes to the Award that Mr. Loewen requests are neither contemplated by the rules nor consistent with the principle of finality of arbitral awards. Moreover, Mr. Loewen's contention is without merit in any event. Contrary to Mr. Loewen's assertion, the "unchallenged and uncontradicted evidence" he points to – consisting of all of two sentences among the thousands of pages in the record before the Tribunal – was indeed challenged and contradicted. The Tribunal's Award is amply supported by the record, and Mr. Loewen's assertion is without substance.

I. The United States' Request For A Narrow Supplementary Decision Clarifying The Award Is Appropriate

The United States' request for a supplementary decision under Article 58 of the ICSID Arbitration (Additional Facility) Rules clarifying that the Award indeed dismissed Mr. Loewen's claims under NAFTA Article 1116(1) is clearly of the sort contemplated by Article 58.

Article 58(1) provides:

Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.

This provision is based on Article 49(2) of the ICSID Convention, which provides that “[t]he Tribunal upon the request of a party . . . may . . . decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award.”¹

The United States’ request fits squarely within the confines of this provision. While the Tribunal implicitly decided the question of the merits of all of Mr. Loewen’s claims, and explicitly stated that all claims were being dismissed, it did not state expressly that Mr. Loewen’s Article 1116 claims were being dismissed on the merits. Thus, while this is not a case where the award was silent as to a question, it is one where further explication would resolve a minor ambiguity. There can be no doubt that Article 58 covers the narrow relief that the United States seeks here, which merely asks the Tribunal to make express that which it has already analyzed and explained in the Award.

The four corners of the Award demonstrate that the Tribunal did dispose of all pending claims “in their entirety.” Award Orders ¶ 3. In all, both Claimants -- the Loewen Group Inc. (TLGI) and Raymond Loewen -- alleged violations of three substantive provisions of the NAFTA, namely Articles 1102 (National Treatment), 1105(1) (Minimum Standard of Treatment), and 1110 (Expropriation and Compensation). Notice of Claim ¶¶ 177-181. These violations were brought as claims either in each Claimant’s own name under Article 1116 or on behalf of the Loewen Group International, Inc. under Article 1117. Most of these claims were dismissed on jurisdictional grounds. Neither Claimant has challenged these jurisdictional dismissals.

But the Tribunal also dismissed all of the claims on the merits:

¹ ICSID Convention art. 49(2); *see* ICSID Additional Facility for Administration of Conciliation, Arbitration and Fact-Finding Proceedings 56 (1979) (table noting that Article 58(1) was derived from Article 49(2) of the ICSID Convention).

As our consideration of the merits of the case was well advanced when Respondent filed [its] motion to dismiss [for lack of jurisdiction] and as we reached the conclusion that Claimants' NAFTA claims should be dismissed on the merits, we include in this Award our reasons for this conclusion.

Award ¶ 2. The reasons referred to in this paragraph took the form of an analysis of the fatal flaws in each of the alleged underlying substantive violations. Two of these three violations were dismissed summarily. The Article 1102 violation failed for a lack of evidence. Award ¶¶ 139-140. And the Article 1110 violation was dismissed because it was subsumed, on the facts of this case, within the Article 1105 violation. Award ¶ 141.

The crux of the Tribunal's analysis was whether a violation of Article 1105 had occurred, a matter to which the Award devoted over 75 paragraphs. In particular, having already decided that the trial itself could have violated Article 1105, Award ¶ 137, the Tribunal determined that both the trial court's and the Mississippi Supreme Court's decisions on the supersedeas bond did not. Award ¶¶ 189, 197. Then, analyzing whether Claimants had failed to pursue available domestic remedies, the Tribunal explained that it could not conclude that settling the litigation was the only reasonable alternative for Claimants to take. Award ¶ 215. Accordingly, the Tribunal held that Claimants had failed to establish their Article 1105 violation because they had failed to exhaust their local remedies. Award ¶ 216.

The Tribunal's conclusions on the merits of the three alleged substantive violations were not dicta. As to the claims dismissed on jurisdictional grounds, these conclusions are alternative holdings also dismissing them on the merits. And as to any remaining claims – such as Raymond Loewen's Article 1116 claims, which he asserts were not dismissed on jurisdictional grounds – the Tribunal's conclusions were the holding underlying the dismissal of such claims on the merits.

The United States filed its Request for a Supplementary Decision to permit the Tribunal to make express that, having found no substantive violation of the NAFTA, all claims – no matter how or on whose behalf presented – were dismissed. This narrow question was implicitly but not explicitly answered in the Award by the analysis of the three alleged underlying substantive violations. While it may not be necessary to directly address this question,² the proper vehicle to correct any ambiguity caused by this express omission is a supplementary decision. Accordingly, the United States requests that the Tribunal state that Mr. Loewen’s claims filed on his own behalf under Article 1116 were dismissed.

II. Raymond Loewen Impermissibly Seeks Reconsideration, Not A Supplementary Decision

In its August 11, 2003 Request for a Supplementary Decision, the United States demonstrated (at 2) that “by its terms and its logic, the Award plainly disposes of Raymond Loewen's Article 1116 claims on their merits.” The Request established that the rationale of the Tribunal’s decision on Article 1105(1) applied equally to both TLGI’s claim under that Article and that of Mr. Loewen – which was based on precisely the same treatment of the same investment. The Request further showed that Mr. Loewen’s claims under Articles 1102 and 1110 failed for reasons expressly stated in the Award in terms applicable to both claimants. Mr. Loewen does not dispute any of these showings in the Request. To the contrary, he openly acknowledges that the reasoning of the Award disposes of all of his claims, and asks instead that

² See *Genin v. Estonia*, ICSID Case No. ARB/99/2, ¶ 14 (Apr. 4, 2002) (Decision on Request for Supplementary Decision) (“[I]t is important to state that the Award itself reveals that the issues now raised by Claimants are in fact dealt with, implicitly if not explicitly, in both the reasoning and the conclusions set out in the Award. Based on its consideration of all of the evidence before it, and in view of all the parties’ submissions, the Tribunal found that none of the impugned conduct of the Republic of Estonia amounted to a violation of any provision of the BIT or Estonian law, and it accordingly dismissed all of Claimants’ claims.”).

the Tribunal “reconsider” its “reasoning on the merits.”³ As his submission establishes, Mr. Loewen does not seek a supplementary decision on an omitted question; rather he is requesting the Tribunal to reconsider a decision to which he objects. In other words, Mr. Loewen’s submission does not call the Tribunal’s attention to an unanswered question, but rather questions an answer that he contends should be changed based on evidence he believes the Tribunal overlooked. This is a request for reconsideration, not for a supplementary decision.

Procedurally, Mr. Loewen’s request is barred because nothing in the ICSID Arbitration (Additional Facility) Rules provides any basis for a Tribunal to reconsider its Award. Only three forms of post-award relief are contemplated. A party may request an interpretation of the award under Article 56. A party may seek a correction of the award for simple clerical or arithmetical errors under Article 57. And finally, it may seek, under Article 58, a supplementary decision to decide any question that may have been omitted from the award. None of these rules provide for a party to seek to have a Tribunal change the substance of its award once made. As recognized in the *travaux préparatoires* of the ICSID Convention, ICSID jurisprudence, and the *Commentary* of Professor Schreuer, the provision authorizing requests for a supplementary decision does not provide a vehicle for challenges to the substance of the award that was rendered, as would be the case for requests for revision or annulment.⁴

³ See Article 58 Submission As To Raymond L. Loewen’s Article 1116 Claim ¶ 5 (arguing that “[t]he essence of the reasoning on the merits contained within paragraphs 215 to 217 of the Award is obiter dicta, is manifestly in error, and requires the evidence to be reconsidered.”).

⁴ See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Vol. II, Part 2: Documents Concerning the Origin and the Formulation of the Convention 849 (a request under ICSID Convention Article 49(2), upon which ICSID Arbitration (Additional Facility) Rule Article 58 is based, “should be in the nature of a supplemental review which [is] not identical with the revision of the award”); CHRISTOPHER H. SCHREUER, THE ICSID CONVENTION, A COMMENTARY ¶ 25 (“Art. 49(2) provides a remedy for inadvertent omissions and minor technical errors in the award. It is not designed to afford a substantive review or reconsideration of the decision but enables the tribunal to correct mistakes that may have occurred in the award’s drafting in a non-bureaucratic and expeditious manner”); *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. Arb/81/1, 1 ICSID Reports 517 ¶¶ 35-36 (Decision on Annulment, May 16, 1986) (“Indonesia alleges that the Tribunal had disregarded facts and arguments which, had they been considered, could have obliged the Tribunal

What Mr. Loewen requests here, however, is not a supplementary decision: it is a request for a decision different from the one unmistakably stated in the Award. The Award found that the evidence presented by the Claimants was insufficient to establish that review in the United States Supreme Court was not reasonably available. Mr. Loewen disagrees, arguing that the evidence was sufficient. This is, however, not a proper basis for a request for a supplementary decision. Mr. Loewen's request for an award different from the one rendered by the Tribunal should be rejected on this ground alone.

It is also noteworthy that Mr. Loewen did not call this asserted omission to the Tribunal's attention within the requisite 45-day post-award period in which he was obliged to do so under the ICSID Additional Facility Rules. If Mr. Loewen truly believed that the Award omitted to decide a question on which the Tribunal might have ruled in his favor, he was required under the Rules to alert the Tribunal to this question within 45 days of the award. At the very least, his failure to do so himself, and only as a response to the United States' submission, demonstrates the lack of seriousness of his belated request. In fact, under the circumstances of this case, the United States submits that this failure should be fatal to his request.

III. Mr. Loewen's Request For Reconsideration Is Baseless In Any Event

Even if it were appropriate to reconsider the substance of the reasoning of the Award in a request under Article 58 (which, as demonstrated above, it is not), Mr. Loewen's request for reconsideration is without merit in any event. Contrary to his suggestion, the evidence cited by Mr. Loewen in his submission does not establish that settlement was the only option. Mr.

to abandon the very bases of its Award. If the Tribunal had accepted as valid any of the arguments invoked in the Application for annulment, their insertion in the Award would have contradicted what had hitherto been the main lines of reasoning of the Award. Thus the Tribunal would have been obliged to modify the rationale of the Award. . . . It follows that the remedy provided by Article 49(2) would be inadequate to cope with the allegations set out in the Application”).

Loewen references discussions in the declarations of Mr. Carvill and Mr. Turner that assert the alleged conclusions of TLGI's Board of Directors as to the reasonableness of the various options presented, in particular the options of (1) filing for reorganization under Chapter 11 of the Bankruptcy Code or (2) filing a petition for a writ of certiorari with the United States Supreme Court challenging the denial of a reduction in the bond requirement. The United States does not concede, as Mr. Loewen contends, that these statements were uncontradicted. To the contrary, evidence of record raised serious questions as to the reasons of TLGI's controlling shareholder and chief executive officer for deciding to accept the settlement rather than pursue other options.⁵ And Mr. Carvill's and Mr. Turner's statements are insufficient to warrant further consideration in any event. The statements are wholly conclusory, containing none of the analysis considered by the Board in deciding what option to pursue. Viewed against the thousands of pages of evidence in the record in this case, these two, conclusory sentences are inadequate on their face.⁶ Moreover, at best the statements of Messrs. Carvill and Turner attest to the state of mind of the Board as to the reasonableness of the various options. But the Board's evaluation of reasonableness is not relevant. The issue is whether any of the various judicial remedies were objectively available. *See* Award ¶ 168. Thus, the Tribunal was left to guess as to the accuracy of the Board's conclusion based on the information presented to the Board. *See* Award ¶ 216.

⁵ *E.g.*, Response of the United States of America to the Submissions of Claimants Concerning Matters of Jurisdiction and Competence, p. 69 (discussing a document produced by TLGI in discovery, and submitted to the Tribunal at U.S. App. 907, that establishes Mr. Loewen desired to avoid bankruptcy to prevent TLGI's stock from falling below a strike price that would wipe out his equity).

⁶ It is noteworthy that in the Claimants' Joint Reply, no reference was made to the two sentences in these statements that Mr. Loewen now asserts to be essential to the disposition of his claim. *Cf. Genin v. Estonia*, ICSID Case No. ARB/99/2, ¶ 10 (Apr. 4, 2002) (Decision on Request for Supplementary Decision) (rejecting request for supplemental decision based on "issues that Claimants themselves failed virtually altogether to address in either their written or oral submissions in the arbitration.").

Even when the Tribunal considered the after-the-fact expert analysis submitted in this proceeding, it was still forced to conclude “[i]t is not a case in which it can be said that [settlement] was the only course which Loewen could reasonably be expected to take.” Award ¶ 216. For example, on the issue of whether a petition for a writ of certiorari to the United States Supreme Court was viable, the expert opinions of two noted practitioners were in opposition. Former Solicitor General Drew Days, testifying for the United States, asserted that the issues presented would have been of interest to the Court and stood a reasonable opportunity of selection had Claimants chosen to present their already drafted petition.⁷ Professor Laurence Tribe, testifying for Claimants, argued the opposite, relying substantially on the factual nature of this case.⁸ The fact that two such well-qualified experts could disagree on this issue shows, at a minimum, that reasonable persons could (and in fact did) disagree. Thus, it is impossible, without more, for this Tribunal to state that a petition for certiorari was not available. The Tribunal correctly concluded that Mr. Loewen failed to carry his burden of proof.

Similar disagreements existed between the experts of the parties on the issue of whether a Chapter 11 bankruptcy proceeding was available.⁹ It should be noted that one thing was not disputed: a bankruptcy filing would have stopped execution on Loewen’s assets and eliminated the requirement for filing an supersedeas bond. Carvill Decl. at 12. Claimants could then have

⁷ Memorial of the United States of America on Matters of Competence and Jurisdiction, attachment A, Statement of Drew S. Days, III, pp. 12-32.

⁸ Memorial of The Loewen Group, Inc., attachment D, Statement of Laurence H. Tribe, pp. 16-25.

⁹ *Compare* Memorial of the United States on Matters of Competence and Jurisdiction, Statement of J. Ronald Trost, *with* Memorial of the Loewen Group, Inc. Inc., Statement of Kenneth Klee.

pursued their appeal, on which they continue to assert they would have been victorious. *Id.* at 17. The dispute over bankruptcy, rather, was concerned with its effect on TLGI's acquisition strategy, in particular whether equity or debt financing would have been available while in bankruptcy. This too was a dispute over which reasonable persons disagreed.

Thus, both because they failed to provide facts on which the Tribunal could base a decision and because the evidence was, at worst, in equipoise, Claimants did not establish that they had no local remedies available. The Tribunal correctly dismissed the Article 1105(1) claim, leaving no basis for Raymond Loewen to now request reconsideration.

IV. Procedural Issues

The United States does not believe that oral argument on its Request for a Supplementary Decision is necessary.

The Award ordered that the parties should bear their own costs and share equally the expenses of the Tribunal and the Secretariat. The United States sees no reason to deviate from that decision to adjudicate its Request, particularly in light of Mr. Loewen's submission, which itself seeks post-award relief.

Conclusion

For the reasons stated herein, the United States requests that the Tribunal supplement its Award by expressly stating that the Award dismisses all claims, including those brought by Mr. Loewen in his individual capacity under Article 1116, on the merits.

Respectfully Submitted,

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