

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

August 11, 2003

BY HAND DELIVERY

Mr. Antonio R. Parra
Acting Secretary-General
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: Loewen Group, Inc. and Raymond L. Loewen v.
United States of America, ICSID Case No. ARB(AF)/98/3

REQUEST FOR SUPPLEMENTARY DECISION

Dear Mr. Acting Secretary-General:

Under Article 58 of the ICSID Arbitration (Additional Facility) Rules, the United States respectfully submits this request for a supplementary decision to you for transmittal to the members of the Tribunal and for notification to counsel for the claimants. By this submission, the United States requests that the Tribunal clarify its unanimous Award of June 26, 2003 in one minor respect. The reasons for this request are as follows:

Claimants The Loewen Group, Inc. ("TLGI") and Raymond L. Loewen ("Raymond Loewen") (collectively the "Claimants") alleged that certain Mississippi court proceedings violated NAFTA Articles 1102 ("National Treatment"), 1105(1) ("Minimum Standard of Treatment"), and 1110 ("Expropriation and Compensation"). TLGI and Raymond Loewen each submitted claims as an "investor of a Party" under NAFTA Article 1116. See Notice of Claim (Oct. 28, 1998) ¶¶ 177-178; see also Counter-Memorial of the Claimant Raymond L. Loewen on the U.S. Objection Dated March 1, 2002 (Mar. 29, 2002) ¶¶ 1-3. TLGI and Raymond Loewen each also submitted claims on behalf of the United States corporation Loewen Group International Inc. ("LGII") under Article 1117 of the NAFTA. See Notice of Claim ¶¶ 179-181.

By its Award, the Tribunal dismissed the Claimants' claims "in their entirety." Award ¶ 240. Concerning TLGI's claims under NAFTA Articles 1116 and 1117, the Tribunal found that TLGI had assigned those claims to a Canadian corporation owned and controlled by a United

States corporation. Consequently, the requisite “continuous national identity from the date of the events giving rise to the claim . . . through the date of the resolution of the claim” was lacking, thus depriving the Tribunal of jurisdiction to adjudicate these claims. *Id.* ¶ 225; *see id.* ¶¶ 220-238. Regarding Raymond Loewen's Article 1117 claims (brought on behalf of LGII), the Tribunal found that it lacked jurisdiction over these claims because Raymond Loewen had not shown that he was “a party in interest” at the relevant time. *Id.* ¶ 239.

The Tribunal also concluded that all of the claims failed on the merits because of “the Claimants’ failure to show that Loewen had no reasonably available and adequate remedy under United States municipal law in respect of the matters of which it complains,” *id.* ¶¶ 2, 207-217, as required by international law, *id.* ¶¶ 142-164 . Further, the Tribunal also found that the Claimants’ Article 1102 claims failed for lack of supporting evidence, *id.* ¶ 140, and that their Article 1110 claims failed for want of a showing of denial of justice under Article 1105(1), *id.* ¶ 141. In reaching these conclusions, the Tribunal drew no distinction between the 1116 and 1117 claims.

Thus, by its terms and its logic, the Award plainly disposes of Raymond Loewen's Article 1116 claims on their merits. The Tribunal's finding that the Mississippi state courts’ treatment of LGII did not breach NAFTA Article 1105(1) necessarily requires dismissal of Raymond Loewen's Article 1116 claim for a breach of Article 1105(1) because Raymond Loewen’s claim was based on the same treatment of the same investment -- LGII -- that TLGI unsuccessfully asserted. And, as the Tribunal observed in terms expressly applicable to both “Claimants,” *see* Award ¶¶ 140-141, Raymond Loewen's Article 1116 claims for asserted breaches of Articles 1102 and 1110 also failed for the same reasons that TGLI's claims under these articles failed -- Article 1102 for lack of evidence to support a breach and Article 1110 for want of a denial of justice.

That said, although the reasoning of the Tribunal’s Award disposes of all of the claims in the case – and the operative part of the Award dismisses the claims of both Claimants “in their entirety” – the Award does not expressly recite its disposition of Raymond Loewen’s Article 1116 claims. To avoid any doubt on the subject, the United States respectfully requests that the Tribunal issue a supplementary decision clarifying its disposition of that claim.

In making this request, the United States is cognizant of the exceptional efforts that the members of the Tribunal have devoted to this case over the past five years. It is with considerable reluctance that the United States returns to this Tribunal to ask it again to devote its attention to the case, even on a matter as minor as this. The United States has concluded,

however, that it is desirable that the Tribunal have an opportunity to clarify its disposition of Raymond Loewen's Article 1116 claims.

Respectfully Submitted,

Mark A. Clodfelter
Barton Legum
Jennifer Toole
U.S. DEPARTMENT OF STATE
Office of the Legal Adviser
2201 C Street, N.W.
Suite 5519
Washington, D.C. 20520

Joseph Hunt
Vincent M. Gravey
Ronald J. Wiltsie, II
Neysun Mahboubi
U.S. DEPARTMENT OF JUSTICE
Civil Division
20 Massachusetts Avenue, N.W.
P.O. Box 883
Washington, D.C. 20530
Tel: (202) 307-1401
Fax: (202) 616-8470

Attorneys for Respondent the
United States of America

cc: James A. Wilderotter, Esq. (by hand delivery)
John H. Lewis, Jr., Esq. (by Federal Express)

Attachment