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Mexico City, October 16, 2000

Members of the Arbitration Tribunal
Margrete Stevens, Secretary of the Tribunal
ICSID
1818 H. Street NW, Washington, D.C.
Facsimile: (202) 522 2027

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

Dear Members of the Tribunal:

A. Introduction

1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA arising from the United States' motion to dismiss the claims of The Loewen Group, Inc. and Raymond L. Loewen on the ground that the Tribunal lacks the requisite jurisdiction.

2. Mexico will address the effect of Article 1121, the meaning of the word "measure", the rights of an investor to advance a claim under Article 1117, and the *Azinian* and *Metalclad* cases, which were referred to by the disputing parties.

3. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties.

B. The Meaning of Article 1121

4. Article 1121 sets out the requirements that must be met by a disputing investor in order to accept a Party's offer to arbitrate set out in Article 1122, as follows:

> 1. A disputing investor may submit a claim under Article 1116 to arbitration only if:
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> (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

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> (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.[1]

It is necessary to examine carefully the words of this provision.

5. First, the range of possible dispute settlement *fora* where a damages claim conceivably could be advanced is wide: it is not just the domestic courts of the disputing Party but rather "any administrative tribunal or court under the law *of any Party*" (Canada, the United States and Mexico) "*or* other dispute settlement procedures" (such as domestic or international arbitration).

6 According to the opening words of Article 1121, therefore, a NAFTA claimant must not initiate or continue proceedings for damages in any such *fora* with respect to the measure of the disputing Party that is alleged to be a breach, if it also wishes to pursue a NAFTA claim.

7. Second, the concluding words of the Article permit a particular set of proceedings to continue as an exception to the non-initiation or discontinuance of proceedings in the broad class of *fora* just noted. A would-be NAFTA claimant could initiate or continue before an administrative tribunal or court *of the disputing Party only*, proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages.

8. Third, the concluding words show that the Article 1121 election requirement is restricted to claims for the payment of damages.

9. Fourth, the majority in *Waste Management, Inc. v. United Mexican States* held that the waiver of the pursuit of other damages claims had to have legal effect.

10. Using the *Loewen* claims as an example, in Mexico's view, Article 1121 initiation or continuance by The Loewen Group, Inc. (or if he had standing, Raymond L. Loewen) of proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, in a United States administrative tribunal or court would not bar a simultaneous or subsequent claim for damages under the NAFTA. However, it could *not* initiate or continue proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages in an administrative tribunal or court *other* than the administrative tribunals and

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[1]. Article 1117, which sets out the requirements for the submission of a claim by an investor of a Party on behalf of an enterprise, is virtually the same.

domestic courts of the United States. In addition, it could not initiate or continue proceedings for damages in the domestic courts of the United States.

11. At the hearing, the President inquired as to the purpose of the injunctive and other relief exception[2]. In Mexico's submission, the purpose of permitting injunctive relief to be pursued against the measure complained of is to permit the claimant to seek a particular form of domestic relief that, if granted, may obviate the international claim.

12. In Mexico's respectful submission, therefore, Article 1121 precluded The Loewen Group, Inc. from simultaneously commencing or continuing claims for damages under Chapter Eleven and in any other *fora*, including the U.S. domestic courts, based upon the measure that is alleged to be a breach of Chapter Eleven.[3]

13. This modification of the exhaustion of the local remedies rule does not affect substantive defenses that may otherwise arise.

14. One of those defenses is that if a claimant does not resort to the local courts and instead chooses to raise a claim to the NAFTA level, it must be prepared to demonstrate how a mere breach of domestic law has ripened into a breach of the international law obligations contained in Section A of Chapter Eleven.

15. In this respect, Mexico agrees with the view of the United States that the operation of the legal system as a whole, not only the act of the inferior court in the instant case, must be examined before it can be said to be in breach of its international obligations. This is supported by the decision of a Chamber of the International Court of Justice in the *Case Concerning Elettronica Sicula S.P.A. (ELSI), United States v. Italy*[4]. Mexico takes no position on whether the pleadings here, if accepted, disclose a potential violation of Article 1105.

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2. Transcript, Vol. 1, at page 89, line 15.

3. As confirmed by the tribunal in *Waste Management Corporation v. United Mexican States*, a domestic action for damages must be waived if it is based on the same measure that is alleged to be a breach of Chapter Eleven, even if the legal grounds for the domestic action is not the NAFTA, but rather domestic law.

4. 1989 I.C.J. 15.

C. The Meaning of the Term "Measure"

16. The word "measures" in the NAFTA is used in the same way as it had been used in the General Agreement on Tariffs and Trade (GATT 1947) as it then was[5].

17. The word "measure" is used in several places in the GATT. For example, GATT Article X, which deals generally with the obligation of transparency, refers to "measures of general application" in paragraph 2; paragraph 1 of that article refers to "Laws, regulations, judicial decisions and administrative rulings of general application ..." in parallel fashion, suggesting that judicial decisions of general application are "measures." Article XI(1), Article XX, and Article XXIII(1)(b) are other examples of places in which the GATT uses the term "measures."

18. In any event, the derivation of the term "measure" from the international trade law context should not preclude a NAFTA Party from invoking the applicable international law, such as the finality requirement when a denial of justice is alleged, to an investment dispute under Chapter Eleven. A NAFTA Party is fully entitled to advance such arguments as are available to it under the applicable international law.

19. Mexico agrees with the United States that the distinction between the courts and other organs of the State is well established in the international law of state responsibility. In international espousal claims and international law generally, the International Court of Justice and arbitral tribunals and the practice of states has been to distinguish between the acts of the judiciary and other organs of the State. There is, as the United States has argued, greater deference accorded to the former than to the latter.

D. The Article 1117 Issue

20. The disputing parties differed as to Mr. Raymond L. Loewen's standing to advance a claim under Article 1117. The Government of Mexico respectfully directs the Tribunal to an additional consideration relating to Article 1117.

21. As the Tribunal can see from a perusal of Section A of Chapter Eleven, the NAFTA distinguishes between two types of obligations: those that are owed to investors and those that are owed to investments of investors. For example, Articles 1102, 1103 and 1104 each extend their reach to both investors and their investments.

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5. The term "measure" was defined identically in Article 201 of the 1987 Canada-United States Free Trade Agreement (FTA). It is Mexico's understanding that the drafters of the FTA similarly used such term in the same way as it was used in the GATT.

22. By contrast, Article 1105(1) extends the minimum standard of treatment obligation to investments of investors only. The obligation is not owed to investors themselves (in contrast to the obligation in Article 1105(2)). In other words, Article 1105(1) was structured to deal with the treatment of the investment *per se* within the territory of the Party.

23. On this approach, the legal duty of the United States under Article 1105(1) was owed to the investment, and not to any investor therein. Any alleged breach of Article 1105(1), if it occurred, was a breach of a duty owed to the enterprise and not to Mr. Loewen personally. This, of course, does not preclude the investor from advancing an Article 1116 claim based upon an alleged breach of one of the duties owed to investors under Section A of Chapter Eleven.

E. The *Azinian* and *Metalclad* Awards

24. During the hearing, both parties referred to two awards rendered in proceedings initiated against Mexico. In the interests of clarity, Mexico wishes to inform the Tribunal of certain additional facts relating to those claims.

25. In *Azinian*, the act complained of was an administrative act of a municipality that nullified a concession contract for the removal of solid waste previously granted to a company known as Desona. After the concession was nullified on the grounds that the company and its representatives had made material misrepresentations to obtain the concession, and that the company was unable to perform, the claimants (the principal shareholders of Desona) caused their enterprise to commence proceedings in the State Administrative Tribunal and then appeal before the Superior Chamber of the Tribunal. When those challenges failed, the company then commenced an *amparo* constitutional challenge in the Federal courts against the decision of the State Administrative Tribunal on appeal. All of these legal challenges were rejected, and Desona had no further recourse available in the Mexican domestic courts. The *Azinian* claimants did not complain about the court proceedings (they did not even disclose them in their initial memorial).

26. Because none of such proceedings involved claims for damages, Article 1121 had no application.

27. Nonetheless, Mexico brought the court proceedings to the attention of the tribunal arguing that the court decisions were important juridical facts relevant to determining whether Mexico had breached the NAFTA. Specifically, Mexico's position was that no international responsibility for the Mexican State could be engaged for what was at best a claim for breach of contract against the municipality. Mexico argued further that no finding could be made of a denial of justice by the Mexican courts where no denial had been described or even complained of. The Tribunal sustained Mexico's position.

28. The *Metalclad* claim was more complex. At issue in that case were the acts of a municipality that opposed the development and opening of a hazardous waste landfill within its

territory. In 1991, while under Mexican ownership, the company, COTERIN, was responsible for the contamination of the site by the unlawful deposit and burial of about 20,000 tons of hazardous waste. The federal authorities imposed a shut-down order on COTERIN, and later ordered that the site be remediated before it could be operated. COTERIN was subsequently purchased by the U.S. company, Metalclad. Having received federal permits and a state land use permit, COTERIN began to construct a landfill over the objections of the municipality, local non-governmental organizations and local citizens. Two municipal stop-work orders were issued. During this time, the site could not be operated because it was also subject to the federal shut-down order. After an audit of the site and negotiations with the company, the federal government, without prejudice to the need to obtain any other necessary state or local permits or authorizations, agreed to lift its closure order and to permit COTERIN to remediate the contaminated site while it operated the landfill. The Municipality considered this action of the federal authorities to be an illegal abrogation of the closure order they had previously imposed, that required the site be remediated first before being operated as a hazardous waste landfill.

29. The municipality took two steps:

a) As COTERIN had commenced construction without applying for a municipal construction permit, the municipality denied its subsequent application for a permit.

b) The municipality also challenged the legality of the federal environmental authorities' decision to allow the simultaneous remediation and operation of the landfill, through an *amparo* proceeding in the federal courts. Its complaint was dismissed two years later.

30. The award, which is skeletal and, contrary to Article 53 of the ICSID Arbitration (Additional Facility) Rules, omitted to deal with every question put to the Tribunal for its consideration, mentions only the litigation in which the municipality obtained an injunction that prevented the federal government from implementing its agreement with the company. That injunction was vacated after two years, when the municipality action was dismissed.

31. The award failed to address COTERIN's litigation against the municipality's refusal to issue the construction permit. COTERIN initially proceeded to the wrong court (a federal *amparo* court rather than the State Administrative Tribunal[6]). The *amparo* court of first instance, therefore, dismissed the case. COTERIN then appealed to the Mexican Supreme Court. It abandoned that appeal in favor of direct negotiations with the municipality. Those negotiations resulted in an agreement to operate the site as an industrial (non-hazardous) waste landfill while remediation occurred, with the parties also agreeing to attempt to secure community approval for the introduction of new hazardous waste into the landfill.

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6. As a rule, an *amparo* proceeding, being a constitutional challenge, may only be initiated in respect of final acts of government authorities, i.e. acts that are not subject to further review or appeal.

32. The resort to, and abandonment of, domestic remedies against the permit denial in favor of a negotiated settlement was a central part of Mexico's defense to the NAFTA claim. Mexico argued that a State's international responsibility was not engaged when a decision of a subordinate authority was subject to review by domestic courts, and where no defect had been identified in the State's legal system as a whole.

33. Mexico also argued that the NAFTA Parties did not intend that the decisions of bodies such as municipalities could immediately amount to violation of the international obligations in Chapter Eleven. Mexico argued that there was no evidence that the Parties intended that mere permit denials, which could be legally challenged by recourse to the courts, could be characterized as international wrongs for which state responsibility could be engaged. This is an example of the ripeness point discussed above.

34. The Award ignored both the court proceedings brought by COTERIN and their abandonment in favor of a negotiated agreement. Neither was addressed in the NAFTA Award. In so doing, the Tribunal failed to address the legal questions relating to these actions posed to it by Mexico.

35. The brief footnote (number 4) in the Award, to which counsel for The Loewen Group, Inc. referred the Tribunal[7] does not, therefore, accurately state the position of the Government of Mexico.

36. The place of arbitration designated by the Tribunal for the *Metalclad* proceeding was Vancouver and the courts of British Columbia therefore possess curial jurisdiction under Article 1136 of the NAFTA. Mexico is applying to the Supreme Court of British Columbia for an order to set aside the award. The grounds of the petition will be, *inter alia*, that the Tribunal acted in excess of jurisdiction and acted contrary to public policy.

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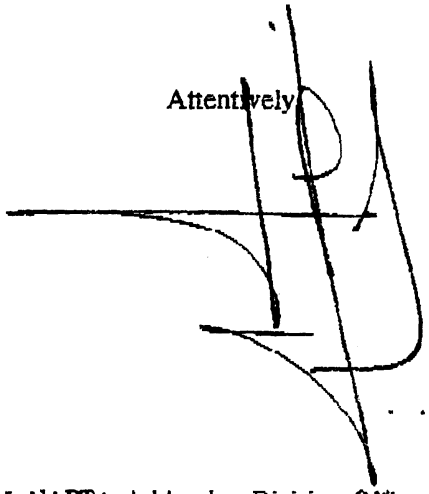
7. Transcript, Vol. 1 at page 45, line 7 *et seq.*

37. The Government of Mexico considers that the *Metalclad* Award is patently unreasonable and unintelligible in material respects and this Tribunal ought not to rely upon it.



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