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

SUBMISSION OF THE GOVERNMENT OF CANADA PURSUANT TO NAFTA ARTICLE 1128

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INTRODUCTION

1. NAFTA Article 1128 entitles a Party to the NAFTA to make submissions on a question of interpretation of the NAFTA. On August 1, 2001, Canada notified the Tribunal and the disputing parties that it intended to make submissions to the Tribunal on certain issues raised by the disputing parties in this phase of the arbitration.

2. This submission is not intended to address all interpretative issues that may arise in this proceeding. To the extent that it does not address certain issues, Canada's silence should not be taken to constitute concurrence or disagreement with the positions advanced by the disputing parties.

3. Canada takes no position on any particular issues of fact or on how the interpretations it submits below apply to the facts of this case.

ARTICLE 1102 (NATIONAL TREATMENT)

4. The relevant provisions of NAFTA Article 1102 state:

> (1) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> (2) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

5. The objective of the national treatment obligation in NAFTA Article 1102 is to prevent a NAFTA Party from discriminating between investors of another Party in respect of their investments or investments of investors of another ~~NAFTA~~ Party and its own investors or their investments that are in like circumstances.

6. This is a relative standard. To establish a breach under Article 1102, a claimant is required to show that a Party has accorded it treatment with respect to investment that is less

favourable than the treatment accorded in like circumstances to its own investors or their investments. ~~This relative standard may include a comparison to like investors or like investments but is focused on the treatment accorded. It is largely a factual determination.~~

7. For there to be denial of national treatment, de *jure* or *de facto* discrimination (i.e., the according of less favourable treatment) by a Party against a foreign investment or against a foreign investor in respect of its investment must be proven. Proof of mere intention to discriminate does not establish a breach of Article 1102.[1] The Tribunal must determine whether the treatment accorded~~measures~~ resulted in actual discrimination.

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ARTICLE 1105 (NOTES OF INTERPRETATION)

8. In its September 10, 2001 letter ("Submission"), the Investor makes the following assertions in support of its position that the Notes of Interpretation of Certain Chapter 11 Provisions, issued by the Free Trade Commission on July 31, 2001 ("Commission's Interpretation"), has no material impact on this proceeding:

a) the Commission's Interpretation has no effect on Article 1105 and the "fair and equitable treatment and full protection and security protections" as it is an amendment to the NAFTA, which can only be effectuated through the formal amendment process set out in Article 2202;[2]

b) the Commission's Interpretation is an acknowledgement that the broad investment protections of "fair and equitable treatment" and "full protection and security" are now part of customary international law;[3]

c) even if the Commission's interpretation were effective, Article 1103 would still require the United States to accord investments the same independent protections of "fair and equitable treatment" and "full protection and security," because those protections appear in bilateral investment treaties to which the United States is a party.[4]

9. Based on those assertions, the Investor in essence submits that the Commission's Interpretation has no effect on the interpretation and application of Article 1105 and that the

1 *In the Matter of Cross-border Trucking Services*, Secretariat file No. USA-MEX-98-2008-01, Final Report of the Panel, February 6, 2001: The Panel, relying on settled WTO practice, declined to examine the motivation or intent of the challenged measure and confined its inquiry to whether the measure was inconsistent with the NAFTA.

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2 First and second arguments identified in the Investor's Submission.

3 Third argument identified in the Investor's Submission.

Tribunal should disregard it.

10. Canada disagrees with such a characterization of the nature, content and effect of the Commission's Interpretation.

The Commission's Interpretation Is Not An Amendment To The NAFTA

11. The Commission's Interpretation is not an amendment to the provisions of the NAFTA.

12. By its own terms, the Commission's Interpretation consists of "interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions." It states not what the provisions of the NAFTA are to mean in the future, but what they always have meant. It identifies the legal standard that the NAFTA Parties intended to apply when agreeing to certain provisions of the NAFTA. It is the legal standard that has been applicable under Article 1105 since the NAFTA entered into force on 1 January 1994. There thus has been no removal of rights as suggested by the Investor.[5]

~~14.~~13. ~~The Investor's Submission indicates a misunderstanding of the nature of the NAFTA as a treaty and of the Commission's structure and functions.~~ As a treaty, the NAFTA is the creature of the States that are party to it. The Parties have assumed obligations *vis-à-vis* one another that protect investors and investments and have established the process that applies to this proceeding. In this instance, the Parties, acting as the Commission, have simply carried out a function that they expressly reserved for their Ministers acting collectively: to ensure the correct understanding of the governing law through issuance of authoritative interpretations.

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14. The Commission, which is established under NAFTA Article 2001, comprises cabinet-level representatives of each Party, specifically, the Ministers of the three Parties responsible for international trade, including investment issues arising under Chapter Eleven. The Commission is the Parties to the NAFTA acting collectively under that treaty. It is the

4 Fourth argument identified in the Investor's Submission.
5 Investor's Submission, at 6.

highest level policy-making organ and administrator for the Treaty as a whole. In acting through the Commission, the Parties act through a single body vested with decision-making power under the NAFTA.

15. The Commission is vested with the prime and final authority as the interpreter of the NAFTA. Article 1131(2) makes that clear: "[a]n interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section [i.e., Section B of Chapter Eleven]." Article 1131(2) forms part of the governing law that a tribunal established under Section B of Chapter Eleven, such as this one, is required to apply.

16. The Commission's authority as the prime and final interpreter of the NAFTA reflects the NAFTA Parties' long-term institutional interest in the proper functioning of the Treaty. An interpretation by the Commission is the full expression of what the NAFTA Parties intended, and its effect is clear: it is binding.

17. In this respect, the Investor's statements – that "if the FTC's 'interpretation' is understood as an attempt to change the scope of Article 1105 *retroactively*, serious questions would arise as to whether the NAFTA Parties have interpreted Article 1105 'in good faith' by changing its meaning in the midst of litigation" (emphasis in text);[6] that "[i]t would be wrong to discuss these three-Party 'interpretation' of what have become key words of this arbitration, without protesting the impropriety of the three governments making such an intervention well into the process of arbitration" (quoting Sir Robert Jennings);[7] and that "private parties not represented in the discussions of the three executives […] [were] unable to exercise democratic input […]"[8] – demonstrate a misunderstanding of the nature of the NAFTA as a treaty, of its provisions and of the Commission's structure and functions.

18. ~~Indeed, t~~The role of the NAFTA Parties as disputing parties, capital exporters, recipients of investments of other Parties and as sovereign states with a clear interest in the proper

6 *Ibid*. at 7.
7 *Ibid*.
8 *Ibid*. at 6.

operation of the NAFTA transcends the merits of specific cases. In acting in their plenary capacity as the Commission, the Parties act as the guardians of the Treaty. They have the legal right to clarify the meaning of the obligations that they agreed to undertake and have specified in the NAFTA a mechanism for doing so. This right was not only negotiated in the NAFTA; it was also approved by the legislatures of each Party when the NAFTA was ratified and implemented.

The Applicable Legal Standard Is That Set Out In The Commission's Interpretation

~~20.~~19. In its Submission, the Investor states that "[i]n sum, the FTC's July 31, 2001 interpretation must be understood as an acknowledgement that the broad investment protections of 'fair and equitable treatment' and 'full protection and security' are **now** part of customary international law~~.~~"[9] (emphasis added). Later, it concludes that "[t]herefore, this Tribunal – now, as before – must determine […] whether the United States and Mississippi accorded Claimants' investments fair and equitable treatment and full protection and security, giving those terms their ordinary meaning."[10] The Commission's interpretation does not create any new concept or standard within customary international law.

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20. The appropriate legal standard under Article 1105 is that set out in the Commission's Interpretation. In particular, the latter provides that "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." This is the standard that must be applied.

~~23.~~21. Any attempt to apply a different legal standard under Article 1105 must fail, as it would be contrary to ~~lead to a breach of~~ the governing law of this proceeding as set out in Article 1131. The task of the Tribunal is to apply Article 1105 in accordance with the Commission's Interpretation.

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Article 1103

9 *Ibid.* at 16.
10 *Ibid.* at 18.

22. In its Submission, the Investor argues that were the Commission's Interpretation to be effective, it "would still be entitled to the free-standing protections of 'fair and equitable treatment' and 'full protection and security' through the application of NAFTA's most-favoured-nation provision, Article 1103."[11] This would be so because, in the view of the Investor, certain bilateral investment agreements to which the United States is a party contain those "free-standing protections."[12]

23. The Commission's Interpretation has clarified the legal standard of Article 1105 and that this standard cannot be changed or modified through reference to other provisions of the NAFTA or provisions of other agreements. The Commission's Interpretation makes clear that a breach of another provision of the NAFTA or of another international agreement is irrelevant with respect to the application of Article 1105 of the NAFTA: "[a] determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)."

All of which is respectfully submitted,

Sheila M. Mann
Of Counsel for the Government of Canada
1 July 2017

11 *Ibid*. at 16.
12 *Ibid*. at 16-18.