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

JOINT REPLY OF CLAIMANTS THE LOEWEN GROUP, INC. AND RAYMOND L. LOEWEN TO THE NOVEMBER 9, 2001 ARTICLE 1128 SUBMISSIONS OF CANADA AND MEXICO

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1. Introduction

Claimants respectfully submit this combined response to the Article 1128 submissions of Mexico and Canada. Claimants will limit their discussion to five key points:

A. Claimants, who are not required by Article 1102 to show discrimination relative to *multiple* comparators, have demonstrated, using any one of three relevant comparators, that their treatment by the Mississippi courts was discriminatory and in violation of NAFTA;

B. the customary international law definition of a denial of justice includes, as the United States has accepted in previous cases, an "unjust" judgment, as well as any proceeding that is not "just, equitable, and impartial";

C. when determining whether a denial of justice has occurred, international law does not limit tribunals to evaluating the respondent State's "legal system as a whole";

D. breach of another NAFTA provision, or of a treaty obligation outside NAFTA, can also result in a breach of NAFTA Article 1105, and nothing in the Free Trade Commission's Interpretive Note suggests otherwise; and

E. under international law, an agreement to arbitrate disputes waives any duty to exhaust local remedies.

2. The United States' Treatment of Claimants was Discriminatory and in Violation of Article 1102, Regardless of Which Comparator is Examined

In its submission, Mexico contends that Article 1102(3)

> does not invite a comparison between the treatment accorded to the investor with another investment of the Party. Rather, it requires the claimant's treatment to be compared to that accorded to investments (plural) or investors (plural) in like circumstances.

(Mexico's Nov. 9, 2001 Subm. at 15.) Mexico seems to be asserting that a foreign investor can only establish a breach of Article 1102 by demonstrating discrimination in comparison with a *class* of comparators.

This argument is textually and logically unsupported and has already been rejected by another NAFTA Chapter 11 tribunal. Mexico's argument, which has not been espoused by the United States in this proceeding, was first offered by Canada and endorsed by Mexico in the

Pope & Talbot case,[1] but that tribunal refused to adopt it. The *Pope & Talbot* tribunal reasoned that "[a]s a general principle of interpretation, use of the plural form does not, without more, prevent application of statutory or treaty language to an individual case. Laws outlawing discrimination against 'women' or setting labour standards for 'children' could not reasonably be interpreted to prevent their application to a [single] woman or a [single] child."[2] This logical approach, the Tribunal concluded, "entails rejection of Canada's contention that the language of Article 1102(2) requires claimants to show whether and how many other foreign owned investments may fall within the 'like circumstances' as themselves."[3] The same logic compels rejection of Mexico's submission here.

Mexico is also mistaken if it is suggesting that Claimants have not shown that they were in "like circumstances" with a relevant comparator under NAFTA Article 1102. In this case, Claimants have demonstrated that there are no fewer than three suitable comparators, and that comparing Claimants' treatment in the Mississippi trial court to any of those comparators proves a violation of Article 1102. (*See* Oct. 2001 Tr. at 215-21.) Indeed, upon such comparison, it is undeniable that Loewen received treatment "less favorable" than the "most favorable treatment" accorded by Mississippi. *See* NAFTA Article 1102(3).

First, O'Keefe, as a party to the same trial proceedings, before the same judge and jury, was in sufficiently like circumstances to make him a relevant comparator. O'Keefe quite clearly was not, nor could he have been, subjected to the nationalistic discrimination directed at Claimants. To the contrary, O'Keefe was extolled as a pillar of the local community, while

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[1] *Pope & Talbot, Inc. v. Canada* (Award on the Merits of Phase 2, April 10, 2001) ("*Pope & Talbot II*"), ¶¶ 33-34 & n.7.

[2] *Pope & Talbot II*, ¶ 37.

[3] *Pope & Talbot II*, ¶ 38. Mexico's baseless "plurality" argument was used in *Pope & Talbot* with regard to Article 1102(2), but the use of the plural is the same there as in Article 1102(3), and in Article 1105 as well, for that matter.

Loewen was excoriated for being a foreign invader. In fact, U.S. expert Professor Greenwood conceded that "O'Keefe could not be similarly accused as its funeral homes in southern Mississippi *were* locally owned." (Second Greenwood Op. & 106 (emphasis in original).)

Second, in addition to Claimants, O'Keefe sued certain Mississippi defendants as well. Wright & Ferguson, for instance, was placed in circumstances identical to those faced by Claimants. Wright & Ferguson and Loewen were defendants in the same action, at the same time, before the same judge and jury. But, as Claimants have demonstrated (Joint Reply at 17-19), the treatment received by Wright & Ferguson, as personified by Mr. John Wright, was not characterized by this type of anti-foreign rhetoric directed against Claimants and reinforced by Judge Graves' tacit complicity. Wright & Ferguson was instead deliberately insulated from such xenophobic treatment, and instead presented at all stages to the jury as a local business and a friend, not an adversary. Indeed, Wright & Ferguson — but not Loewen, the defendant demonized to the jury — was effectively absolved by plaintiffs' counsel of any responsibility for O'Keefe's alleged damages. (*See* App. at A371 ("just because the Wright name is on it, you understand, we're suing the Loewen Group.").)

Third, in this case a hypothetical comparator — a Jackson, Mississippi-based funeral-home operator in all other respects exactly like Loewen, sued by Jerry O'Keefe for breaches of contract — is fully sufficient to establish a violation of Article 1102, because it would be conceptually impossible for a similarly-situated local investor to be treated as Claimants were. When there is direct evidence of invidious discrimination against a member of a class (Canadian "outsider" investors) protected by the non-discrimination rule, courts and tribunals need not engraft an additional, technical requirement that a claimant specifically come forth with the example of another, actual comparator who did not suffer. The direct evidence of discriminatory

motive and adverse consequences is enough. As U.S. expert Professor Bilder admitted, much of the case against Loewen in Mississippi was based on Claimants' "outsider" status (Bilder Op. & 10). The fact that Professor Bilder was able to reach this conclusion without identifying an actual comparator demonstrates forcefully why, in the circumstances of this case, it is wholly unnecessary to identify an actual comparator in order to complete the discrimination analysis. By its very identity, *any* local investor would have been protected from the parochial, xenophobic biases of the trial court and jury, and from the resulting outrageous jury award.

Thus, whether the comparator is O'Keefe, Wright & Ferguson, or a hypothetical local investor, it is inconceivable that the treatment Claimants received in the Mississippi justice system was anything other than discriminatory and violative of Article 1102.

3. The Customary International Law Definition of a Denial of Justice Includes, as the United States Has Accepted in Previous Cases, an "Unjust" Judgment, As Well As Any Proceeding That Is Not "Just, Equitable, and Impartial"

Mexico asserts that "[t]he strict tests for . . . denials of justice formulated in the early part of the last century and applied since then are settled and well-accepted, and therefore are properly characterized as rules of customary international law." (Mexico's Nov. 9, 2001 Subm. at 3.) However, even the United States has conceded that "'the international minimum standard is not a standard frozen in the 1920s. It is an evolving standard . . . that, like other rules of international law, evolves through state practice.'" (Claimants' Sept. 12, 2001 Letter at 9 (quoting *Methanex*, Tr. at 514:12-15).)[4] And as Claimants have already demonstrated, the United States has, until now, espoused a far less "strict" test than it and Mexico are currently urging. (*See* Oct. 2001 Tr. at 39-40; Joint Reply at 95.)

[4] Indeed, Mexico's assertion is all the more surprising given its twin concessions that: (1) "[c]ustomary international law results from the accretion and broadening of State practice until it assumes widespread acceptance;" and (2) even long-time adherents to the *Calvo Doctrine* like Mexico have accepted the obligation to

In the *Denham Claim*, the United States expressly endorsed a number of definitions of denial of justice that are much closer to the "fair and equitable treatment" standard of Article 1105, and far more protective of foreigners than the "strict" test being pressed upon this Tribunal. The brief filed by the United States in *Denham* shows that the United States' historic definition of denial of justice is virtually the same as Claimants' position now. In *Denham*, the United States argued with regard to denials of justice that "'the foreign laws shall be applied to [aliens] in a just, equitable, and impartial manner; that the due and ordinary methods of procedures should be adopted; that no arbitrary or unusual steps or measures shall be taken.'" *Denham Claim* (U.S. v. Panama 1933), U.S. Brief at 71 (quoting Pomeroy, *Lectures On International Law in Time of Peace* § 205). The United States further asserted that "[a]n unjust sentence must certainly be considered a denial of justice." *Id*. at 70 (emphasis in original) (citing Wheaton, *Elements of International Law*). Claimants agree completely with the standards previously endorsed by the United States in its brief in the *Denham Claim*, a copy of which is attached as Exhibit 1, and believe they provide the appropriate standard in this case.

Moreover, although there have over time been alternative articulations of the standard for denial of justice, a review of the case law demonstrates that the "strict test" now urged by Mexico and the United States is clearly not "well-accepted," (Mexico's Nov. 9, 2001 Subm. at 3), and is, indeed, an anomaly. Attached to this submission as Exhibit 2 is a chart illustrating the history of the "denial of justice" standard by means of a representative sample of definitions utilized by tribunals, commissions, nations, and commentators from 1839 to the present. The strict test being urged by the United States and Mexico in this case appears in only two reported

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provide foreign investors with the broad protections now found in some 1,800 bilateral and multilateral investment treaties such as NAFTA. (*See* Mexico's Nov. 9, 2001 Subm. at 2.)

awards, both issued by the Mexico-U.S. Claims Tribunal in 1927. *See Neer v. United Mexican States (U.S. v. Mexico)*, 4 R.I.A.A. 60, 61 (1927); *Chattin v. United Mexican States (U.S. v. Mexico)*, 4 R.I.A.A. 282, 287 (1927). The chart illustrates that the denial of justice standard has, over the years, more closely mirrored the standard urged by Claimants and by the United States in the *Denham Claim*. And while the United States has changed its position for present purposes, customary international law has closely followed the *Denham* definition, never again returning to the aberrations of *Chattin* and *Neer*. *See* Exhibit 2.[5]

Moreover, although the evolving definition of "denial of justice" has been anything but a "settled litmus test," Mexico's proposed definition of a "flagrant disregard of law" has *never*, to Claimants' knowledge, been mentioned by tribunals or commentators, and the notion that a measure must be an "outrage" before it will be considered a denial of justice was abandoned more than seventy years ago. Instead, tribunals now speak of a "seriously inadequate administration of justice" (*Azinian v. Mexico*, ICSID Case NO. ARB(AF)/97/2 (Award of Nov. 1, 1999)), or "manifest unfairness," (*The Texas Co. Claim*, Decision 32-B, American-Mexican Claims Report 142, 143 (1948)), while commentators define denial of justice as including "unjust decisions" (A. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice under Int'l Law*, XIV Can. Y.B. Int'l L. 73, 91 (1976) (emphasis in original)), or "unreasonabl[e] depart[ures] from principles of justice recognized by principal legal systems of the world" (L. Sohn & R.R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*). *See* Exhibit 2. In short, a denial of justice is a state action that denies a foreigner justice.

[5] Given Mexico's own reliance on non-NAFTA arbitral awards such as *ELSI*, it is surprising that Mexico would assert that this "Tribunal may not rely on awards issued by other tribunals that are inconsistent with the [Free Trade] Commission's interpretation." Mexico's Nov. 9, 2001 Subm. at 3. The fact that Mexico attempts to distinguish awards that are "inconsistent" with the Commission's interpretation simply ignores the fact that the Commission did not even purport to define, or "interpret," the content of customary international law. Both sides in

Claimants satisfy each of those tests as, indeed, they satisfy the long-rejected "strict test" Mexico seeks to resurrect in its submission.

Furthermore, Claimants have already demonstrated that the scope of Article 1105's investment protections extend beyond prohibiting denials of justice as defined by customary international law. (*See* Joint Reply at 134-44.) NAFTA requires "fair and equitable treatment" as well as "full protection and security," and international tribunals have consistently taken those words to mean exactly what they say. Thus, in discussing Article 1105's "minimum standard of treatment," the *S.D. Myers* Tribunal used terms such as "fair and equitable treatment," "harsh, injurious, and unjust manner," and "unjust or arbitrary manner." *S.D. Myers, Inc. v. Canada* (Partial Award, Nov. 13, 2000), && 259, 262-64, 266. The Tribunal never mentioned "denial of justice" (let alone "outrage" or "flagrant disregard of law") in finding that Canada had violated Article 1105. *See id.* Indeed, the *Pope & Talbot* tribunal set forth the inescapable logic of this fact: "It is doubtful that the NAFTA parties would want to present to potential investors and investments . . . the possibility that they would have no recourse to protection against anything but egregiously unfair conduct." *Pope & Talbot II*, & 116.

Likewise, the term "denial of justice" never appears in the *Lauder* and *CME* awards, which examined treaties with language very similar to NAFTA Article 1105. In fact, the *CME* and *Lauder* tribunals ***both*** held that the standards of "fair and equitable treatment" and "full protection and security" have passed into the customary international law of investment protection:

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this case have relied on hundreds of such arbitration awards, and neither side has ever suggested that other tribunals' decisions are suspect or worthless.

> *[U]nfair and inequitable treatment*, the Media Council's unreasonable actions, [and] the destruction of the Claimant's investment *security and protection*, are together a violation of the principles of international law assuring the alien and his investment treatment that does not fall below the standards of customary international law.

CME v. Czech Republic, Interim Award of Sept. 13, 2001 & 614 (emphasis added). And:

> Fair and equitable treatment is related to the traditional standard of due diligence and provides *a 'minimum international standard which forms part of customary international law*.'

Lauder v. Czech Republic, Final Award of Sept. 2001 & 292 (emphasis in original) (citing U.N. Conference On Trade & Development: Bilateral Investment Treaties In The Mid-1990s at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998) (English version)).[6]

Indeed, far from urging the "strict test" found in its latest submission to *this* Tribunal, even Mexico has previously agreed that the phrases "fair and equitable treatment" and "full protection and security" are to be given their ordinary — and ordinarily broad — meaning. (*See, e.g.*, Claimants' Sept. 12, 2001 Letter at 3; Joint Reply at 141-42.)

4. When Determining Whether a Denial of Justice has Occurred, International Law Does Not Limit a Tribunal to Evaluating the Respondent State's "Legal System as a Whole"

Mexico also insists that the test for denial of justice must be applied to "the respondent State's legal system as a whole." (Mexico's Nov. 9, 2001 Subm. at 6.) This assertion is incorrect, and unsupported by even the authority that Mexico cites. First, nothing in Mexico's quotation from Aréchaga stands for the proposition that an international tribunal's "angle of

[6] The fact that the *CME* award was not unanimous, (*see* Mexico's Nov. 9, 2001 Subm. at 3), is irrelevant. Dissenting opinions are relatively common in both domestic and international jurisprudence, and do nothing to render the award any less binding on the parties affected. Mexico's suggestion that disagreement among reasonable men, hardly unique in the annals of law, somehow casts doubt on the "soundness of the [*CME*] arbitration," (*id.*), is unfounded. Moreover, despite Mexico's suggestion to the contrary, *Lauder v. Czech Republic* is, in all relevant respects, consistent with *CME*. The primary points of difference between the tribunals were on the issue of causation and in applying applicable standards to the facts at hand, and were unrelated to the scope of investment protections.

examination" is limited to "examin[ing] the respondent's legal system as a whole." (*Id.* at 6.) In fact, the very quotation on which Mexico relies speaks only of evaluating "'the result of the decision'" (phrased in the singular) of a "'domestic tribunal'" (also phrased in the singular), not the domestic "legal system as a whole." (*See id.* (quoting Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 Receuil des Cours 282).) Just as importantly, Aréchaga clearly states that "the essential business of an international tribunal" is simply to determine whether "injustices have been committed," not to indict the state's system as a whole. (*Id.,* (quoting Aréchaga, *supra*).)

Mexico makes a related claim, equally devoid of legal support or logical consistency, that "[u]nless the rules [relating to the conduct of trials and appeals] themselves are indicted at the international level, their application in the normal course by domestic courts must be respected by international tribunals." (Mexico Nov. 9 Subm. at 6.) Such an assertion flies in the face of international law and common sense; under this extreme Mexican position, a law can be grossly discriminatory or unfair in its *effect* without violating NAFTA, as long as it is neutral on its face. Such a result is directly contrary to the spirit and jurisprudence of NAFTA and international law, according to which it is the effect, not the facial neutrality of a rule, that gives rise to an international claim. (*See* Joint Reply at 126-27.) Indeed, NAFTA tribunals and state parties alike have agreed that NAFTA can be violated by "measures that do not facially discriminate." *Pope & Talbot II,* & 43; *see S.D. Myers,* & 252 ("the practical effect of the measure" is just as important as facial propriety in determining Chapter 11 violation). Likewise, in *Pope & Talbot*, the Tribunal found a violation of Article 1105 based upon the treatment of an investor by a government review board. The Tribunal made no suggestion that the board's procedures were

prima facie unfair, only that "the end result for the Investment . . . is nothing less than a denial of the fair treatment required by NAFTA Article 1105." *Pope & Talbot II*, & 181.

Claimants have repeatedly demonstrated that they suffered multiple denials of justice in the Mississippi trial court, culminating in the grossly excessive judgment against them. (*See, e.g.*, TLGI Mem. at 75-90; Joint Reply at 97-126; Oct. 2001 Tr. at 511-12; 1099.) Claimants have further shown that they suffered a separate, procedural denial of justice when they were prevented from vindicating their rights on appeal. Finally, Claimants have shown that there were no other effective remedies legally available to them within the domestic legal system. (*See, e.g.*, TLGI Juris. Subm. at 28-43; TLGI Final Juris. Subm. at 29-57; Oct. 2001 Tr. at 468-510.) Consequently, even if Mexico were correct, its insistence that an international tribunal is limited to reviewing the respondent State's "legal system as a whole" would have no effect on the outcome of these proceedings.

5. Nothing In The Free Trade Commission's July 31, 2001 Interpretive Note Suggests That Breach Of Another NAFTA Provision, or of a Treaty Other Than NAFTA, Cannot Also Be A Breach of NAFTA Article 1105

Although most of the comments in Canada's Article 1128 submission require no reply from Claimants, there is one contention that demands a brief response.

Specifically, Canada contends that the Free Trade Commission's July 31, 2001, Interpretive Note "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." (Canada's Nov. 9, 2001 Subm., ¶ 23 (emphasis added).) But the Commission's Interpretive Note says nothing of the sort: Instead, it states that "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)." (Free Trade Commission, July 31, 2001 Interpretive Note ¶ B.3) (emphasis added).)

The fact that the breach of another provision of the NAFTA, or of a separate international agreement, does not *per se* "establish" a violation of Chapter 11 (as the FTC Interpretive Note says) hardly means that such a breach is *per se* "irrelevant." Indeed, in contrast to Canada, Mexico acknowledges that a single measure may violate both Articles 1102 and 1105. (*See* Mexico's Nov. 9, 2001 Subm. at 1-2.) Once a discriminatory violation of Article 1102 has been established, that violation constitutes powerful evidence of a violation of Article 1105. Since discriminatory practices are usually unfair and inequitable, a finding that Article 1102 has been violated is *highly relevant* — even if not determinative — in assessing the legality of the same practices under Article 1105.

In the *S.D. Myers* case, for example, the Tribunal held that a Canadian export ban that discriminated against an American investor violated both Article 1102 and Article 1105. *S.D. Myers*, ¶¶ 256, 268. As the Tribunal stated, "the fact that a host Party has breached a rule of international law that is specifically designed to protect investors will tend to *weigh heavily* in favour of finding a breach of Article 1105." *Id.,* & 264 (emphasis added). It then found that "*on the facts of this particular case* the breach of Article 1102 essentially establishes a breach of Article 1105 as well." *Id*., & 266 (emphasis added). That finding is entirely consistent with the Free Trade Commission's Interpretive Note. Canada's breach of Article 1102 did not establish a *per se* violation of Article 1105, but was compelling evidence that Article 1105 had also been violated.[7]

[7] The *Lauder* Tribunal reached the same conclusion. It stressed that a requirement of fair and equitable treatment "will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances." *Lauder,* at & 292 (emphasis omitted) (citing U.N.

6. Under Contemporary International Law, An Agreement To Arbitrate Disputes Waives Any Duty To Exhaust Local Remedies

Even setting aside, *arguendo,* the present state of the local remedies rule and its inapplicability to NAFTA cases in light of Article 1121, Claimants have shown repeatedly that, if Loewen was required to exhaust local remedies, it did so — under any standard. (Oct. 2001 Tr. at 456-510; TLGI Juris. Subm. at 26-43.) That said, Claimants must disagree with Mexico's submission regarding the local remedies rule.

As with its position on denial of justice, Mexico asserts that the local remedies rule presents a "strict test[] . . . formulated in the early part of the last century and applied since then." (Mexico's Nov. 9, 2001 Subm. at 3.) But international law simply has not, as Mexico suggests, been frozen in stasis since the "early part of the last century." As Claimants have shown, the modern view is that an agreement to arbitrate disputes implies a waiver of any duty to exhaust local remedies. As stated in the *Headquarters Agreement* case, cited in the Tribunal's jurisdictional decision (¶ 74), "[i]t is accepted that a provision of a treaty (or a contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies." *Headquarters Agreement*, 1988 I.C.J. 12, 42-43 (Sep. Op. of Schwebel, J.).

As Claimants demonstrated at the merits hearing, (*see* Oct. 2001 Tr. at 365-67) the ICSID Convention codifies this modern rule. Article 26 of the Convention expressly deems the local remedies rule waived *unless* the State party specifically preserves the rule *before* consenting to arbitration. *See* ICSID Convention, Art. 26 and Rept. of Exec. Directors, 1 ICSID Rep. 3, 10, 29-30 (1993). And NAFTA Article 1122 expressly provides the Parties' consent, *in advance*, to

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Conference On Trade & Development: Fair And Equitable Treatment, Vol. III at 10, 15, U.N. Doc.

arbitration under the ICSID Convention *without* preserving the local remedies rule. Thus, Mexico's observation that "Investor-State arbitration under the ICSID Convention still permits a Contracting State to insist on compliance with the procedural requirements of the local remedies rule," (Mexico's Nov. 9, 2001 Subm. at 12) ignores the fact that the NAFTA Parties simply did *not* insist on such compliance. As a result, the exhaustion rule is completely inapplicable to an ICSID Convention proceeding. And there is no credible argument that the NAFTA Parties intended to waive the local remedies rule for ICSID Convention proceedings, but not for proceedings under the ICSID Additional Facility or the UNCITRAL rules.

If any further evidence of the modern rule were necessary, it is readily found in the growing network of U.S. Bilateral Investment Treaties. Although no express waiver of the local remedies rule can be found in those treaties, the United States has repeatedly acknowledged that the rule is nevertheless inapplicable: "BITs give U.S. investors the right to submit an investment dispute with the treaty partner's government to international arbitration. *There is no requirement to use that country's domestic courts*." U.S. Department of State, *U.S. Bilateral Investment Treaty Program Fact Sheet*, released by the Office of Investment Affairs, Bureau of Economic and Business Affairs (Nov. 1, 2000), *found at* http://www.state.gov/www/issues/economic/7treaty.html (last visited Dec. 4, 2001) (emphasis added); *see also* Letter of Submittal (July 21, 1992), U.S.-Russian BIT ("This Treaty, as do all U.S. BITs, provides that an investment dispute between a Party and a national or company of the other Party . . . may be submitted to international arbitration six months after the dispute arose. *Exhaustion of local remedies is not required*." (emphasis added)).

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UNCTAD/ITE/IIT/II, U.N. Sales No. E.99.II.D.15 (1999) (English version)).

Indeed, the United States has, prior to this case, always argued that investment treaties *should not* require exhaustion. For example, in 1992, the United States objected to a draft of the World Bank's Guidelines on the Treatment of Foreign Direct Investment because it gave States the option of "requir[ing] the exhaustion of local remedies before submission to international arbitration." Ibrahim Shihata, *Legal Treatment of Foreign Investment: The World Bank Guidelines* 110 (1993). As the United States then urged:

> Investors should not be required to exhaust local remedies before gaining access to international arbitration. In many BITs, countries have accepted the principle of assured access to international arbitration. These countries believe access to arbitration provides a mechanism for depoliticizing disputes and preventing disputes from escalating into diplomatic issues.

Memorandum Outlining U.S. Concerns Relating to the Legal Framework for the Treatment of Foreign Investment, dated May 28, 1992, *reprinted* in Shihata, *supra*, at 413, 418. That reasoning explains why the United States has always — except for this case — accepted and endorsed the modern view that the local remedies rule does not apply to disputes arising under an agreement that does not expressly invoke it.

Even more evidence that the local remedies rule does not apply to NAFTA, any more than it applies to the U.S. BITs on which NAFTA is modeled, is found in the apparent efforts of the U.S. Department of Justice to incorporate an express, modified version of the exhaustion rule in a free-trade agreement now being negotiated with Chile. Specifically, the Justice Department has proposed incorporating a limited version of the local remedies rule that would apply in "cases where the claim is the result of a government action initiated through the judiciary or where the company had originally sought redress in the local courts." "Administration, Business to Meet as Investment Issue Lags," *Inside U.S. Trade* at 13-14 (Nov. 30, 2001) (attached as

Exhibit 3). By proposing a limited exhaustion rule for future treaties, the United States has tacitly admitted that NAFTA does not include any exhaustion requirements whatever.

Yet even ignoring this general rule that an agreement to submit disputes to arbitration obviates the local remedies rule, a specific waiver can be found in the language, structure and design of NAFTA Article 1121. Far from *requiring* claimants to exhaust domestic remedies, Article 1121 gives them the *option* of foregoing such remedies and pursuing an international claim instead, on condition that they agree not to "initiate *or continue*" domestic proceedings. Like the United States, Mexico fails to address this express language of Article 1121. And, like the United States, Mexico fails to explain how an investor could *discontinue* a remedy once it has been exhausted. Instead, Mexico simply chooses to ignore the contradiction.

In fact, it is surprising that Mexico spends half of its latest submission to this Tribunal discussing a rule that it has acknowledged in other NAFTA proceedings is simply inapplicable to a Chapter 11 claim. In Mexico's own words, "if a claimant takes a position that an action by a state or a federal government is a NAFTA breach under Section A, it is entitled to invoke Chapter 11 and it need not exhaust local remedies." *Metalclad Corp. v. Mexico*, Case No. ARB/AF/97/1, Ch. 11 Tr. at 108. Mexico can hardly argue that in acknowledging Chapter 11's waiver of the local remedies rule, it intended to exclude denial of justice claims. To the contrary, during the *Metalclad* hearing, President Lauterpacht specifically asked Mexico a hypothetical question directly applicable to *this* case:

> Supposing we have a denial of justice situation where there is an allegation of a denial of justice by a federal district court. Is that immediately justiciable, or has there got to be exhaustion of local remedies first?

Id. at 113. Mexico unequivocally responded: "No. There need not be exhaustion of local remedies, subject to compliance with the choice of foreign [probably forum] provisions of Chapter 11." *Id.* at 114.[8]

7. Conclusion

For these reasons, as well as those set forth in Claimants' earlier written and oral submissions, the Tribunal should hold the United States liable for the actions of the Mississippi judiciary, which were contrary both NAFTA and to international law.

[8] Mexico suggests that Claimants inaccurately represented Mexico's position in *Metalclad*. (Mexico's Nov. 9, 2001 Subm. at 7.) Offering a separate quotation from its Post-Hearing Submission in *Metalclad*, Mexico further asserts that "[a]ctions which fit within the category of public acts from which appeals on juridical grounds is provided in law, cannot be treated in isolation; the entire juridical structure must be considered in order to determine whether fair and equitable treatment has been accorded." (*Id.* (quoting *Metalclad Corp. v. Mexico*, Respondent's Post-Hearing Subm. ¶ 316).)

In *Metalclad*, however, Mexico was only asserting that, because the claimant had "abandoned [its] domestic legal challenge" before a judicial decision had been rendered on the merits, there was *no* judicial determination that could constitute a denial of justice. *Metalclad*, Respondent's Post-Hearing Submission ¶¶ 317-18; *see also Metalclad*, Mexico's Counter Memorial ¶¶ 611, 615, 630. Here, of course, Claimants *were* subject to a final judgment by the Mississippi courts, a judgment from which they were effectively denied their right to appeal.

Respectfully submitted,

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DATED: December 7, 2001

CERTIFICATE OF SERVICE

I, Christopher F. Dugan, certify by my signature below that I caused a true and correct copy of the foregoing JOINT REPLY OF CLAIMANTS THE LOEWEN GROUP, INC. AND RAYMOND L. LOEWEN TO THE NOVEMBER 9, 2001 ARTICLE 1128 SUBMISSIONS OF MEXICO AND CANADA to be served upon the following individuals by hand delivery on this 8th day of June, 2001:

Kenneth L. Doroshow, Esq.
United States Department of Justice
Civil Division
Federal Programs Branch
901 E Street, NW
Washington, D.C. 20004

Barton Legum, Esq.
Chief, NAFTA Arbitration Division
Office of the Legal Adviser
International Claims and Investment Disputes
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