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Raymond Loewen Submission

5-25-2000

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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 RAYMOND L. LOEWEN REGARDING COMPETENCE AND JURISDICTION

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Attorneys for Claimant/Investor Raymond L. Loewen

Claimant/investor Raymond L. Loewen ("Mr. Loewen") respectfully files this Submission Regarding Competence and Jurisdiction pursuant to the Tribunal's Order of April 3, 2000.

I. INTRODUCTION

The "Memorial of the United States of American On Matters of Competence and Jurisdiction" in fact contains very little argument on the legal issues of competence and jurisdiction. Rather, the Government's Memorial is primarily an ill-disguised and inappropriate attempt to pre-argue the *factual* issue of whether The Loewen Group, Inc. ("TLGI") was coerced into settling the massive $500 million verdict against it in the O'Keefe litigation. The Government's submission is also, to an unfortunate degree, a continuation of the character assassination campaign against Mr. Loewen first begun in and with the assistance of the Mississippi courts. Ironically, the Government's attempt to make Mr. Loewen the villain of its Memorial, just as he was made the focus of the jury's xenophobia in the O'Keefe trial, only highlights Mr. Loewen's central role in the events at issue, and thus his primary claim to standing in this case.

Such "evidence" as the Government offers in support of its limited legal arguments is rank speculation that is tainted in source and inaccurate in fact.

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The Government's legal arguments, which should have taken precedence in its pleadings on this purely legal issue, are instead lost in a barrage of personal attacks, improper testimony, and inappropriate attempts to pre-argue disputed issues of fact. Such legal arguments as the Government does present should not distract this Tribunal from the explicit and broad language of NAFTA's jurisdictional provisions, or the unavoidable fact that the injury complained of in this claim occurred by and through the exercise of the judicial power of a constituent state of the United States. Mr. Loewen brings before this Tribunal a claim based on precisely the type of conduct that NAFTA was intended to prevent, brought by precisely the type of claimant NAFTA was intended to protect. The Tribunal has jurisdiction to proceed to the merits of that claim.

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IV. THE GOVERNMENT'S LEGAL ARGUMENTS IGNORE THE PLAIN LANGUAGE OF NAFTA, THE GOVERNMENT'S OWN PRONOUNCEMENTS INTERPRETING THAT LANGUAGE, AND ESTABLISHED PRINCIPLES OF INTERNATIONAL LAW

The Government's Memorial is largely concerned with improperly attempting to pre-argue its case on the merits by presenting opinion "evidence," such as the Declarations and the testimony of its several proffered experts, to show that Mr. Loewen and TLGI were not in fact coerced into settling the O'Keefe litigation because they had other viable alternatives. The subjective mental state of Mr. Loewen and TLGI at the time of settlement is an issue of fact beyond the power of any expert to decree. Mr. Loewen will not respond in this Submission to the Government's efforts to raise such disputed issues of fact, which are utterly inappropriate for resolution at this stage of the proceedings. See In re Pope & Talbot, Inc. and The Government of Canada, ("Pope & Talbot", copy attached hereto as Exhibit F) (in ruling on motion to dismiss on jurisdictional grounds, adopting facts as alleged by Claimant; refusing to dismiss claim on jurisdictional grounds at pre-hearing stage of the proceedings).

As to the relatively sparse legal argument advanced by the Government, Mr. Loewen notes that most of these issues were previously briefed in his October 18, 1999 Memorial and the Memorial of TLGI. Mr. Loewen therefore will address these issues only to the extent necessary to rebut new arguments or to correct the Government's inaccurate or confusing rendition of facts. In making this response, Mr. Loewen also incorporates by reference the legal arguments advanced in the Submission of TLGI regarding competence and jurisdiction.

A. The Acts of the Mississippi Judiciary are "Measures" Under NAFTA Article 105

NAFTA Article 105 provides that: "[t]he parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance, except as otherwise provided by this Agreement, by state and provincial governments." NAFTA clearly provides that Canada, Mexico, and the United States are responsible for taking all necessary measures to ensure that the protections afforded to investors under Articles 1102 (discrimination), 1105 (equitable treatment), and 1110 (expropriation) are available throughout their constituent states. Thus, the United States is liable for NAFTA violations attributable to the governments of the various states. Indeed, the United States' own statement of administrative action concerning NAFTA correctly observes that under Article 105, "[n]o country can avoid its commitment under the Agreement by claiming that the measure in question is a matter of state or provincial jurisdiction." U.S. Statement of Administrative Action regarding NAFTA at 5.

In Pope & Talbot, a recent decision involving similar jurisdictional issues, the Tribunal considered the application of NAFTA Chapter 11 to an investment dispute between an American corporation and the Government of Canada. In that case, the Government of Canada, like the United States here, moved to dismiss the claimant/investor's claim under NAFTA Articles 1102, 1105, and 1110 as outside the scope of Chapter 11 of NAFTA. In support of its motion, Canada

argued for a restrictive interpretation of jurisdiction and competence. The United Mexican States filed a submission in support of Canada's argument for the narrow interpretation of NAFTA. Significantly, the United States chose not to join the other NAFTA signatories arguing for a limited jurisdictional view, perhaps because the claimant in that case was an American corporation arguing for a broad interpretation. The Government cannot be heard to argue for limited jurisdiction only when the claim is against the United States.

In denying the motion to dismiss, the Pope & Talbot Tribunal determined that Canada's actions were "capable of constituting measures within the meaning of Articles 201 and 1101." See Exhibit F at 15. Article 201 defines "measure" as including any law, regulation, procedure, requirement or practice. In the present action, the Government's arguments for a restrictive reading of Article 201 directly contravene the Tribunal's decision in Pope & Talbot to interpret that provision liberally.

In an effort to avoid the plain language of NAFTA and its own previous pronouncements on the treaty, and lacking any precedent supporting a restrictive interpretation of Article 201, the Government's Memorial devolves into 21 pages of tortured construction over the definitions of "adopted" and "maintained." No amount of sophistry, however, can erase the plain, broad language of NAFTA's jurisdictional provisions. The injury complained of in this case occurred through the power and under the control of the Mississippi judicial system, before a state official whose bench was flanked by the flags of the United States and Mississippi, and whose orders were enforced by the executive power of the State of Mississippi. The Mississippi judiciary's denial of justice – the conscious and unceasing use of nationalistic and xenophobic appeals to inflame the jury against Mr. Loewen – is therefore actionable under NAFTA.

B. The Acts of the Mississippi Judicial System Were "Final" Acts of the United States Judicial System

The Government argues that the judgments of the Mississippi judiciary were not final acts of the United States judicial system, and therefore are not measures adopted or maintained by the United States for which it is liable under NAFTA. The Government's argument ignores settled United States Supreme Court precedent. As fully explained in the previous Memorials of both Mr. Loewen and TLGI, neither collateral review in federal district court, nor discretionary review in the United States Supreme Court, was available to TLGI.

The Government's attempts to turn Mr. Tribe's arguments in Pennzoil v. Texaco, 481 U.S. 1 (1986) against him skips over the fact that the United States Supreme Court was compelled to grant certiorari in Pennzoil by a jurisdictional statute that was subsequently repealed and not available to Mr. Loewen or TLGI. See 28 U.S.C. § 1254(2) (1986). Moreover, the Government's assertion that Mr. Tribe's arguments to the United States Supreme Court in the Pennzoil case were correct and should have prevailed, while flattering, overlooks the fact that the Court unanimously rejected those arguments. Instead, the Pennzoil Court refused to rule on the merits of a supersedeas claim involving an amount even greater than that at issue here, and instead established an iron-clad rule of federal abstention from interference with state court supersedeas procedures.

Accordingly, the Government's Memorial contains nothing to undermine the Claimants' assertion that the judgment of the Mississippi Supreme Court was, as a matter of law and as a practical matter, a final judgment for which the United States is liable under NAFTA.

C. Bankruptcy Was Not a Viable Alternative for TLGI

The Government argues that TLGI should have filed a proceeding under Chapter 11 of the United States Bankruptcy Code, contending that this measure would have allowed TLGI to avoid the required supersedeas bond and maintain an appeal. The Government's argument is based on the false premise that Chapter 11 would not have adversely affected the reputation or business of TLGI. Aside from presenting an issue of disputed fact as to the subjective mental state of Mr. Loewen and TLGI, the Government's argument is contrary to common sense and its own purported evidence.

The Government relies primarily upon the statement of Professor Elizabeth Warren to support its contention that bankruptcy is a desirable business practice that would have greatly benefited TLGI. However, the Government is undone by contradictions between its arguments and the testimony of its experts. While Professor Warren seems to think that bankruptcy is an invigorating and cathartic process that every right-thinking corporation should welcome,

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The Government's argument concerning the bankruptcy option is also irrelevant to the issue of competence and jurisdiction. Regardless of whether Mr. Loewen and TLGI chose bankruptcy or settlement, they would still have suffered financial injuries that would support jurisdiction here. The Government does not suggest that TLGI could have avoided *all* injury from the O'Keefe verdict by lapsing into bankruptcy. On the contrary, its own experts admit that bankruptcy has "potentially adverse consequences," beginning with the legal fees required to file

and prosecute a bankruptcy proceeding, and ending with long-lasting injury to the corporation's goodwill and reputation even after it has emerged from bankruptcy.

Thus, the Government's argument on this issue does not dispute the fact that the Claimants suffered substantial and inevitable injuries as a result of the O'Keefe verdict, but rather only go to the *amount* and *type* of injury suffered. Even if the Tribunal accepts the Government's assertion that Mr. Loewen and TLGI should have chosen bankruptcy, Claimants would still have a claim under NAFTA, and this Tribunal would still have jurisdiction over that claim.

Finally, the Government's hypothetical argument that bankruptcy would have been a better alternative is belied by the fact that TLGI's eventual bankruptcy filing, in June 1999, continues to detrimentally affect its profitability. See May 1, 2000 Press Release from TLGI (attached hereto as Exhibit G).

D. The Coerced Settlement in This Case is a "Measure" for Which the United States is Liable Under NAFTA

The Government argues that the settlement of the O'Keefe litigation was not a government measure for which the United States is liable because Mr. Loewen and TLGI chose to settle the claim against it. This cynical argument ignores both the facts of the case and settled principles of international law, which clearly and unequivocally provide that settlements of domestic disputes made under duress do not foreclose a party's right to maintain an action under international law.

On the contrary, government-sanctioned duress transforms what would otherwise be a valid transaction into an invalid expropriation or taking. See Starret Housing Corp. v. Iran, 4 Iran U.S.C. Trib. Rep. 122, 171 (1983) (Holtzmann, concurring) ("there is a 'general consensus

that proven threats of coercion . . . are sufficient duress to make an otherwise valid transfer a [taking].'") (quoting B. H. Weston, "Constructive Takings" Under International Law: A Modest Foray into the Problems of "Creeping Expropriation," 16 Va. J. Int'l. L. 101, 142 (1975)); see also G.C. Christie, What Constitutes a Taking of Property?, [1962] British Y.B. Int'l L. 307, 324 (1964) ("[A]n apparently voluntary transfer made under the threat of an impending expropriation is, none the less, forced"); Restatement (Third) of the Foreign Relations Law of the United States, § 712 cmt. G (1992) (state action forcing alien to abandon property or sell it at a distressed price is an actionable violation of international law).

As cited in TLGI's October 18, 1999 Memorial, international tribunals have applied these basic principles for over a century to uphold claims by those pressured to settle a claim or dispute in order to mitigate their damages and avoid even more punitive measures. (See Memorial of TLGI at pp. 126-34). Based on this settled international law, a state is clearly liable for discriminatory actions that cause an alien to enter into a transaction under duress. This principle applies even where the other party to the transaction was not the cause of the duress, if the other party "knew of the threats and the position of persecution in which the [alien] found himself and [] took advantage of the plight." Poehlmann v. Kulmbacher-Spinnerei A.G., 3 U. S. Ct. Rest. App. 701, 709 (1952). The Government's Memorial completely ignores this substantial body of international law.

The Government's argument also fails to mention that the settlement in question did not discuss, and surely did not waive, the claims that Mr. Loewen has against the Government under NAFTA. Mr. Loewen was not a signatory to the settlement, and that settlement does not contain any reference to NAFTA or Claimants' rights thereunder. To argue that Mr. Loewen waived his

NAFTA rights against the Government in an agreement to which he is not a party and which does not mention NAFTA is simply absurd.

Finally, by arguing that the settlement caused all of the damages alleged in this dispute, the Government disregards the undeniable damages that flowed directly from the O'Keefe verdict, including the precipitous drop in TLGI's stock price that occurred immediately after that verdict and well before the settlement. This damage could not have been undone by declaring bankruptcy, as the Government's own experts claim TLGI should have done. Thus, under settled international law and common-sense economics, the O'Keefe settlement does not constitute a waiver of Mr. Loewen's right to pursue his claims under NAFTA Chapter 11.

E. Mr. Loewen and TLGI Did Not Waive Their NAFTA Claim by Failing to Object at Trial

The Government contends that Claimants failed to contemporaneously object to plaintiffs' counsels' xenophobic and racist attacks against Mr. Loewen and TLGI. This is manifestly untrue. For example, TLGI's counsel appealed to the trial court for protection against Willie Gary's inappropriate appeals from the pulpits of local black churches and on local radio programs popular with black potential jurors, to no avail. (App. at A741-42). Although Claimants had no opportunity to "object" to this misconduct because it occurred outside the courtroom, they nevertheless protested to Judge Graves, who failed to curtail Mr. Gary's antics or sanction him for his misconduct.

TLGI's counsel also requested an additional jury instruction on the issue of bias that would have perhaps cooled some of the nationalistic fever with which Mr. Gary had deliberately infected the jury. See App. at A223 1-32. Judge Graves sustained Mr. Gary's objection to this

charge, thereby refusing to provide the jury with any instruction that specifically addressed anti-Canadian or racial bias.

Finally, TLGI's counsel objected to the trial court's inexplicable decision, on its own initiative, to accord a percentage of the jury's initial $260 verdict as compensatory damages rather than to invalidate the verdict, and to instead send the jury back for further deliberations on the issue of punitive damages. Counsel for TLGI immediately moved for a mistrial on the basis that the verdict was biased, excessive and procedurally defective. (Tr. at 5738-39). The motion for a mistrial is the most strenuous objection available to an attorney under American jurisprudence. Judge Graves denied the motion for a mistrial without discussion.

In light of these multiple objections by TLGI counsel, the Government's true contention is reduced to the ridiculous and inequitable argument that Claimants have waived their rights to maintain their claims under Chapter 11 of NAFTA by failing to object to each and every improper attack that they suffered during the course of the O'Keefe trial. This is patently inequitable, particularly as the impact that Mr. Gary's inflammatory conduct was having on the jury could not have been known to counsel until the jury rendered its astonishing verdict. Under the circumstances of this case, with its ceaseless appeals to anti-Canadian, racial and class-based discrimination, counsel for TLGI gave Judge Graves ample opportunity to protect TLGI. Instead, as highlighted in the Statement of Claim, and the October 18, 1999 Memorials of Mr. Loewen and TLGI, Judge Graves willingly participated in this denial of justice.

There are other grounds upon which to reject the Government's argument on this point. By citing to the contemporaneous objection rule, the Government attempts to turn this proceeding into a form of appellate review under American appellate jurisprudence. As this Tribunal is most certainly aware, this is an original proceeding under NAFTA for violations of

Articles 1102, 1105 and 1110, and is governed solely by the letter of NAFTA and general principles of international law. The Government's appellate argument is thus misplaced. In any event, it may be defeated by a parallel provision of American appellate law.

"In exceptional circumstances, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." United States v. Atkinson, 297 U. S. 157, 160 (1936). See also Berry v. State of Mississippi, *728* So.2d 568, 571 (Miss. 1999) (plain error review appropriate where the error has "impacted upon a fundamental right of the defendant"); United States v. Frady, 456 U.S. 152, 170 (1981) (defendant has burden of showing that errors worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions). The "plain error" doctrine is applicable here because the trial court deprived Mr. Loewen of his basic right to a trial free from discrimination. Judge Graves' failure to stop Mr. Gary's improper tactics, failure to properly instruct the jury, and failure to declare a mistrial was simply manifest error. As a result, Mr. Loewen was denied national treatment and protection from discrimination under both NAFTA and settled canons of international law.

F. Mr. Loewen Has Standing to Maintain His Claim Under Article 1117

As an initial matter, the Tribunal should reject the Government's last and perhaps least persuasive argument that Mr. Loewen lacks standing under NAFTA Article 1117 for the obvious reason that it is non-dispositive. The Government does not challenge Mr. Loewen's standing to bring his claim under Article 1116. Neither does the Government object to TLGI's right to bring a claim on behalf of Loewen Group International, Inc. ("LGII") under Article 1117. Thus, even were the Government to prevail on this argument – which it should not – Mr. Loewen would still

be a claimant in this case, and the Tribunal would still be required to resolve a claim against the Government on behalf of LGII under Article 1117.

As a matter of substance, the Government's contention that Mr. Loewen lacks standing to bring his claim under Article 1117 because he does not directly "own or control" LGII or because he is not the proper, sole party to bring this claim on its behalf is riddled with defects of language and logic.

The Government disingenuously edits and creatively interprets the language of Article 1117 to suit its argument. For example, the Government routinely quotes Article 1117 as requiring that the claimant/investor have "owned or controlled" the investment at issue, deliberately omitting the subsequent language of Article 1117 stating that the requisite ownership or control may be either *direct or indirect.* See NAFTA Article 1117 (claim may be brought "on behalf of an enterprise of another party that is a juridical person that the investor owns or controls, *directly or indirectly*") (emphasis added). The Government cannot avoid this language simply by ignoring it. Under the clear language of the statute, Mr. Loewen may bring a claim on behalf of LGII under Article 1117 if he controlled that "investment" either directly or indirectly.

The Government's own Memorial concedes that Mr. Loewen exercised more than enough control over TLGI, and thus LGII, to qualify as a claimant under Article 1117. On page 91 of its Memorial, the Government openly concedes that Mr. Loewen "may have 'controlled' TLGI (*and indirectly LGII*) at some point in the past" (emphasis added), thus clearly qualifying him as an Article 1117 claimant.

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REDACTED In fact, the Government's entire pre-argument of the coercion issue is premised upon the allegation that Mr. Loewen controlled TLGI and LGII, and personally caused TLGI to choose settlement over bankruptcy. The Government cannot have it both ways, arguing on the one hand that Mr. Loewen controlled TLGI and its decision regarding settlement, and on the other claiming that he has no standing under Article 1117 because he did *not* control TLGI either directly or indirectly.

Mr. Loewen's extensive control over TLGI and LGII is hardly surprising, in light of the facts that Mr. Loewen founded both companies; that both companies bore his name; and that he was the parent company's President, Chief Executive Officer, Chairman of the Board of Directors, *and* owned or controlled a controlling block of the its stock during the period in question. Indeed, one would be hard-pressed to find anyone since Henry Ford who has been as closely identified with and in control of a large international corporation as Raymond Loewen was identified with and controlled The Loewen Group, Inc. and Loewen Group International, Inc.

Significantly, in its recent decision in Pope & Talbot, the Tribunal recognized the standing under Article 1117 of Pope & Talbot, Inc., a United States corporation that owned a Canadian "investment," Pope & Talbot Ltd., through yet another wholly owned Canadian subsidiary, Pope & Talbot International, Ltd. The Pope & Talbot Tribunal thus recognized, without challenge from the Respondent Government of Canada, the standing of an American company to bring a claim under Article 1117 where the chain of "control" over the investment was at least one link more attenuated that that presented here. Thus, there is no question that Mr. Loewen has standing under NAFTA Article 1117.

In addition to selectively misquoting the language of Article 1117, the Government attempts to read implied limitations to standing under that provision that appear *nowhere* in the statute. First, the Government contends that only one claimant may present a claim on LGII's behalf under Article 1117. Although it concedes that Article 1117 contains no such limiting language, the Government nevertheless urges this Tribunal to imply such a limitation on the grounds that to do otherwise would raise the possibility that "multiple investors could offer divergent, and possibly conflicting, theories on behalf of the same enterprise."

This argument disregards the fact that the same potential for multiple claims exists to a much greater degree in claims under Article 1116, which allows *any* investor of an "investment" to bring a claim for damage to that person's investment caused by a breach of NAFTA Chapter 11. If any and every individual investor may bring a claim for damage to an investment under Article 1116 – which the Government does not deny – there is no logical or legal reason to deny the relatively few "controlling" investors to bring claims under Article 1117 on the hypothetical fear that they may advance diverse grounds for relief.

Despite its denials, the Government's fear of some conflict between the Claimants' positions under their respective Article 1117 claims *is* entirely hypothetical at this point. The Government concedes that the Claimants have already filed their full Memorials on the merits, and that those pleadings contain no conflict or inconsistency as regards their claims under 1116 or 1117. Given these facts, there is little chance of the sudden conflict that the Government weakly asserts is possible. In short, the Tribunal should not establish a novel, bright-line prohibition of multiple Article 1117 claims where the language of Article 1116 expressly contemplates multiple claims, the language of Article 1117 says nothing to prohibit them, and

the Government offers only the unlikely possibility of some unknown, future conflict in the Claimants' position on this issue.

The Government's final argument that Mr. Loewen has no standing under Article 1117 because he does *not presently* control TLGI and LGII once again attempts to invent limitations to standing that appear nowhere in the text of Article 1117, and ignores the fact that Mr. Loewen was in control at the time of the O'Keefe litigation and for several years thereafter. Indeed, Mr. Loewen's eventual loss of control over TLGI and LGII was a direct result of the financial upheaval stemming from the O'Keefe verdict and the coerced settlement. To deny Mr. Loewen standing to bring a claim under Article 1117 because he has now lost his control over TLGI and LGII, as well as the value of his investment in those companies, would be cruelly inequitable – the equivalent of denying relief to the victim of an assault because he ultimately dies of his wounds.

Willie Gary understood and acknowledged Mr. Loewen's controlling role in TLGI when he used Mr. Loewen as the human target for his anti-Canadian and race-based attacks on the company.

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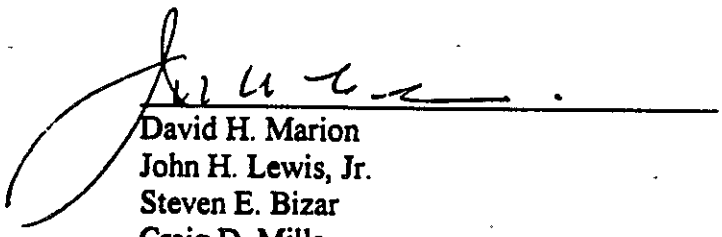
The Government has conceded Mr. Loewen's controlling role by making his conduct and character the centerpiece of its Memorial. Indeed, there is no other person upon whom the Government can focus its scorn, as Mr. Loewen is the only natural person before this Tribunal who was involved in the events in question. For the Government to now claim that Mr. Loewen has no standing to pursue his claim under Article 1117 is therefore not only disingenuous and unfair, but also contrary to its own arguments and tactics.

V. CONCLUSION

Nothing in the Government's Memorial affects the fact that Mr. Loewen's claim involves exactly the type of xenophobic conduct that NAFTA was designed to prevent, brought by exactly the type of investor that NAFTA was intended to protect. Beyond the clear jurisdictional language of NAFTA, whose broad and general terms command an open and liberal interpretation, are the admitted and equitably compelling facts of this case: that Mr. Loewen, as the human emblem of TLGI, was denied equal treatment by and in the Mississippi courts and singled out for personal vilification because of his country of origin and race, and has suffered massive losses to his investments. Indeed, Mr. Loewen is the only claimant before the Tribunal who was personally involved in the turbulent events giving rise to this dispute. If the plain letter and overriding equitable spirit of NAFTA do not grant this Tribunal the power to protect Mr. Loewen under these circumstances, then the Tribunal will be powerless to protect anyone under any circumstances. Accordingly, the Tribunal should reject those few and tenuous legal arguments that the Government has proffered and proceed to the merits of this claim.

Respectfully submitted,



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