Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	[Handwritten notes re: Loewen] (1 page)	n.d.	P5 2110
002. note	[Handwritten notes re: Dan Marcos] (3 pages)	n.d.	P5 2111
003. note	[Handwritten notes re: Bob Novick] (1 page)	n.d.	P5 2112
004. note	[Handwritten note re: Loewen (1 page)	7/26	P5 2113
005. memo	Ronald J. Bettauer to Interested Agencies re: Metalclad Corporation v. United Mexican States, NAFTA Arbitration (2 pages)	09/16/1999	P1/b(1)
006a. memo	Cynthia S. Francisco to Interested Agencies re: Metaclad Corporation v. United Mexican States, NAFTA Arbitration (1 page)	10/01/1999	P1/b(1)
006b. draft	re: Metaclad Corporation v. United Mexican States (3 pages)	10/03/1999	P1/b(1), P5
007. note	[Handwritten note re: DOJ] (1 page)	n.d.	P5 2114
008a. email	Steve Fabry to Peter Rundlet re: Loewen: Investment agencies' contribution (1 page)	12/16/1999	P5 2115
008b. email	[Attachment] Attorney-Client Privileged-Work Product-Predecisional-FOIA Exempt - Do Not Disclose (2 pages)	n.d	P5 2116
009a. draft	re: Metaclad Corporation v. United Mexican States (6 pages)	11/02/1999	P1/b(1), P5
009b. draft	re: Metaclad Corporation v. United Mexican States (7 pages)	11/02/1999	P1/b(1), P5

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Counsel's Office
Peter Rundlet
OA/Box Number: 23666

FOLDER TITLE:
Loewen (NAFTA [North American Free Trade Agreement] Arbitration) [2]

2010-0021-F
jm471

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

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Loewen

Chap. 11

- Jurisdictional argument : ct. judgments ≠ "measures adopted"

Qs

- What is trigger to attacking ct judgments? How to determine whether any particular judgment is "unfair or discriminatory" given fact-specific context? How is cum-bondedness in this area determined?
  → Is it just the cost of litigating there?

It: The issue is bound to come up again. (Mendes)

Q: What was our understanding (actual) on this issue at the time of signing?

Q: What are the ramifications, if any, on adverse hearings that are reqd by other Arts?

Q: "procedure, regt, or practice" means ?

Q: Do Am. companies currently have analogous cases under review in Mexico or Canada?

Don Marcos

V. sensitive

NAFTA has arb. procedure & Mex. & Can. co. believes it has been denied of under U.S. law or wrongly, it can file complaint of NAFTA body - arb. process

- if they win, they get compensated by U.S. - intended to protect US cos. in Mexico.

Here, big Canadian co. & Canadian law firm, last State anti-trust claim in Mass. State court they "framed" by xenophobic arguments to jury - these local businesses & local bank firm, co. brings big judgment ag. company

Under Mass. law - last to post bigger bond to appeal.

(2)

Claim: coerced to settle the case

① Supersedeas bond = fund'l denial of D Process

② Discrimination claim: (vs. Canadian companies; weaker argument)

→ No one thought about this when NAFTA implementing law passed.
— Ct. judgments

Arb. proc. invoked & arbitrators appointed.
Justice asked by State. Civil div'n leading
at rq Phil Bartz, Fed'l Program branch — David Ogden

Abner Mikva — arbitrator

[Frank Rogers wanted Howell Heflin, fmr Sen Alabama.
Attorneys of State, wanted Mikva

Following disagreement b/w State & Justice

(3)

P

DOJ say "arcane" for ct. judgments

State doesn't want to make that argument - will hurt us creatively.

DOJ say, if we lose this case, Cong. will go crazy about NAFTA

Judgment [illegible] couple of hundred million dollars

Canadian's didn't properly pat? for cert.
= didn't exhaust remedies

- Can argue that settlement was good.

Arbitration b/w U.S. and Canadian company. (Loewen)

Arbitration was delayed - briefs due Sept./Oct.

Loewen bankrupt - now coming in individually

Bob Nouick 59663

"deeply troubled"

- NEC process - about Lock B
- If conclusion is good argument, Justice make it.

- PTO
- Treasury

7/26 DOJ Bob Novak USTR

Location

Q: What are the ideas in the legal argument?

States: ① not likely to succeed here
② if it did, contrary to U.S. investors

① Tribunal likely to take a broad reading
More important: U.S. investors

precedent for BITs, too.

"measures of purely private disputes"

Pam Haney
305 3481

DOJ: Lawsuit's claim not arbitrable bec. the judgments of dom cts are not "measures".

Justice

(1) loss on the merits (State disputes this)
(2) politically endangers NAFTA: overturn dom legal system.
(3) Strongest argument
(4) Less likely occurs in other than US
(5) administrative govt actions do = "measures" as policy concerns intact.

Alternatives - DOJ

(1) domestic ct. judgments ≠ measures
(2) only proceedings initiated by govt entity that result in ct judgments are measures

(3) Although some may be "measures", certainly not those b/w 2 private parties in a civil proceeding.

(4) Ct measures - only when taken to highest ct. available. (Broader)

State:

Re 1: - unlikely to prevail
- disputes likelihood of loss on merits
- political battleground to waging argument (w/ our bus. community)

FABRY_STEVE@ustr.gov
12/16/99 06:10:00 PM

Record Type: Record

To: Peter Rundlet@eop

cc:
Subject: Loewen: Investment agencies' contribution

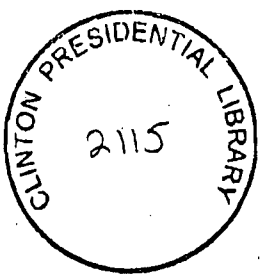
is attached, in Word Perfect format. Don't hesitate to call if you have questions.

You'll see we've used the terms "first", "second" and "third" arguments to mean the arguments that Peter and I talked about -- first means the broad argument that court judgments are never measures, second means the argument that only private cases are subject to NAFTA rules, and third means the argument that decisions fall under NAFTA rules only when they have been appealed to the highest court. You may very well have used a different set of shorthand names for the arguments.

The first paragraph is a super-short summary of our concerns about the legal arguments' strength. This is for context -- to explain why we think the "upside" of making the arguments is small. The rest of the paper is about the "downside" -- the effects on U.S. investment policy. Up to you, of course, whether you need that first paragraph if it's redundant of what you've already done on the legal issues.

Finally, as I said to John, this is close-to-final draft. If anyone in the agencies wants to make more changes, I'll provide you a redline showing our suggestions.

--Steve Fabry



We are extremely unlikely to convince the Loewen Tribunal either that "court judgments are never measures" (the "first argument") or that "court judgments in cases not initiated by the government are not measures" (the "second argument"). The Tribunal would have to believe that the NAFTA Parties intended a radical departure from customary international law (and the BITs) without clearly indicating such an intent. Such arguments conflict with the common understanding of negotiators that Chapter 11 covers "denials of justice" involving court decisions; conflict with use of the word "measure" elsewhere in NAFTA where the word "measures" clearly includes court actions; and are inconsistent with analysis under traditional canons of treaty interpretation. (It is also not clear to us whether DOJ now advocates this second argument, because DOJ represented in August of 1999 that it did not view the argument as legally defensible.) Notably, the *Azinian* tribunal, the only NAFTA tribunal yet to reach a decision on the merits, reasoned (in dicta) that it *would* have authority to review domestic court actions for violations of Chapter 11.

Excluding some or all types of judicial decisions from the scope of Chapter 11 would conflict with the U.S. policy goal of protecting investors from a broad range of abusive government action. This is true whether or not one of these arguments actually prevail, since our pleadings will almost certainly be made public and other countries will be quick to cite our arguments to the detriment of U.S. investors.

A specific objective of USG investment treaties has been to provide protection for U.S. investors where a host country's judicial system may be seriously deficient, prejudiced or corrupt. For NAFTA in particular, either of these two arguments would deny Chapter 11 remedies against abuses in Mexican and Canadian courts such as local bias, unconscionable delays, or outright corruption. This would be true in many cases even under the second argument.

The business community and some members of Congress tell us that a major strength of our investment agreements is that they enable investors to bypass the deficiencies of foreign judicial systems. Unfortunately, abuses persist in at least some of these judicial systems: a 1994 World Bank report identified in Mexico "abuse of judicial procedures for the resolution of civil and commercial disputes [and] . . . an unacceptable level of competence and integrity of the judges, especially in the local court system." The USG 1999 investment climate statement for Mexico confirmed that corruption is a severe problem there. Exempting judicial action from investment rules -- even in private cases only -- would leave a large category of state action unaddressed. Thus, either of these arguments would be a serious step backward for our advocacy of U.S. investor interests abroad (in NAFTA, in the BITs, and in future investment negotiations) as well as for our promotion of fair and transparent legal systems worldwide.

In addition to blocking investor-to-state claims, the proposed arguments would preclude state-to-state arbitration of these issues under NAFTA Chapter 20, and make it difficult to offer investors effective diplomatic protection once we have taken the position that NAFTA does not

discipline such behavior. Although the BIT language is not identical, our BIT partners may also try to use the position against our investors or the USG.

Because these arguments are based on the meaning of the word "measures," which is used throughout the NAFTA, they could have negative consequences for other parts of the Agreement. The term is used in the intellectual property chapter (Chapter 17) in provisions that relate to domestic court enforcement of intellectual property rights, provisions that were hailed as a major step forward in the protection of U.S. IPR abroad. Nearly identical provisions appear in the WTO TRIPS Agreement. Our NAFTA partners (and other countries in the WTO context) might also use these arguments to circumvent NAFTA trade rules by discriminating against U.S. goods -- e.g., by excluding U.S. agricultural exports based on disputed biotechnological or health standards -- through their court systems instead of their administrative systems.

The third argument that interagency participants have discussed, which states that court judgments cannot form the basis of a NAFTA claim until they have been appealed fully, has a better chance of success. Although none of these three arguments can be made without some cost to U.S. investors, the third argument at least strikes a better balance between the dual interests of protecting U.S. investors abroad and defending against claims based on U.S. court actions, because it preserves the right of investors to challenge court action (albeit after the delays occasioned by appeals). It has much more support in customary international law, and would not have as widespread an effect on other parts of NAFTA. Admittedly, it is not clear that this argument will prevail in the Loewen case, because Loewen will argue that as a factual matter its ability to appeal was limited. We should, however, advance no other jurisdictional argument than this one at this phase of the case because it alone minimizes the adverse effects on the foreign investment environment while advancing the rule of law through judicial accountability.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. note	Handwritten note re: Loewen (1 page)	11/19	P5 2117

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Loewen (NAFTA [North American Free Trade Agreement] Arbitration) [3]

2010-0021-F
ry1524

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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RR. Document will be reviewed upon request.

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11/19 Loewen

Extension to February

Gov: State's alternative
denial of justice claim esp. highest court | "Notice" a

Board Ogden: Floodgates, giving up sovereignty

How big a problem is private-to-private decisions
→ why not cases initiated by parts | Q: Is way to limit these
- at courts of appeals

Does a judgment have to be appropriated every year or does it just come from the judgment fund?

Stein, Podesta why
- How much $, who pays, how big a blow up

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (6 pages)	02/2000	P5 2118
002. memo	To: Peter Rundlet from David J. Anderson re: the Loewen Group v. United States NAFTA Arbitration (2 pages)	01/28/2000	P5 2119
003. report	Re: Is it a realistic option ot make no jurisdictional argument in the Loewen case? (1 page)	01/28/2000	P5 2120
004. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (6 pages)	01/2000	P5 Dup
005. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (5 pages)	01/2000	P5 Dup
006. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (6 pages)	01/2000	P5 Dup
007. memo	Michael J. Matheson to Cheryl D. Mills re: Loewen Group, Inc. v. United States, NAFTA Arbitration (9 pages)	08/09/1999	P1/b(1)
008a. letter	To David W. Ogden from Michael J. Matheson re: May 3 draft (2 pages)	06/22/1999	P5 2121
008b. report	[Attachment] re: Privileged & Restricted - Predecisional - Do Not Disclose (4 pages)	n.d.	P5 2122
009. email	Peter Rundlet to Beth Nolan re: NAFTA meeting (1 page)	10/21/1999	P5 2123

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Loewen / NAFTA [North American Free Trade Agreement] - Podesta Memo and other documents [1]

2010-0021-F
jm472

RESTRICTION CODES

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010. report	Re: Attorney-Client Privileged-Work Product- Predecisional-FOIA Exempt - Do Not Disclose (2 pages)	n.d.	P5 Dup
011. letter	To Ms. Cheryl Mills from David R. Andrews re: Loewen case (1 page)	08/26/1999	P5 2124
012. briefing paper	re: Metaclad Corp. v. United Mexican States, NAFTA Chapter 11 Arbitration (1 page)	08/26/1999	P1/b(1)
013a. memo	From Steven F. Fabry to John Duncan re: background materials (1 page)	08/04/1999	P5 2125
013b. report	[Enclosure] USTR Concerns with the DOJ Argument (August 4, 1999 3pm) (10 pages)	n.d.	P5 2126

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Loewen / NAFTA [North American Free Trade Agreement] - Podesta Memo and other documents [1]

2010-0021-F
jm472

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DRAFT DRAFT DRAFT DRAFT

February ___, 2000

MEMORANDUM FOR JOHN D. PODESTA

FROM: **BETH NOLAN**
GENE SPERLING
BILL MARSHALL
PETER RUNDLET
JOHN DUNCAN

SUBJECT: **Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in *Loewen* NAFTA Arbitration**

We seek your guidance in resolving an interagency dispute that raises important policy considerations over the appropriate jurisdictional defense to advance on behalf of the United States in a NAFTA arbitration, Loewen Group, Inc. v. United States. As outlined below, there are strong equities favoring each position, and the approach we take will not only have significant implications on the nature and extent of investor protections afforded by the NAFTA, but may also affect the long-term viability of the NAFTA itself. Because the Department of Justice must file its brief by February 18, we must resolve this issue immediately.

Background

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Chapter 11 was designed to encourage trilateral investment by establishing rules of fair treatment of foreign investment and investors, and by establishing a means for resolving disputes between investors and their host governments. Among other things, Chapter 11 authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11. The claim is arbitrated by the Additional Facility of the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C.

Loewen contends that the United States is liable under the NAFTA for $725 million in damages. Loewen alleges the damages resulted from Mississippi state court judgments rendered against it as a result of a $16 million suit brought against Loewen over a failed business deal. After a controversial trial, during which Loewen contends the court improperly permitted the plaintiff's lawyer to inflame the jurors with anti-Canadian, racial, and class rhetoric, the jury returned a verdict of $500 million against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims that it was unable to post a supersedeas bond in the amount of 125% of the judgment, as required under Mississippi law to stay the judgment

pending appeal. After the Mississippi Supreme Court upheld the bond requirement, Loewen settled the case for structured payments of $175 million (which at the time had a net present value of $85 million), arguing that the bond requirement effectively denied it the opportunity to appeal. Thereafter, Loewen submitted its claim for arbitration, contending that the large jury verdict and the Mississippi courts' refusal to waive or reduce the bond requirement were unjust and discriminatory, in violation of several standards set forth in NAFTA Chapter 11.

The Issue

The Department of Justice is defending the United States in this matter, coordinating with its client agencies, the Department of State and the Office of the United States Trade Representative ("USTR"). Although all of these agencies agree that the United States should make some jurisdictional challenge to the tribunal's competence to hear this case, the gravamen of the current dispute is how broad our jurisdictional argument should be. Justice believes our strongest defense lies in advancing the broadest jurisdictional argument -- that the arbitral tribunal lacks jurisdiction in this case because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the judgments of domestic courts are not "measures" as that term is used in NAFTA. As discussed below, Justice is also prepared to advance a narrower version of this argument. State and USTR oppose advancing either of the broader jurisdictional arguments (outlined below), because they believe neither jurisdictional argument is likely to prevail and, in any case, would undermine the ability of U.S. investors to challenge unfair and discriminatory court judgments abroad. State and USTR prefer the narrower jurisdictional argument that court judgments can be measures only when they have been appealed to the highest available court. Although both sides point to the NAFTA's drafting history in support of their views, what remains of the negotiating history is unfortunately sparse and inconclusive.

In evaluating these arguments, it is of course necessary to consider the strength of our position with respect to the underlying merits of the case, and assess the anticipated damages in the event we lose. None of the agencies thinks that we are in a strong position with respect to the merits of the case. Justice, in particular, believes that we face a serious possibility of losing if the case is heard on the merits. Although State and USTR assert that we have credible answers to each of Loewen's charges, they concede that only Justice has comprehensively analyzed the merits. Justice points out that the Mississippi judgments were widely viewed in both Canada and the U.S. (including Mississippi) as a miscarriage of justice. Professors Laurence Tribe and Charles Fried of Harvard Law School, and Sir Robert Jennings, former President of the International Court of Justice, all submitted testimony that the judgments were a "travesty." Justice does not deny that we have some credible defenses, but it is very concerned that the magnitude of the punitive damages awarded and Loewen's alleged inability to appeal from the jury award could lead an international tribunal to conclude that even our highly regarded, constitutionally based judicial system failed in this case to satisfy the NAFTA's "minimum standard of treatment." With respect to the question of damages, all of the agencies agree that the tribunal is unlikely to assess all of the damages claimed by Loewen, but it is not unreasonable to expect an award of at least $50 million plus millions more in attorneys' fees and costs.

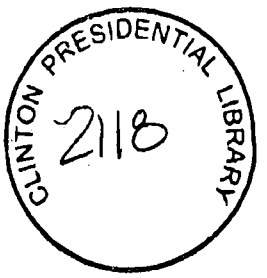
Resolving the jurisdictional argument question requires a careful balancing of policy and political concerns on the one hand, against the probability of success of different legal arguments, on the other. With the exception that everyone agrees that "we want to win this case," Justice and State/USTR -- despite months of discussions -- have been unable to reach agreement on the substance and relative importance of the legal and policy arguments. Most recently, we chaired a meeting with senior officials from Treasury, State, USTR, Justice, and Commerce that resulted in no appreciable movement toward resolving these issues. Because of the complexity of the issues and the importance of resolving them appropriately and immediately, we felt your guidance was necessary.

Policy Considerations

It is important to outline the primary policy concerns and disputes that are the backdrop to the alternative jurisdictional arguments. Everyone agrees that winning this case is important. In addition to the cost of a high damage award, Justice believes that a loss on the merits would establish a dangerous precedent whereby the U.S. could effectively become a guarantor with respect to any judgment rendered against a foreign investor in the state or federal courts of the United States. Further, Justice argues, given that the U.S. is alone in its recognition of large punitive damage awards, the cost of allowing challenges to our court judgments far outweighs the benefits that U.S. investors may gain from being able to challenge foreign court judgments. Finally, Justice believes a loss is likely to generate a great deal of political hostility toward the NAFTA, particularly if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors. Justice has noted that the case already has received significant media attention and fears that the possible headline "NAFTA Panel Overturns Mississippi State Court Ruling, U.S. to Pay Millions" may threaten the continued existence of the NAFTA. Because Justice believes that our best, and possibly only, chance to win this case is to win a jurisdictional argument, they would prefer to make the broadest possible argument -- that court judgments are not "measures" under NAFTA Chapter 11.

State and USTR[1], on the other hand, believe that making this argument would severely undermine our policy of protecting U.S. investors abroad by limiting their flexibility to challenge arbitrary, expropriatory, or otherwise unfair court judgments in other countries (particularly Mexico, where the U.S. Government and World Bank reports have confirmed the continued existence of judicial corruption). State and USTR point out that, because our pleadings will likely become public, the loss of investor protection will occur irrespective of whether the U.S. prevails on this point, and further, that our arguments might eventually undermine protections we have under other trade agreements, such as our Bilateral Investment Treaties ("BITs"). While State and USTR recognize the danger to the NAFTA of losing this case, they argue that we will face certain criticism from the investment community if we argue that court judgments are not covered by Chapter 11.

[1] Although this memorandum refers only to the positions of State and USTR, which are the client agencies in this matter, Commerce and Treasury appear to concur with the State/USTR position, based on our senior-level meeting, which included these agencies.



Possible Jurisdictional Arguments

1. Court judgments are not "measures" for purposes of NAFTA Chapter 11.

The broadest possible jurisdictional argument is that domestic court decisions can never be "measures" as defined by NAFTA Chapter 11. Because Justice believes that our best hope for success is through a jurisdictional defense, its preferred argument is the broadest jurisdictional bar. Although Justice recognizes that the broadest jurisdictional argument is not unassailable, it believes that it is strong for the following reasons: (1) Chapter 11 applies only to "measures *adopted or maintained*" by a government, (emphasis added), and although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice," the definition makes no mention of court judgments and, on its face, appears to contemplate only legislative and executive acts as opposed to verdicts rendered by the judiciary, which are not "adopted or maintained"; (2) because Chapter 11 is, at most, ambiguous as to whether the drafters intended to include court judgments within the definition of "measures," and because it is a canon of treaty interpretation that ambiguities in international agreements are to be resolved in favor of sovereignty ("*in dubio mitius*" or "restrictive interpretation"), court judgments should not be included within the definition of "measures"; (3) State and USTR cannot identify a single occasion in which an international tribunal used the term "measures" to refer conclusively to domestic court judgments; and (4) Professor David Bederman, an international law expert whom Justice consulted upon the recommendation of the State Department, "fully endorsed" Justice's approach and agreed that this argument is legally viable.

State and USTR have strong reservations about Justice's approach, even from a strictly legal point of view. They argue that this jurisdictional argument is unlikely to prevail in an international tribunal because this definition of "measures" requires a radical departure from customary international law (and the BITs) and there was no indication by the parties to the NAFTA that they clearly intended this result. They point out that the definition of "measures" is illustrative, not exhaustive, and that the term is commonly understood to include all actions by a state. State and USTR also question Justice's reliance on the "ambiguity favoring sovereignty" doctrine, arguing that the principle is not a particularly strong or credible guide to treaty interpretation. Furthermore, because the Justice interpretation conflicts with the use of the word "measures" elsewhere in NAFTA, where it clearly includes court judgments, it could have negative consequences for other parts of the Agreement, such as Chapter 17, covering intellectual property.

Our review of the legal arguments suggests that while Justice's position has strengths, it is not certain to prevail. Accordingly, while Justice's approach may be the best argument to win this case, this possibility needs to be weighed against the probable costs of making it.

2. Court judgments in cases not initiated by the government are not "measures" for purposes of NAFTA Chapter 11.

Even though Justice prefers the broadest jurisdictional argument (since arguments distinguishing between types of court judgments are unmoored from the text of the NAFTA), Justice is comfortable making the more narrow jurisdictional argument that only those court

judgments that result from the actions of executive or administrative officials or entities, including the initiation of an enforcement action, would be "measures" subject to NAFTA Chapter 11. Justice argues that this compromise strikes the appropriate balance between winning this case and protecting U.S. investors abroad because, under this theory, the only situation in which an investor would be precluded from proceeding would be a lawsuit between private parties.

State and USTR argue that most of the failings of the first argument apply here, as well. First, they believe that this argument will be unlikely to prevail and that we will diminish the protections for U.S. investors (not only under the NAFTA, but potentially in the BITs, and in future investment negotiations, as well) just by making the argument. Second, even if we win, State and USTR believe this approach provides inadequate protection to U.S. investors because the dangers of unfair or corrupt court judgments in private disputes abroad are real and far-reaching, and will ultimately harm our efforts to promote fair and transparent legal systems worldwide. In response to these concerns, Justice disputes the magnitude of this danger, noting that State and USTR did not identify any examples of harm to a U.S. investor from a court decision that did not involve improper influence by executive or administration officials.

3. *Court judgments can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.*

This is the jurisdictional argument that State and USTR would like to make. State and USTR argue that requiring investors to appeal court judgments to the highest available court before they can be "measures" under the NAFTA has more support in customary international law than the jurisdictional arguments Justice wants to assert. Moreover, they point out that their argument is distinguishable from the typical exhaustion of remedies situation waived in the NAFTA. Exhaustion normally covers situations in which the executive takes an action and courts are asked to remedy that action. Here, the injury first arose through the action of the court, hence it is only reasonable to provide the highest court an opportunity to review and correct that action if appropriate. Although State and USTR concede that it is not clear that their jurisdictional argument would prevail for some of the reasons that Justice points to below, it does attack one of the most troubling aspects of Loewen's claim -- that it chose to settle instead of giving the higher courts an opportunity to correct any errors below. More importantly, this argument strikes a better balance between minimizing the impact on U.S. investors abroad, while advancing the rule of law through judicial accountability.

Although Justice is willing to make this argument as a subsidiary argument to a broader jurisdictional argument, Justice contends that the argument has several weaknesses standing alone. First, it is difficult to argue that a final trial court judgment -- which is a fully executable action -- is less "final" for purposes of state responsibility than a statute or regulation that has not been challenged in court. Second, since the NAFTA explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to arbitration, it would be difficult to persuade the tribunal that exhaustion of the judicial process is required before a court judgment becomes a measure under the NAFTA. Third -- and probably most damaging, the argument, even if accepted, may not work in this particular case. Loewen will have a strong argument that they were effectively barred from achieving highest court

review because of Mississippi's bond requirement. Loewen can argue that they were left with two equally unacceptable alternatives: (1) petition the U.S. Supreme court for an emergency stay of enforcement of the underlying judgment and for a writ of certiorari on the question of the Mississippi Supreme Court's refusal to waive the bond requirement -- both of which are rarely granted, or (2) file for bankruptcy protection, which provides for an automatic stay, but which the tribunal would likely find to be an unreasonable requirement in order to have exhausted the judicial process.

Conclusion

As stated at the outset, the equities favoring different jurisdictional arguments are strong, and the consequences of different approaches are significant. While weighing the options, it may be helpful to keep the following foundational question in mind: *If we were negotiating the NAFTA today, would we seek to include court judgments within the definition of "measures," thereby gaining greater protection for U.S. investors while risking the consequences of a loss in a case like Loewen, or would we prefer a narrower definition of "measures" that excluded some or all court judgments?*

Given that there are competing equities presented by this question, it is **[our/Counsel's Office?]** recommendation that the United States assert the second jurisdictional argument presented here. First, we begin with the premise, shared by all of the agencies, that we want to win this case and a broader jurisdictional argument (together with the subsidiary exhaustion argument) is more likely to succeed than the narrow argument standing alone. Second, by arguing that court judgments in cases not initiated by a governmental entity are not "measures" under Chapter 11, we would strike the best balance between presenting a strong jurisdictional argument in this case and preserving Chapter 11 protection for U.S. investors abroad from unfair or discriminatory court judgments. In our view, the likelihood of a loss on the merits and the magnitude and immediacy of such a loss outweighs the more speculative ~~and cumulative~~ damages that might accrue to the U.S. investor over time if we argue that court judgments in these cases are precluded from the protections of Chapter 11.

At your request, we are willing to meet with you to discuss this at your earliest convenience, to coordinate a principal's meeting to more fully air all views, or redraft this memorandum for the President's decision. We have limited time, however, because of the need to craft and submit briefs by the February 18 filing date.

Purely private actors

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

~~PRIVILEGED & CONFIDENTIAL~~
ATTORNEY WORK PRODUCT

January 28, 2000

MEMORANDUM

To: Peter Rundlet
Office of the White House Counsel

From: David J. Anderson
Director
Federal Programs Branch

Re: The Loewen Group v. United States NAFTA Arbitration

As we understand it, there has been some discussion about not raising jurisdictional defenses in the Loewen case. As you know, we strongly believe that the United States must raise jurisdictional defenses and must raise our strongest possible arguments. This view is based on our belief in the correctness of these jurisdictional arguments, as well as our concern that the United States faces a very serious prospect of losing on the merits. This memorandum provides a very quick overview of our concerns about the merits of the Loewen case. In reviewing this memorandum, it is important to remember that only the Department of Justice has thoroughly reviewed the underlying record in this case and we believe such a review is critical to assessing the merits of this case.

As noted, we believe that the United States faces a serious possibility of losing the Loewen case on the merits. The underlying Mississippi judgments were widely viewed in both Canada and the U.S. (including Mississippi) as a miscarriage of justice. The Loewen Group has submitted testimony from several well-respected scholars (including Professors Laurence Tribe and Charles Fried of Harvard Law School, and Sir Robert Jennings, former President of the International Court of Justice) that the judgments were a "travesty." While the investment agencies may be comforted by the fact that the standards set forth in the NAFTA are difficult to meet, we remain concerned that our defenses on the merits are few and less compelling than our jurisdictional defenses, given the facts of this case.

While we do not mean to suggest that we have no credible defenses on the merits, we do not share the investment agencies' confidence that the applicable NAFTA standards cannot be satisfied on the facts of this case. For example, although the NAFTA's "minimum standard of treatment" may take into account the practices of courts worldwide, this fact may prove inadequate here, as the United

States is alone in the world in its recognition of large punitive damages awards like that in Loewen. Similarly, while the United States' constitutionally-based judicial system is generally regarded as among the fairest in the world, Professors Tribe and Fried both testify that the Loewen case -- especially Loewen's alleged inability to appeal from the jury award -- reflects a significant failure of our constitutional system. Indeed, international liability for "manifestly unjust" court decisions need not be based on worldwide practices, as even a gross misapplication of domestic law can give rise to a "denial of justice" in certain circumstances. Notwithstanding the investment agencies' current assessment of the NAFTA's substantive provisions, the State Department previously advised us (and commentators have confirmed) that some of those same provisions -- in particular, the "fair and equitable" standard of NAFTA Article 1105 -- were unacceptably vague and imprecise when considered in connection with the proposed Multilateral Agreement on Investment ("MAI") in 1997.

With respect to the question of damages, we believe that the United States can persuasively argue that much of the damages claimed by the Loewen Group did not result from the Mississippi court judgments. Nevertheless, in the event that the Tribunal concludes that Loewen's rights under the NAFTA were violated, we do not believe that we can avoid at least some damages award, which is likely to be substantial. While it is extremely difficult to predict what such an award may be at this point, it is not unreasonable to expect that the Tribunal would assess damages of at least $50 million, given that the present value of the Loewen Group's settlement of the Mississippi litigation was $85 million. The tribunal also has the power to award attorneys' fees and costs in this case, which are likely to be in the millions of dollars as well.

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Is it a realistic option to make no jurisdictional argument in the Loewen case?

We do not believe so. First, failing to file a jurisdictional argument may hurt the USG's credibility with the Tribunal since the USG has represented that it intends to file one.

Second, whether or not the USG makes one of the arguments now before the White House for decision, it will likely at least wish to make the jurisdictional argument that Ray Loewen's claim is barred because he fails to meet the standing requirements implicit in Chapter 11.

Finally, if the USG does not challenge jurisdiction, it will be required to file its counter-memorial on the merits 60 days after the initial filing deadline of February 18. It is unclear that 60 days will allow sufficient time to prepare a submission on the merits. By contrast, filing a jurisdictional challenge on February 18 will likely provide at least a few extra weeks to prepare on the merits and may cause the Tribunal to bifurcate the case and hear the jurisdictional question separately.

How strong are the USG arguments on the merits of the case?

While we have been deeply involved in analyzing potential jurisdictional arguments, we have not been in a position to comprehensively analyze the merits of the case and therefore cannot predict with confidence what the outcome will be with regard to any of three obligations the claimants allege to have been breached. However, in general, the USG has credible answers to each of Loewen's charges.

First, there is virtually no international law precedent for Loewen's Article 1110 claim for expropriation.

Second, Loewen's Article 1105 claim for failure to provide treatment in accordance with international law suffers from the fact that the applicable standard for government action is a relatively low one as, for example, it must take into account worldwide norms and practices. Against this low standard, it may be difficult for Loewen to demonstrate that a decision emanating from a well-developed, constitutionally-based court system like ours, and falling within the range of acceptable outcomes of that system, violates international norms.

Third, with respect to Loewen's national treatment claim, it is difficult to know whether Loewen's foreign status made a significant difference in the outcome of its court case. However, the fact that counsel for the plaintiffs in the underlying case repeatedly pointed to Loewen's foreign nationality alone is insufficient to establish a violation; the claimants must show that their injuries were caused by biased government actions.

Moreover, the claimants will face difficulties in establishing that state action, as opposed to their own business and tactical decisions or the actions of the plaintiffs' counsel in the Mississippi courts, caused the losses they claim. Finally, there are good reasons to believe that any damages recoverable can be limited to an amount below the approximately $85 million net present value of Loewen's settlement with the plaintiffs in the underlying case, and, thus, far below the $725 million claimants seek.

Must an Obj?

United States Department of State

Washington, D.C. 20520

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June 22, 1999

David W. Ogden
Assistant Attorney General, Acting
Civil Division
Department of Justice
Tenth Street and Constitution Avenue, N.W.
Washington, D.C. 20530

Dear Mr. Ogden:

We have reviewed a copy of your office's May 3 draft setting forth your proposed jurisdictional arguments and a letter from Professor David Bederman describing his thoughts on those arguments. We wanted to share with you our reaction to both these papers.

For a number of reasons, this is an extremely important case. It will be viewed by many as a test of NAFTA and of the system of investor-state dispute settlement found in NAFTA and in U.S. bilateral investment treaties. We, like you, think it is extremely important to win this case. We also recognize that the legal positions taken by the U.S. government and the decision of the tribunal could have enormous implications for U.S. investors abroad. With these interests in mind, we are in agreement that, at this point, the United States must make a jurisdictional argument of some kind to the Tribunal. Our differences lie in what that argument should be. We believe that the primary argument set forth in the May 3 draft, which asserts that because of the ordinary meaning of the word "measure," court decisions can *never* be "measures," is both unpersuasive legally and undesirable from a policy standpoint because of the effect it could have on the protection of U.S. investors abroad.

Some of the legal problems with this argument are described in the attached paper, which was prepared by our Office of International Claims and Investment Disputes. From a policy viewpoint, it would be contrary to the interests of U.S. investors to exempt all judicial actions, since such actions could be a means for imposing improper restrictions on trade and investment.

However, as we have indicated before, there are variations of this argument that we would find acceptable. We noted with interest that, despite Professor Bederman's assertion that he is in full agreement with the May 3 draft, his letter actually defends a narrower position. In particular, he suggests that certain judicial proceedings, including those that are initiated by a governmental entity or brought under statutes designed to vindicate public interests, might be "measures" for this purpose.

There could still be problems in defending such a position in an international arbitration. Nevertheless, if a more tailored argument along these lines could be supported, we would strongly prefer it to the primary argument set forth in the May 3 draft. We also believe that U.S. interests would be better served by an argument along the lines we originally suggested, that a court decision cannot be considered a "measure[] adopted or maintained by a Party" unless it is an act of that Party's judicial system as a whole, as ratified by its highest applicable court. We note that, in our conversations with him, Professor Bederman found this approach interesting and worth exploring further. We have done some work on developing this argument and look forward to discussing it with your office in more detail.

We hope that this letter helps to clarify our views. We believe that reaching consensus on a coordinated Justice-State-USTR position is of primary importance and look forward to working with your office to develop that position.

Sincerely,

Michael J. Matheson

Michael J. Matheson
Acting Legal Adviser

Enclosure: As stated.

An arbitral tribunal is unlikely to find persuasive the argument set forth in the May 3 draft ("Draft") that, because of its ordinary meaning, the term "measure" in NAFTA cannot include a court judgment.[1] The Vienna Convention on the Law of Treaties, Art. 31, does put a primary emphasis on the "ordinary meaning to be given to the terms of the treaty in light of its object and purpose." However, it is far from clear that the ordinary meaning of the word "measure" includes legislative or regulatory actions, but excludes actions by a court. While the "specific" definition of "measure" in several dictionaries is "a legislative enactment" (Draft at 3), even if this phrase is read to include administrative actions, it seems unlikely that this is the meaning intended under NAFTA since the drafters added three additional words ("procedure, requirement or practice") to the non-exhaustive definition in NAFTA §201.[2] Therefore, it would seem that the broader dictionary meaning, "a plan or course of action intended to attain some object, a suitable action" (Draft at 3) must be closer to the intended meaning in the NAFTA. It is difficult to see how a decision by a judge is not as much a "suitable action" as an action by another type of government official. Similarly, it would seem that a judicial organ could, through its decisions, easily engage in a "procedure, requirement or practice."

The use of the term "measures" in international judicial decisions also suggests that court actions can be measures. The recent Case Concerning Fisheries Jurisdiction (Spain v. Canada), notes that "the word [measure] is wide enough to cover any act, step or proceeding" of a State as a whole. 1998 I.C.J. 9 (Dec. 4) (slip op.). In fact, several cases of the International Court of Justice have made reference to "judicial measures." See, e.g., Advisory Opinion Concerning the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 88 (noting South Africa's "legislative, administrative, or judicial measures contrary to the tenets of both national and international law"); The Nottebohm Case (Lichtenstein v. Guatemala), 1955 I.C.J. 4, 9-10 (holding that because of Mr. Nottebohm's nationality, Lichtenstein could not assert a claim on his behalf for the "judicial measures" Guatemala had taken with regard to him). U.S. jurists, too, have used the word "measures" to refer to actions by courts. See, e.g., New York Times v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting) (noting that even in the absence of express statutory authority, the Court has the power to use "judicial measures" to protect confidentiality of its internal operations).

Neither is it clear from the use of the word "measures" elsewhere in the NAFTA that the term excludes court decisions. The Draft argues that because Article 1121 refers to "proceedings with respect to the measure," a "proceeding" cannot itself be a measure. However, this reading is

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[1] While Professor Bederman's letter purports to support the argument made in the Draft, it actually sets forth a much narrower argument that concedes that some judicial proceedings might be measures.

[2] The definition appears non-exhaustive, since the other definitions in §201 use the term "means" while the definition of "measure" uses "includes." Compare §201 ("days means calendar days . . .") with §201 ("measure includes any law . . . ").

contradicted by footnote 2 of the Draft, which notes that "judicial proceedings" are, in fact, part of the French definition in §201 of the word "measure." A Tribunal could easily find that the other uses of the word "measure" cited in the Draft similarly do not exclude court judgments. For example, in 1106(2), "measures that require[] an investment to use a technology to meet generally applicable health, safety or environmental standards" might be read to include a court decision forbidding an investment from using a particular technology because it was creating a common law nuisance, effectively requiring the investment to use a more environmentally sound technology. See Draft at 7. In NAFTA Art. 1502(3), a Party agrees to "ensure, through regulatory control, administrative supervision or the application of other measures" that a monopoly does not take certain actions. A judicial decision enjoining those actions could be seen to fall within the scope of "other measures." NAFTA Article 904 discusses "measure[s] to ensure [another measure's] enforcement or implementation." A judicial decision could easily be considered a measure to ensure "implementation" of another measure--for example, an injunction of further production when a factory fails to meet air quality standards could be said to be ensuring "implementation" of the air quality measure. This is, of course, to say nothing of references to interim or provisional "measures," which clearly contemplate court actions. It is doubtful an arbitral tribunal would see the term "provisional measures" as a term of art distinct from "measures that are provisional in nature."

It is also difficult to conclude from the "object and purpose" of NAFTA, as set forth in NAFTA Chapter 102 ("Objectives"), that excluding court actions from the scope of Chapter 11 would be consistent with that purpose. It would seem that if a Party's judges are biased against foreigners, then to allow those biased decisions to be challenged under Chapter 11 would indeed "promote conditions of fair competition." Similarly, the Agreement has the objective of "provid[ing] adequate and effective protection and enforcement of intellectual property rights." In the United States, the enforcement of intellectual property rights is in large part done through court decisions, typically in cases brought by private parties. When courts fail to perform this role so completely as to occasion a denial of justice, it could be seen to defeat this objective not to permit an investor to challenge the decision.

It is questionable whether an arbitral tribunal would find a basis in customary international law to distinguish between "affirmative actions" of a state carried out through legislative or executive branch officials and actions by its judicial officers. It appears to be well accepted in international law that acts by judicial officers "are indeed acts of the State." See Freeman, The International Responsibility of States for Denial of Justice 31 (1970). A denial of justice occurs when "the unlawful acts and omissions of judicial organs become international torts." Schwarzenberger, 1 International Law 621 (1957) (also referring to "positive acts" by a judicial officer which can constitute denial of justice). Although Professor Bederman states that he "fail[s] to see how a private civil action of the sort here . . . could be seen as one 'adopted or maintained by a Party,'" the real claim is not that the civil action itself is a measure, but rather that the actions of the judges involved were measures. As discussed above, there is significant

legal support for the argument that judges are as much state actors as are other government employees.

Professor Bederman implies that it would defeat judicial independence to admit that judicial acts (again in the context of a private civil case) might be measures because it would mean that judges and juries were an "'arm' of the United States government." But the obvious response is that the judiciary is surely a "branch" of the U.S. government, whose acts are acts of the United States. See International Law Commission, Draft Articles on State Responsibility, Art. 6, in U.N. GAOR, 51st Sess., Supp. No. 10 (A/51/10 and Corr.1, pp. 125-151) ("The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power . . .").

The Draft cites several claims settlement agreements in support of its argument that in the context of international agreements, "measures" cannot include court decisions. This type of treaty primarily covers expropriations. See, e.g., The Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Art. II (19 Jan. 1981), *reprinted in* 1 Ir.- U.S. C.T.R. 9 (setting forth jurisdiction of Iran-U.S. Claims Tribunal to include "expropriation or other measures affecting property rights"). But judicial decisions have been considered to constitute expropriations. See Oil Fields of Texas v. Iran, 12 Ir.-U.S. C.T.R. 308, 318 (1986) ("It is well established in international law that the decision of a court in fact depriving the owner of the use and benefit of his property may amount to an expropriation of such property that is attributable to the state of that court.").

It has been argued by Professor Bederman and others that the "subsidiary" argument -- that no measure exists because of the failure to appeal -- is only effective in conjunction with the argument that a "denial of justice" (limited by Professor Bederman to private civil cases) is distinct from a "measure." This may be because there is not full recognition of the intended "subsidiary" argument -- that because of the appellate structure of a judicial system, a judicial "measure" can only arise from the actions of the highest available court. While this argument might depend on a distinction between courts and other state actors, it does not depend on the argument that courts cannot ever effect measures.

The Draft relies heavily on the treaty interpretation principle of "in dubio mitius" or "restrictive interpretation"-- that treaties should be interpreted in deference to the sovereignty of states. While one can argue that this interpretive principle should apply in the context of a dispute between a state and an investor, there is substantial support for the argument that, as a general rule, this principle is not considered a particularly strong guide to treaty interpretation. See Lauterpacht, "Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties," 26 Br. Yb. Int'l L. 48, 84 (1949) (discrediting the principle of

restrictive interpretation and noting in particular that in the context of treaty obligations conferring jurisdiction on international tribunals, the ICJ has given "scant respect for the rule in dubio mitius"). Even the citation from Oppenheim's International Law used in the Draft to support the use of in dubio mitius is immediately followed by a limitation on the principle's use: "However, in applying this principle regard must be had to the fact that the assumption of obligations constitutes the primary purpose of the treaty, and that, in general, the parties must have presumed to have intended the treaty to be effective." Jennings & Watts, Oppenheim's International Law 1278-79 (9th ed. 1992).

Perhaps the most fundamental problem with the broad jurisdictional argument set forth in the Draft is that its logic could be argued to exclude all actions by individual government officials from the scope of NAFTA. The Draft uses NAFTA's definition, "measure includes any law, regulation, procedure, requirement or practice," to conclude that a judicial decision cannot be a "measure." Under this approach, it is difficult to identify a clear textual basis for a distinction between a judicial "decision" on how a law applies and an executive "decision" on how a law applies, since an executive decision seems to fit within these terms no more easily than does a judicial decision. This logic would suggest that no particular action in a specific case by any individual government employee could ever be a "measure," unless the action were to occur frequently enough to be considered a "practice" (which, it seems, could as easily be a judicial "practice" as an executive or legislative one). This approach could lead to the conclusion that an individual expropriation (or other single action), no matter how blatantly it violated international law, could never be a "measure" subject to dispute settlement under the NAFTA. It seems unlikely that this was the intended meaning of the Agreement.

important point (that see Civil's response, p 8)

Finally, it is difficult to believe that the primary jurisdictional argument set forth in the Draft will have little or no effect on the protections provided to U.S. investors abroad. Irregular and arbitrary judicial actions that deprive U.S. investors of fundamental due process rights, including those done without legislative or regulatory authority, are a serious concern of the executive branch, as well as the Congress. The more tailored a jurisdictional argument made here, the more protection the NAFTA will provide to U.S. investors abroad.

Peter Rundlet
10/21/99 12:09:26 PM

Record Type: Record

To: Beth Nolan/WHO/EOP@EOP

cc:
Subject: NAFTA meeting

Beth,

Lael Brainard (I believe, with the input of Gene) recommended the following individuals to attend a meeting jointly hosted by you and Gene to discuss the Loewen NAFTA arbitration:

Andy Pincus, Gen. Counsel at Commerce
Ambassador Richard Fisher, Deputy USTR
Bob Novick, Gen. Counsel USTR
Stu Eisenstadt, Deputy Sec of Treasury
Gary Gensler, Asst Sec, Financial Markets, Treasury
Al Larson, Acting Undersecretary of State for Economic Affairs

Lael suggested we would know whom to invite from Justice. I think the list is very good; but I have one concern: Bob Novick has been one of the lawyers pressing the legal arguments and, athough I think it is avoidable, I am a little worried that the discussion could break down into a rehash of the legal strategy. If Bob comes, we should probably invite Dan Marcus and David Ogden. The Legal Adviser's Office at State would then want to be represented. If we make clear from the outset that the purpose of the meeting is not to relitigate their already well-briefed arguments, we can avoid this, but I wanted to raise it as a concern in case you wanted to exclude the lawyers altogether.

Assuming you don't want to exclude them, I think Dan Marcus and David Ogden make the most sense from Justice, but I won't call them until I hear from you. If you agree that it makes sense, I will ask Dan if he has any thoughts about other individuals who have policy expertise in this area that should be invited.

One final question is whether we should invite someone from the COS office (Richetti?).

Please let me know your thoughts. Once the list is finalized, Gene's office will schedule the meeting as soon as possible. Thanks.

Peter

THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

August 26, 1999

PRIVILEGED
UNCLASSIFIED WITH ~~CONFIDENTIAL ATTACHMENT~~
BY SECURE FACSIMILE TO (202)757-2679

Ms. Cheryl Mills
Counsel to the President
The White House
1600 Pennsylvania Ave., NW
Washington, DC 20500

Dear Ms. Mills:

The Department of Justice has shared with us its latest memorandum, dated August 18, regarding the Loewen case. We do not think that it would be useful at this point to continue to exchange detailed legal mini-briefs on this issue. Therefore we have limited ourselves to a few brief comments on some of the points made by Justice, which are attached.

We believe that the U.S. interest in protecting American investors from arbitrary or discriminatory decisions by foreign courts outweighs the concerns that Justice has articulated about NAFTA review of American court decisions. We believe that we have reached the point at which this basic policy decision needs to be made through the NEC Deputies Committee. In view of what Justice has said about the need for a prompt decision, I suggest that we encourage our respective clients to proceed with that policy process as soon as possible. This process should involve the other agencies that have interests in the matter but have not yet had a chance to express them.

Please let us know if we can help get this process under way. Thank you for your help.

Sincerely,

David R. Andrews

AUG-19-1999 11:01

8/6/99 Copy for Ron Linden 616-8202

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

Executive Office of the President
600 17th Street, N.W., Washington, D.C. 20508
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FACSIMILE COVER SHEET

Number of Pages Including This Cover Sheet: 11

DATE: August 4, 1999

FROM: Steven F. Fabry, Associate General Counsel, 395-9512

TO: (name)	(fax number)	(telephone number)
John Duncan	6-9280	6-9288

MESSAGE:

As discussed I'm enclosing some background materials on the concerns that USTR has with advancing DOJ's argument that "court judgments aren't measures" in the *Loewen* NAFTA Chapter 11 case. State, Treasury, Commerce and PTO have all expressed similar concerns to us, although of course they have not yet had an opportunity to lay out their equities in writing. We we understand you may be getting materials from State as well.

In light of the issues involved, we have been trying, with our colleagues at DOJ and State, to construct an alternative legal argument that takes account of the various policy concerns, political implications and legal issues that have been raised. We hope to continue that work with interested parties.

cc: Robert Novick

If you have any difficulty receiving this fax, please call (202) 395-3582.

Attorney Work Product
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USTR Concerns with the DOJ Argument (August 4, 1999 3 pm)

Legal Issues

1. **The text of NAFTA does not support DOJ's position, part 1: the definition of "measure" in Article 201**

- Article 201 says that "measure" *"includes"* a list of specific items. This is a non-exhaustive list, and DOJ has not articulated any reason to exclude court judgments from that definition.

- The ordinary meaning of "measure" can include court orders. A good example of this is the U.S. Federal Rules of Civil Procedure, which use the term "measure" in ways that mean court order in several places.

  – Rule 23(d)[1]; Rule 19(b)[2]; Rule 53(c)[3].

---

[1] "In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing *measures* to prevent undue repetition or complication in the presentation of evidence or argument; ...."

[2] Determination by Court Whenever Joinder Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other *measures*, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[3] Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all *measures* necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

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2. **The text of NAFTA does not support DOJ's position, part 2: the substantive provisions of Chapter 11**

- There are several provisions of Chapter 11 that don't make sense unless court judgments can be "measures":

  -- Specific exceptions in Article 1109(4) refer to judicial action: in particular, the application of a Party's laws relating to bankruptcy (exception 'a'), criminal or penal offenses (exception 'c'), and ensuring the satisfaction of judgments (exception 'e'). These exceptions would not be needed if court orders could not be "measures".

  -- In addition, the reference to "application of a Party's laws" suggests that a court's application of such laws is itself covered by Chapter 11. That is, even if the court judgment itself is not a measure, a court judgment may be *applying* a measure and therefore within the scope of Chapter 11.

  -- Article 1106(1)(f) creates an exception to one of the prohibitions contained in Article 1106. The prohibition applies "except when the *requirement* is imposed or the commitment or undertaking is *enforced by a court*, administrative tribunal, or competition authority . . . ." If court orders could not be "measures", there would be no need for this additional exception.

  -- Article 1110 disciplines expropriation (*i.e.*, takings of property). In the United States, however, the typical taking is done through an eminent domain proceeding in which a court determines the amount of compensation due for the property taken. DOJ's interpretation would take such ordinary takings out of the scope of Chapter 11..

3. **The text of NAFTA does not support DOJ's position, part 3: the text of other provisions of NAFTA**

- There are several provisions of other Chapters of NAFTA that don't make sense unless court judgments can be "measures":

  -- Articles 1714 *et seq.* require the NAFTA parties to provide enforcement procedures for intellectual property rights, including for example TRO's against infringement. The words "measure" and "procedure" (one of the types of "measure" according to Article 201) appear throughout those provisions.

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4. **The use of the term "measure" in other trade agreements and international law leads to the conclusion that the term "measure" can include court judgments.**

- Trade Agreements:

  -- GATT jurisprudence holds that adjudications can be measures. The 1983 *Spring Assemblies* panel interpreted the word 'measure' to mean a Section 337 exclusion order issued by the ITC acting in its judicial capacity.

  -- Staff at the Antitrust Division of DOJ have pointed out to us the "court judgments aren't measures" argument would imply that antitrust enforcement by DOJ is treated differently than antitrust enforcement by the FTC, and that seems a strange result.

- Other International Law

  -- The Department of State has pointed to the ICJ decisions in the *Fisheries* case (Spain v. Canada) and the *Barcelona Traction* case (Belgium v. Spain) as referring to judicial actions as "measures."

5. **The negotiating history that DOJ cites doesn't help settle the issue.**

- DOJ cites to a talking point for Carla Hills to use during negotiations, which says that no country wants Chapter 11 tribunals to act as "courts of appeal".

- The principal problem is that the talking point appears not to refer to the definition of "measure", but to a different issue -- whether an investor is barred from bringing an investor-state arbitration on a law or regulation if the investor has previously challenged that law or regulation in domestic court. Under our BITs, and under the first draft of Chapter 11 but not the final draft, the answer is generally that an investor has to elect between investor-state arbitration and domestic court. Under the final version of Chapter 11 an investor does not have to make such an election. Consequently, it could easily be said that Carla Hills' talking point was *rejected* by the negotiators.

- A subsidiary problem is that no one knows whether that talking point was delivered or what response Mexico and Canada made.

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Practical Considerations

1. **The argument will not dispose of the whole case**

- DOJ wants to argue that court judgments aren't "measures." But the Mississippi appeal bond rule is clearly a "measure", because it fits within the definition in NAFTA Article 201 – and a large part of the claimants' case is based on the bond rule (which they claim "coerced" them into settling). We don't believe that DOJ disagrees with us on this point.

- If at least some part of the case is still viable, then the arbitration tribunal will find that it has jurisdiction, and the case will proceed.

- Therefore, even if DOJ advances this argument, the tribunal can be expected to proceed to the merits of the case (or at least some part of it).

2. **The argument depends on an assumption that if something isn't a "measure", Chapter 11 doesn't apply to it in any fashion. For this assumption, DOJ relies on a controversial interpretation of Article 1101.**

- DOJ argues that court judgments aren't "measures", and therefore Chapter 11 does not apply. The unstated assumption of the argument is that if something isn't a "measure", Chapter 11 does not apply. DOJ bases this assumption on Article 1101(1), which DOJ says limits Chapter 11 to "measures". Article 1101 says:

  "This Chapter applies to measures adopted or maintained by a Party relating to:
  (a) investors of another Party;
  (b) investments of investors of another Party in the territory of the Party; and
  (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

- Article 1101 does not explicitly limit the scope of the Chapter to "measures". Or, to put it differently, it does not say that something that would otherwise violate the provisions of Chapter 11 is exempt from Chapter 11 if it is not a measure.

- Article 1105 – which is one of the bases for the Loewen claim -- is in fact not limited to "measures" at all: "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." DOJ is essentially assuming that we can defend a claim of a violation of Article 1105 on the ground that the violation is not a "measure" -- a word that isn't found in Article 1105.

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- -- The words "treatment in accordance with international law" in Article 1105 is generally thought to include protection against "denial of justice" -- i.e., mistreatment by a country's courts.

3. **If DOJ's argument is correct, then Chapter 11 of the NAFTA has a narrower scope than US BITs.**

- US bilateral investment treaties (BITs) do not contain a provision similar to NAFTA Article 1101. Therefore, it is hard to argue that BITs are limited to "measures", and hard to argue that court judgment are excluded from the BITs on that basis.

- DOJ's argument therefore implies that NAFTA Chapter 11 provides less protection to investors than our BITs do. We have seen no any drafting history or other documentation that suggest the negotiators intended such an outcome.

- U.S. NAFTA negotiators have told us that they in fact did not intend such an outcome.

- DOJ's argument therefore leads to less protection for US investors in Mexico and Canada than in other countries with which we have BITs. For additional implications of this, see the section on investor protection later in this paper.

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Implications for Other Chapters of NAFTA

Because the term "measure" is defined in a general article of NAFTA, any position we take on the meaning of "measure" can have implications throughout NAFTA. (In addition, the term is used in other trade agreements -- principally the WTO Agreement -- and this argument could therefore have implications there as well.)

1. **Implications on the intellectual property provisions of NAFTA Chapter 17, the Agreement on TRIPS, and similar agreements**

- The implications of DOJ's arguments on the intellectual property protections that the United States has negotiated in the NAFTA and the WTO would have to be considered seriously. For instance:

- DOJ's proposed argument could dramatically undermine the provisions of Chapter 17 of NAFTA concerning the protection of intellectual property rights. Fundamental provisions of Chapter 17 relate to the enforcement of intellectual property rights in domestic courts. The ownership of an intellectual property right means little if a right holder cannot enforce that right and prevent infringements. For this reason, the inclusion of enforcement obligations in Chapter 17 concerning civil, criminal, and border enforcement procedures was hailed as a major step forward in the protection of U.S. intellectual property abroad.

- As defined in NAFTA, the term "measure" includes "any . . . procedure." (NAFTA Article 201). The enforcement provisions of Chapter 17 (articles 1714-1718) are replete with references to "civil *judicial procedures*," "provisional *measures*," "criminal *procedures*," and "enforcement *procedures*." To argue that "measures" (and thus "procedures") under NAFTA do not include judicial procedures flies in the face of the text of Chapter 17. Moreover, we would need to consider serious whether this argument might not gut the Chapter's most important provisions.

- This argument would also have ramifications beyond NAFTA, as the enforcement obligations in Chapter 17 of NAFTA are identical in large part to the enforcement obligations of the TRIPS Agreement. The United States is currently pursing a case in the WTO against Greece based on Greece's failure to comply with its obligation to provide effective enforcement procedures under TRIPS. The United States has also pursued two separate WTO cases against Sweden and Denmark based on those countries' failure to provide provisional measures in accordance with TRIPS requirements.

- The intellectual property industries, particularly the copyright and trademark industries, have identified the enforcement of enforcement obligations concerning civil and criminal

judicial remedies as the single most important aspect of NAFTA and the TRIPS Agreement. The motion picture and sound recording industries, in particular, continue to press USTR to bring a NAFTA case against Mexico for the ineffectiveness of its court system in handling intellectual property cases. Arguing that the term "measures" in NAFTA excludes judicial measures is certain to result in a tremendous negative response from these industries.

2. **Implications on NAFTA chapters involving goods**

- Allowing court judgments to drop out of the definition of "measure" would allow Mexico and Canada (and other countries in the WTO context) to begin to apply regulations to U.S. goods through their court system.

- For instance, if we successfully challenged a discriminatory Mexican SPS regulation applied to U.S. agricultural goods, could Mexico accomplish the same discrimination by judicial action and claim that the judicial action was not a "measure" and therefore beyond the scope of a NAFTA (or WTO) challenge?

- This point is the same one that was made by the DOJ Antitrust Division: in the United States, antitrust laws are enforced by both the FTC and DOJ -- why should the FTC's enforcement activity be disciplined by a trade agreement while DOJ's isn't?

- DOJ has said that it is willing to argue that while the term "measure" should not extend to court decisions in private litigation, it could extend to court decisions in actions initiated by the Government. While this might solve the problem in the previous points, it has its own difficulties, and USTR would want to discuss the advantages and disadvantages of such an approach before proceeding. For instance:

  -- There is no textual basis in the NAFTA for saying that a court decision in a government case is a "measure" but a court decision in a private case isn't.

  -- Saying that the "measure" is the government's decision to initiate the court action leads to several odd consequences: Would this allow prosecutorial discretion to be interfered with in ways that we have not foreseen? And could one challenge the *initiation* of a case rather than its *result*? What if the trial court disagreed with the government's decision but nonetheless was subject to challenge or appeal -- would its decision be a measure?

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Effects on U.S. investment policy

The NAFTA investment chapter, consistent with United States outward investment policy and other investment agreements of the United States, such as the BIT program, was designed to address as broadly as possible the type of government actions which could effect a violation of the chapter's obligations. The policy reflected the fact that actions could take a variety of forms and that any branch of the government could undertake an action inconsistent with the obligations of the treaty. The breadth of the possible actions goes so far as to include "practices", given that government actions may be without explicit legislative or executive authority.

A specific objective of United States investment treaties is to provide redress for certain investment disputes between U.S. investors and host governments where judicial systems or actions are seriously deficient, prejudiced or corrupt. In our view, the United States has always stood more to gain in this exchange of obligations in investment treaties given that the United States has more outward investment than any other country and among the most reliable court systems in the world.

The investment disputes in which U.S. companies ask for U.S. government assistance to resolve frequently include situations where they claim a foreign court has rendered a blatantly prejudiced or unfair decision, or where they have strong evidence of corruption. A few examples of current disputes involving a court action against U.S. investors follow. Where U.S. investment treaties have been in place, these investors, and the U.S. government are in a strong position to deter the violation or argue for it to be corrected. Foreign governments have in fact responded positively to the threat of an arbitration proceeding under bilateral investment treaties, averting the need for the investor to actually bring a claim. The Department of State, which has a unit devoted to investment disputes, may have additional information in this connection.

Examples of U.S. Investor Disputes Involving Foreign Court Judgments (Past 6 months)

1. Ecuador: The Mormon Church received a judgment confirming an $800,000 arbitral award which "resolved" an $18,000 dispute over a land purchase from a several-times convicted felon. The Church alleges that the seller bribed the trial judge to confirm the award, and just last week, received telephone calls from an appellate judge requesting a bribe in order to rule in the Church's favor. Senators Hatch, Bennett, and Reid have been extremely upset about this case, and we understand they have written directly to Treasury Secretary Summers. It is probably not subject to the U.S.-Ecuador BIT only because the purchase by the Church is unlikely to qualify as an "investment" of a U.S. "national" or "company."

2. Ecuador: Proctor & Gamble and other foreign investors in Ecuador have been faced with court decisions imposing multimillion dollar damage awards under that country's Dealers' Act, which bear no relationship to damages suffered. We understand that the companies haven't

sought arbitration under the BIT primarily because they anticipate that their Ecuadorian opposing parties will attempt to enforce the judgments in the U.S., and they can resist enforcement here.

3. Russia: Dart Investments alleges that the oligarchs who control OAO Yukos, Russia's second largest oil company, obtained a court order which prevented Dart and other minority shareholders from attending a critical shareholders' meeting in which all assets of Yukos' major subsidiary were diluted; the minority shareholders otherwise had enough votes to block the move.

4. Costa Rica: a number of U.S. investors continue to complain about adverse court judgments or delays in the courts that prevent or delay them in receiving adequate compensation for their expropriated land, in U.S. dollars.

5. Indonesia: a recent court order has blocked enforcement of an ad hoc arbitral award in favor of CalEnergy against the state-owned oil company, Pertamina.

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The political and public relations consequences of losing DOJ's broad argument

- While DOJ rightly views the proposition that NAFTA tribunals can review court decisions as politically undesirable, this proposition is now theoretical, and not real.
- If, however, DOJ's argument is advanced and fails -- as we think it would, for the reasons outlined elsewhere in this paper -- the headline "NAFTA panel overrules state court decision" becomes real. (This may be particularly true if the argument is ruled upon at this jurisdictional stage, in isolation from other arguments, because it would be the only decision that the tribunal is making.)
- If we can develop an alternative to this broad argument -- which we would like to explore -- we can avoid this risk in this case.

Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. letter	To Kenneth L. Doroshow from David J. Bederman re: The Loewen Group v. United States (NAFTA Arbitration) (3 pages)	06/07/1999	P5 Dup
002. memo	To Gene Sperling, Lael Brainard, Hollay Hammonds from John Duncan re: Meeting of Senior Agency Officials in Attempt to Resolve Interagency Litigation Strategy Dispute - The Loewen Group, Inc. v. United States NAFTA Arbitration (4 pages)	11/18/1999	P5 2127
003. memo	To Lael Brainard from Holly Hammonds, John Duncan re: Interagency Dispute Over Whether to Advance Jurisdictional Defense on Behalf of the U.S. in an NAFTA Arbitration - The Loewen Group, Inc. v. United States NAFTA Arbitration (3 pages)	08/04/1999	P5 2128
004. memo	To John Podesta Through Gene Sperling, Cheryl Mills From John Duncan, Peter Rundlet re: Attempt to Resolve Interagency Litigation Strategy Dispute - The Loewen Group, Inc. v. United States NAFTA Arbitration (3 pages)	12/17/1999	P5 2129
005. report	The Department of Justice's Position on Arguments that Should Be Advanced in the Loewen NAFTA Arbitration (4 pages)	n.d.	P5 2130
006. memo	To Charles F.C. Ruff From Raymond C. Fisher re: the loewen Group, Inc. v. United States NAFTA Arbitration (8 pages)	08/05/1999	P5 2131
007. draft	Argument (24 pages)	08/06/1999	P5 2132

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Loewen/NAFTA [North American Free Trade Agreement] - Podesta mem and Other Documents [2]

2010-0021-F
ry1525

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

MEMORANDUM

TO: Gene Sperling
Lael Brainard
Holly Hammonds

FROM: John Duncan

DT: November 18, 1999

RE: Meeting of Senior Agency Officials in Attempt to Resolve Interagency Litigation Strategy Dispute – The Loewen Group, Inc. v. United States NAFTA Arbitration

Purpose of Meeting

You met with White House Counsel on October 7, 1999, to review the legal positions of the various agencies involved in the dispute over the appropriate jurisdictional defense to advance on behalf of the U.S. in the Loewen arbitration case, and to explore whether White House Counsel believed a compromise position could be reached. All participants agreed that it was unlikely that agency attorneys would reach agreement on this matter. You suggested that a policy level meeting be put together consisting of a small group of senior agency officials in order to help think through the policy implications of advancing a particular jurisdictional argument. The importance of reaching a decision increases as the December 17, 1999, filing deadline for making jurisdictional arguments approaches.

While my August 4, 1999, memorandum captures the overall issues, I thought a paper that broke down in detail the particular arguments might be useful as a reference/guide for the meeting.

NAFTA Provisions at Issue

NAFTA Chapter 11 was designed to encourage investment in Canada, Mexico and the U.S. by establishing rules of fair treatment of foreign investors and their host governments.

NAFTA Article 1116 (1) authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11.

NAFTA Article 1101 (1) appears to limit the scope of Chapter 11 to "measures adopted or maintained" by a government relating to the investor or investment at issue, but it is unclear whether a non-measure that would otherwise violate the provisions of Chapter 11 is exempt from coverage simply because it is not a measure.

NAFTA Article 1105 states that "each party shall accord to investments of investors treatment in accordance with international law, including fair and equitable treatment and full protection and security" (the term "measure" is not found in Article 1105).

NAFTA Arbitration claims are submitted to the Additional Facility of the international Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C.

Loewen's Claim and Potential Effect on U.S. Judicial System

Loewen contends that the Mississippi jury verdict of $500 million ($400 of which constituted punitive damages) in a case in which the initial damage claim was only for $16 million, and the Mississippi Supreme Court's refusal to waive or reduce the bond requirement (125% of the judgment amount), were unjust and discriminatory and in violation of several standards set forth in NAFTA Chapter 11. Loewen eventually settled the case for structured payments of $175 million (with a net present value of approximately $85 million). As a result, Loewen claims the court decision constituted an expropriation in violation of Chapter 11 and seeks $725 million in damages from the U.S. Government.

Loewen is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination.

Jurisdictional Arguments Proposed

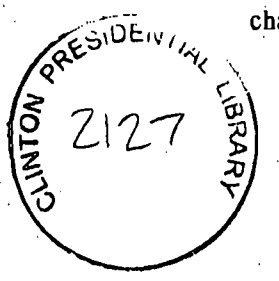
DOJ – Domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.

State/USTR – Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

DOJ Proposed Arguments

DOJ proposes to argue that Loewen's claim is not subject to arbitration under the NAFTA because the judgments of domestic courts are not "measures" within the scope of NATA Chapter 11. Subsidiary arguments are:

- at most NAFTA is ambiguous as to whether the drafters intended to include court judgements within the definition of "measures."
- not persuaded that the term "measures" is ordinarily used in the international law community to refer to court judgments.
- argument that an investor could challenge any action under NAFTA Chapter 11, even if it is not a "measure adopted or maintained" by a NAFTA country, is meritless and dangerous as it would render Chapter 11 limitless in its scope.
- allowing foreign investors to attack domestic court judgments through international arbitration would undermine our system of justice and thereby threaten continued public support for NAFTA and other agreements; also could result in a flood of arbitrations and extraordinary liabilities against the government.
- domestic cost to U.S. of allowing challenges to our court judgments may outweigh the benefits that the U.S. investment community may gain from being permitted to challenge Mexican or Canadian court judgments (where far less litigation occurs).



- jurisdiction argument does not foreclose U.S. investor challenges abroad to actions of officials that lead to adverse court decisions, as administrative government actions are plausibly construed as "measures" even though resulting court decisions are not.
- even if our argument would affect the ability of a U.S. investor to bring a private "denial of justice" claim, OPIC insurance coverage may still provide a remedy.
- given the posture of the Mondev case (Mondev International, Ltd. v. United States) (Dispute with City of Boston over redevelopment project that resulted in breach of contract judgment against City reversed by highest court in Massachusetts and certiorari was denied by Supreme Court) only way we can avoid addressing the merits of the case is if tribunal finds domestic judicial decisions are not measures.
- While it is correct that the bond rule is itself a "measure" that could be separately challenged under Chapter 11, our argument would nevertheless succeed in defeating the most troubling of Loewen's claims that pertain to trial process and the jury verdict. If those claims are out, we will be on stronger footing defending the case.
- State underestimates the risk of an adverse decision in the Loewen case, and State has previously advised us that the international standards of treatment incorporated in the NAFTA are largely untested and suffer from a severe lack of precision.

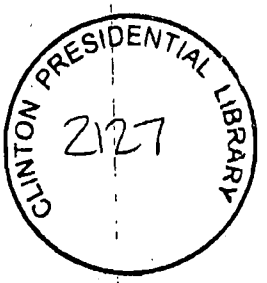
State and USTR Arguments

State and USTR oppose the DOJ jurisdictional argument, arguing that it would undermine the ability of U.S. investors to challenge irregular and arbitrary court judgments abroad. They propose, instead, to argue that Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

- the U.S. interest in protecting American investors from arbitrary or discriminatory decisions by foreign courts outweighs the concerns that Justice has articulated about NAFTA provisions permitting review of American court decisions by arbitration.
- exempting judicial action from international review would be a serious step backward in our advocacy of U.S. investor interests abroad.
- scrutiny of U.S. domestic court decisions by international tribunals for compliance with international obligations is not a new concept.
- NAFTA Article 201 does not support DOJ's position on "measures," as it merely provides a non-exhaustive list of what the term includes, and DOJ has not articulated any reason to exclude court judgments from that definition.
- a number of other provisions of Chapter 11 do not make sense unless court judgments can be "measures."
- there are provisions in other Chapters of the NAFTA that do not make sense unless court judgments are "measures," and those provisions could be undermined by advancing the DOJ argument (Chapter 17 – protection of intellectual property rights).
- there are several prominent instances in international case law, other provisions of NAFTA and elsewhere in which the term "measure" is clearly used in a manner that encompasses judicial actions.
- even if court judgments are found not to be "measures," the Mississippi bond rule is clearly a "measure" because it fits within the definition in NAFTA Article 201, hence

if at least some part of the case remains viable after the DOJ jurisdiction argument, and the tribunal finds it has jurisdiction to proceed why make the argument at all.

- DOJ's argument implies that NAFTA Chapter 11 provides less protection to investors than our Bilateral Investment Treaties (BITs) an outcome clearly not intended by our NAFTA negotiators.
- even if we win on DOJ's argument, we will still face the wrath of the investment community for unduly narrowing the scope of NAFTA's investor protections.
- our proposed argument presents a reasonable compromise between international investment policy concerns and protection of sovereignty because it permits court decisions to be challenged, but only after the party's higher courts have an opportunity to correct whatever irregularities that may have occurred.
- argument is distinguishable from a simple exhaustion of remedies requirement (which appears to have been waived in the NAFTA) as it is typically considered to cover situations where the executive takes an action and courts are asked to remedy that action, but will only do so after all administrative recourse has been pursued. Here the injury first arose through the action of the court, hence only fair to let highest court review and correct if appropriate.
- DOJ overemphasizes the danger of having to address NAFTA cases on the merits as international law standards applicable to the merits at issue are high ones; hence, it is extremely rare that violations of these standards are found, especially in a well-developed, constitutionally-based legal system.



MEMORANDUM

TO: Lael Brainard

FR: Holly Hammonds
John Duncan

DT: August 4, 1999

RE: Interagency Dispute Over Whether to Advance Jurisdictional Defense on Behalf of the U.S. in an NAFTA Arbitration – The Loewen Group, Inc. v. United States NAFTA Arbitration

INTRODUCTION

On October 30, 1998, the Loewen Group, Inc., a Canadian corporation, filed a Notice of Claim for arbitration against the U.S. under Chapter 11 of the North American Free Trade Agreement (NAFTA). Loewen contends the U.S. is liable under the NAFTA for $725 million in damages that resulted from court judgments rendered against Loewen in a Mississippi state court proceeding. The Civil Division of DOJ is defending the U.S. in the matter.

ISSUE

Justice wishes to advance an argument that the arbitral tribunal lacks jurisdiction because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the U.S., and that the judgments of domestic courts are not "measures" as that term is used in the NAFTA. State and USTR disagree over the wisdom of DOJ advancing its jurisdictional argument and would prefer making the narrower argument that court judgments can only be measures when rendered by the highest available court in a judicial system (exhaustion of domestic legal remedies argument).

BACKGROUND

Loewen's NAFTA claim is based on a lawsuit in Mississippi state court in which a Mississippi businessman sued Loewen and its U.S. subsidiary for $16 million as a result of a failed business deal. Loewen contends during trial the court permitted plaintiff's lawyer to appeal to jurors' alleged anti-Canadian racial and class sentiments. The jury returned a $500 million verdict against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict but claims it was unable to post a supersedeas bond in the amount of 125% of the judgment. After the Supreme Court of Mississippi upheld the bond requirement, Loewen settled the case for $175 million. Loewen contends the jury verdict and the Mississippi state court's refusal to waive or reduce the bond requirement were unjust and discriminatory and in violation of NAFTA Chapter 11 standards for the treatment of foreign investors.

ARGUMENTS

Justice

Justice believes that allowing foreign investors to attack decisions of our domestic courts through international arbitration could severely undermine our system of justice and, ultimately, threaten the existence of the NAFTA itself. Justice cites media attention as evidence that political hostility against NAFTA will be generated if its provisions are construed to effect a waiver of sovereignty that would permit international investors to have international tribunals sit in review of U.S. court decisions. Further, Justice believes it imperative to advance the strongest jurisdictional argument possible as it believes there is a real possibility of an adverse tribunal decision if we reach the substantive merits of the case.

Justice believes that subsidiary arguments to the effect that Loewen failed to exhaust the domestic judicial process derive much of their force from the principal argument that court judgments are not "measures," and that, standing alone, these subsidiary arguments are not likely to prevail. Justice cites support from an international law expert it consulted at State's suggestion who takes the position that the DOJ principal argument is legally viable and more likely to prevail than the subsidiary arguments.

Finally, Justice notes that neither State nor USTR has been able to identify any case in which a U.S. investor has attempted to arbitrate a claim challenging a foreign court judgment under any investment treaty; hence, it questions whether the concerns raised by State and USTR are of sufficient practical significance to justify withholding the argument that court judgments are not "measures." Moreover, Justice points out that more litigation involving foreign interests occurs in U.S. courts than in Mexican or Canadian courts, hence permitting review of court judgments under NAFTA may be contrary to the interests of the U.S. investment community as it would permit foreign investors to obtain review of U.S. court decisions, but, given the imbalance in litigation, would not permit U.S. investors to do the same.

State and USTR

State contends the Justice "measures" argument is not likely to prevail and, in any event, would undermine the ability of U.S. investors to challenge irregular and arbitrary court judgments abroad. They argue that if countries cannot be held liable for the actions of their court systems that U.S. investors will have no remedy for final court decisions resulting from corruption or anti-American bias. They note that wrongful expropriation has been a key investment policy concern in the post-colonial era, and that court decisions play an important role in the expropriation of foreign property by, for example, implementing wrongful expropriation decrees and statutes, under-assessing value for purposes of determining compensation and by favoring local disputants over foreigners in property title disputes.

USTR argues that the text of the NAFTA does not support the Justice position. For example, USTR argues that Article 201 is an non-exhaustive list of specific items and Justice has not articulated any reason to exclude court judgments from that definition. Moreover, USTR argues that there are several provisions of Chapter 11 that don't make sense unless court judgments can

be construed to be "measures." Additionally, USTR notes that there are several other Chapters of the NAFTA that would be called into question if court judgments are not "measures," such as Article 1714 which requires parties to provide enforcement procedures for intellectual property rights against infringement. They argue that the words "measure" and "procedure" (one of the types of measures according to Article 201) appear throughout those provisions. Finally, USTR argues that other trade agreements and international law suggest that the term "measure" can include court judgments (1983 Spring Assemblies panel of the GATT interpreted the word "measure" to mean a section 337 exclusion order issued by ITC acting in its judicial capacity).

On a practical level, USTR makes the argument that the Justice position will not dispose of the entire case. USTR notes that even if the tribunal agrees that court judgments are not "measures," that the Mississippi appeal bond rule is clearly a "measure" because it fits within the definition in NAFTA Article 201. USTR believes that if at least some part of the case is still viable, then the arbitration tribunal will find that it has jurisdiction and the case will proceed. Further, USTR takes the position that the Justice "measures" argument depends upon the assumption that if something is not a "measure" that Chapter 11 does not apply in any fashion. USTR believes Justice relies on a controversial interpretation of Article 1101 to reach its conclusion. Finally, USTR argues that Justice ignores that fact that one of the bases for the Loewen claim is Article 1105, which is not limited to "measures" at all. Indeed, the word is not found in Article 1105.

USTR cautions that because the term "measure" is defined in a general article of NAFTA any position we take on its meaning may have adverse implications throughout NAFTA as well as in other trade agreements – principally the WTO agreement. For example, USTR notes that it would have to seriously consider possible adverse implications of putting forth the Justice argument on "measures" for the intellectual property protections that the U.S. has negotiated in the NAFTA and the WTO. USTR states that the Justice argument could dramatically undermine the provisions of Chapter 17 of the NAFTA that relate to enforcement of intellectual property rights and may have similar ramifications relating to the TRIPS agreement.

USTR agrees with Justice that the proposition NAFTA tribunals can review court decisions is politically undesirable; however, it views that proposition as theoretical and not real. If, however, Justice advances its argument and fails USTR believes it is much more likely that the proposition would become real. The USTR bottom line is that it would like to be able to develop an alternative to the Justice "measures" argument that, hopefully, would avoid the risk of the headline "NAFTA Panel Overrules State Court Decision."

MEMORANDUM

TO: John Podesta

THROUGH: Gene Sperling
Cheryl Mills

FROM: John Duncan
Peter Rundlet

DT: December 17, 1999

RE: Attempt to Resolve Interagency Litigation Strategy Dispute – The Loewen Group, Inc. v. United States NAFTA Arbitration

INTRODUCTION

White House Counsel and the NEC met on October 7, 1999, to review the positions of the agencies involved in the dispute over the appropriate jurisdictional defense to advance in the Loewen NAFTA arbitration case, and to explore whether a compromise could be reached. Loewen is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination. After reviewing the arguments, and the history of the inter-agency dispute, we were of the opinion it was unlikely that agency attorneys would reach agreement. As a result, a policy level meeting was held on November 19, with a small group of senior officials from the agencies most effected (USTR, State, Treasury, Justice), in order to think through the policy implications of advancing particular jurisdictional arguments and in an attempt to break the stalemate. The meeting, however, concluded without appreciable movement on either side. A decision must be reached in the near future as the extended briefing period expires in February 2000. We recommend that a Principals Committee be convened to resolve the dispute.

ISSUE

Justice wishes to advance an argument that the NAFTA tribunal lacks jurisdiction because Chapter 11 applies only to "measures adopted or maintained" by the U.S., and that judgments of domestic courts are not "measures" as that term is used in NAFTA. State and USTR disagree over the wisdom of DOJ advancing this argument and would prefer making the narrower argument that court judgments can only be measures when rendered by the highest available court in a judicial system (essentially, an exhaustion of domestic legal remedies argument).

BACKGROUND

On October 30, 1998, the Loewen Group, Inc., a Canadian corporation, filed a Notice of Claim for arbitration against the U.S. under Chapter 11 of the North American Free Trade Agreement (NAFTA). Loewen contends the U.S. is liable under the NAFTA for damages that resulted from court judgments rendered against Loewen in a Mississippi state court proceeding in which a

businessman sued Loewen and its U.S. subsidiary for $16 million as a result of a failed business deal. Loewen contends during trial the court permitted plaintiff's lawyer to appeal to jurors' alleged anti-Canadian, racial and class sentiments. The jury returned a $500 million verdict against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims it was unable to post a supersedeas bond in the amount of 125% of the judgment. After the Supreme Court of Mississippi upheld the bond requirement, Loewen settled the case for structured payments of $175 million (with a net present value of about $85 million).

Loewen contends that the jury verdict was excessive, especially given that the initial damage claim was for $16 million. Loewen also argues that the Mississippi Supreme Court's refusal to waive or reduce the bond requirement, was unjust and discriminatory and in violation of several NAFTA Chapter 11 standards. Finally, Loewen alleges the jury's verdict and the appellate court's decision constituted an expropriation in violation of Chapter 11. As a result, Loewen seeks $725 million in damages from the U.S. Government.

Respective Jurisdictional Argument Proposals

DOJ – Domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.

State/USTR/Treasury – Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

DOJ Defense of its Position

DOJ believes our best hope for success in the Loewen case is to argue that domestic court judgments, particularly those in cases involving only private parties, are not "measures" under the NAFTA. If we do not make the argument, there is a substantial risk we will lose the Loewen case which, in turn, would create significant policy problems for us. The tribunal's assertion of jurisdiction in Loewen would establish a dangerous precedent whereby we could face international arbitration with respect to any state or federal court judgment adversely affecting the interests of foreign investors. The result would likely be a great deal of political hostility toward NAFTA and other international agreements. Our interpretation will not cause significant loss of protection for U.S. investors abroad because executive action, including an enforcement action, that results in a court judgment would still be a "measure" subject to the NAFTA.

NAFTA Chapter 11 applies only to "measures adopted or maintained" by a government. Although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice, " the definition makes no mention of domestic court judgments and, on its face, appears to contemplate only legislative and executive acts as opposed to verdicts rendered by the judiciary. This understanding is supported by the NAFTA's drafting history, which suggests that the U.S. sought to foreclose international review of domestic court judgments. Because international tribunals cannot assert jurisdiction on the basis of ambiguous treaty terms, our argument should present a complete bar to the Loewen claim.

Given that we are alone in our recognition of large punitive damage awards, we believe that the cost to the U.S. of allowing challenges to our court judgments far outweighs the benefits that

U.S. investors may gain from being permitted to challenge foreign court judgments. A case such as Loewen highlights that the NAFTA provides foreign investors with more rights than Americans have and arguably gives foreign companies an advantage over domestic companies.

State and USTR Defense of Their Position

Our investment treaties provide protection for U.S. investors where a host country's judicial system is seriously deficient, prejudiced or corrupt. Excluding judicial decisions from the scope of Chapter 11 "measures" would undermine this protection. This is true whether or not the DOJ argument prevails, since our pleadings will be made public and other countries will cite our arguments to the detriment of U.S. investors. For NAFTA, the DOJ argument would deny Chapter 11 remedies against abuses in Mexican and Canadian courts such as local bias, delays, or corruption. A 1994 World Bank report found that Mexico had "an unacceptable level of competence and integrity of the judges." Our 1999 investment climate statement confirmed corruption is a severe problem. Exempting judicial action from investment rules -- even in private cases only -- would leave a large category of state action un-addressed.

We are unlikely to convince the Tribunal that court judgments are never measures. They would have to believe the NAFTA Parties intended a radical departure from customary international law without clearly indicating such an intent. The common understanding of negotiators is that Chapter 11 covers "denials of justice" involving court decisions. The DOJ argument also conflicts with use of the word "measure" elsewhere in NAFTA where it ~~clearly~~ includes court actions. Because the word "measures" is used throughout NAFTA, the DOJ interpretation could have negative consequences for other parts of the Agreement such as Chapter 17 involving intellectual property. Nearly identical provisions appear in the WTO TRIPS Agreement. Moreover, our BIT partners may also try to use the DOJ argument against our investors.

but from an Attorney.

The argument that court judgments cannot form the basis of a NAFTA claim until they have been appealed fully, has the best chance of success. It strikes a better balance between the dual interests of protecting U.S. investors abroad and defending against claims based on U.S. court actions, because it preserves the right of investors to challenge court action. It has more support in customary international law, and would not have as widespread an effect on other parts of NAFTA. Admittedly, this argument may not prevail because Loewen will argue its ability to appeal was limited. We should, however, advance this argument because it alone minimizes the adverse effects on the foreign investment environment while advancing the rule of law through judicial accountability.

Are any of these for Iran. If we were negotiating today...

Better approach: day 1: Justice, USTR - respond

day 2: " " "

day 3: ___ ___ ___

The Department of Justice's Position on Arguments that Should Be Advanced in the Loewen NAFTA Arbitration

The Department of Justice believes that the United States' best hope for succeeding in the Loewen arbitration is through the assertion of jurisdictional defenses. In particular, DOJ believes that the United States' strongest argument is that domestic court judgments, particularly those arising out of cases involving only private parties, are not "measures" for the purposes of NAFTA. This is the best interpretation of the text of the NAFTA and is a complete defense to liability in this case. By contrast, we believe that the other jurisdictional arguments favored by State and USTR will not be successful because they are unmoored from the text of the NAFTA and are internally inconsistent. Thus, if the United States does not make the argument that domestic court judgments are not "measures," there is a substantial risk that we will lose the Loewen case. Finally, there are also important policy reasons that justify making this argument.

1. *Domestic court judgments are not "measures adopted or maintained" for purposes of NAFTA Chapter 11.*

NAFTA Chapter 11 applies only to "measures adopted or maintained" by a NAFTA party. See NAFTA Article 1101(1). Although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice, " NAFTA Article 201(1), the definition makes no mention of domestic court judgments. On its face, the definition appears to contemplate only actions by the political organs of a state (i.e., legislative and executive acts) as opposed to judgments rendered by an independent judiciary.

International agreements are to be "interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Art. 31. The dictionary definitions of the words "measures," "adopted" and "maintained" all suggest that the term "measures adopted or maintained" is limited to legislative or regulatory actions. Similarly, the term "measure" has been used in international agreements to refer exclusively to legislative or regulatory actions and not to court judgments. This distinction finds additional support in international scholarship concerning "denials of justice," which plainly distinguishes acts of the judiciary from acts of all other government organs. See, e.g., A. Freeman, The International Responsibility of States for Denial of Justice 146 (1938).

Although international tribunals have construed the term "measures" in its broadest sense "to encompass statutes, regulations and administrative action," Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998) at ¶65, neither State nor USTR has identified a single occasion in which the term was used conclusively to refer to domestic court judgments. The Loewen Group cites one case, Regina v. Pierre Bouchereau, 2 C.M.L.R. 800 (ECJ 1977), in which the European Court of Justice found that the term "measure" applied to deportation recommendations of a domestic court where the domestic court was required by law to issue such recommendations that the executive branch, in its discretion, could choose to follow. Even in that case, however, it was acknowledged that "[t]he word 'measure' is

not one of precise import" and that "[i]ts interpretation requires a consideration of the context in which it is found." Id. at 810.

The term "measures" appears several hundred times throughout the NAFTA, and never refers to domestic court judgments. Indeed, the negotiating history of NAFTA Chapter 11 reveals that the United States proposed provisions expressly to prevent international tribunals from reviewing domestic court judgments, recognizing that "most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." U.S. White Paper of Talking Points for Ambassador Carla Hills (undated). Although the NAFTA contains a handful of references to "provisional measures" ordered by courts in intellectual property disputes, provisional measures in such disputes are well-recognized in international law as distinct from court judgments.

To the extent that the term "measures adopted or maintained" remains ambiguous with respect to its application to domestic court judgments, canons of treaty interpretation require that NAFTA Chapter 11 be construed to exclude domestic court judgments from its scope. It is a "fundamental principle of international judicial settlement" that a tribunal "not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt." Qatar v. Bahrain, 1995 I.C.J. 6, 64. In the absence of an "unequivocal indication" of a "voluntary and indisputable" acceptance of the tribunal's jurisdiction by the United States, id., any ambiguity of the term "measures adopted or maintained" should be resolved in favor of sovereignty.

Finally, the DOJ interpretation will not cause a significant loss of protection for United States investors at the hands of foreign governments. Under DOJ's interpretation, executive action, including an enforcement action, that results in a court judgment would still be a "measure" subject to NAFTA Chapter 11. The only situation in which there would be no "measure" that could be challenged by a foreign investor is the situation presented by the Loewen case -- where the only government action is judicial action in a lawsuit between private parties.

2. *The jurisdictional arguments that the Department of State and USTR find acceptable are far weaker and find little support in the text of the NAFTA*

Both the Department of State and USTR have suggested that, because our other jurisdictional arguments are strong, it should not be necessary to make the argument that court judgments are not "measures." In particular, State and USTR have suggested that we should argue that court judgments become "measures" only if they reflect the decision of the highest court. For several reasons, we do not believe that this argument is likely to succeed.

First, the distinction between the decisions of the highest court and the decisions of a trial court does not appear on the face of the NAFTA, which refers only to "measures." Moreover, it may be difficult to argue that appealable court judgments, unlike other forms of government action, do not represent a "final" action of the government for purposes of state responsibility. Indeed, a final judgment of a trial court is, absent a stay pending appeal, a fully executable action that is no less "final" than any statute or regulation in its effect. Because a domestic appeal is possible in each instance (i.e., a statute or regulation can be challenged in court just as a trial

court judgment can be appealed), State's argument that the government has not yet "spoken definitively" would seem to apply as easily to unchallenged statutes and regulations as it would to appealable court judgments.

Second, this argument is inconsistent with the Department of State's view that the NAFTA waived the "local remedies rule" which traditionally applies in international proceedings. "The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law." In the Interhandel Case (Switzerland v. United States), I.C.J. Rep. 6, 26-27 (1959). The essence of this "local remedies rule" is that, "[b]efore resort may be had to an international court" to challenge an alleged violation of international law, "the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system." Id.[1] The subsidiary jurisdictional argument that State has endorsed -- i.e., that court judgments are not "measures" unless rendered by the highest available court -- while seemingly independent of the local remedies rule, in fact rests on the same principles that justify the rule. If the local remedies rule was waived by the NAFTA, it is difficult to see how the NAFTA would require an investor to seek review of a court judgment if the investor does not have to seek review of an administrative, legislative, or executive decision.

Third, the Loewen group will have a strong argument that seeking review of the district court's decision was futile. If the arbitral panel were to accept this claim as a factual matter, there is a good chance that it would (applying the rationale developed under the local remedies rule) excuse the Loewen Group from having sought review of the highest court (because such review was futile). Thus, we believe that, in this case, even if the United States advanced the argument preferred by State and USTR, we might nonetheless lose.

For all of these reasons, the Department believes that, in order for the United States to have the strongest chance of succeeding, we must make the argument that domestic court judgments are not "measures."

3. *There are strong policy reasons to make the argument recommended by DOJ*

Several policy concerns weigh heavily in favor of advancing the foregoing argument. First, a loss on the merits of Loewen (which is quite possible in the absence of a favorable ruling on jurisdiction) would establish a dangerous precedent whereby the United States could face international arbitration with respect to any state or federal court judgment adversely affecting the interests of foreign investors. A single foreign investor in a corporation could embroil the

[1]DOJ and the State Department continue to disagree on whether the NAFTA actually waived the local remedies rule. Because the local remedies rule is a "fundamental rule of international law," the requirement of exhaustion is an imputed term in all international agreements "in the absence of an express contrary stipulation" in the agreement. A. Freeman, International Responsibility of States for Denial of Justice 414 (1938). As a result, international tribunals require an unequivocal expression of a sovereign's intent to waive the local remedies rule. DOJ does not find such an express waiver in the NAFTA.

United States in an arbitration over any domestic verdict by that corporation. Second, the tribunal's assertion of jurisdiction to review the court judgments at issue in Loewen would likely generate a great deal of political hostility toward the NAFTA and other international agreements, particularly given that "even some of those who were most involved in the debate over the [NAFTA] say they did not anticipate claims based on court verdicts." W. Glaberson, *Nafta Invoked to Challenge Court Award in U.S.*, N.Y. Times (Jan. 28, 1999) at C1. Third, while the United States unquestionably has an interest in affording protection to U.S. investors from unjust court judgments abroad, it appears that far less litigation affecting foreign interests occurs in Mexico and Canada than in the United States. Given this substantial imbalance in the amount of litigation, as well as the fact that the United States is alone in its recognition of large punitive damages awards, we believe that the domestic cost to the U.S. of allowing challenges to our court judgments far outweighs the benefits that U.S. investors may gain from being permitted to challenge foreign court judgments. Fourth, a case such as Loewen highlights that the NAFTA does not simply protect foreign investors from discrimination by the United States — it provides foreign investors and foreign companies with more rights than Americans have and arguably gives foreign companies an advantage over domestic companies. Although this may be true under any interpretation of the NAFTA, the interpretation advanced by State and USTR substantially expands the rights given to foreign investors that are not possessed by U.S. investors and corporations (admittedly, U.S. investors abroad would receive similar advantages).

Finally, our proposed argument is consistent, as a practical matter, with the policy concerns raised by State and USTR. Under our theory, an investor is not foreclosed under NAFTA Chapter 11 from challenging a court judgment that results from the actions of executive or administrative officials or entities, as such actions can plausibly be construed as "measures." State and USTR have not identified any example of harm to a U.S. investor from a court decision that did not involve improper influence by executive or administrative officials and which, therefore, a U.S. investor would not be able to challenge under NAFTA Chapter 11. Moreover, although there may be concerns about court judgments in other countries, such as China, we are not aware of any similar concern expressed about Canada and Mexico. To the extent that State and USTR believe that their interpretation is necessary to protect U.S. investors in countries other than that are signatories to the NAFTA, the United States could be more explicit in future treaties.

U.S. Department of Justice

Office of the Associate Attorney General

DETERMINED TO BE AN ADMINISTRATIVE MARKING
INITIALS: JAM DATE: 12/23/11
2010-0021-F

The Associate Attorney General

Washington, D.C. 20530

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ATTORNEY WORK PRODUCT

August 5, 1999

MEMORANDUM

To: Charles F.C. Ruff
Counsel to the President

From: Raymond C. Fisher
Associate Attorney General

Re: The Loewen Group, Inc. v. United States NAFTA Arbitration

Purpose: To resolve an interagency dispute over the efficacy of advancing a particular jurisdictional defense on behalf of the United States in this NAFTA arbitration.

Timing: Immediate.

INTRODUCTION

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Loewen contends that the United States is liable under the NAFTA for $725 million in damages that allegedly resulted from court judgments rendered against Loewen in a Mississippi state court proceeding. The Civil Division of the Department of Justice ("DOJ") is defending the United States in this matter.

DOJ and our client agencies in this case — the Department of State ("State") and the Office of the United States Trade Representative ("USTR") — currently disagree over the wisdom of advancing a jurisdictional argument that we have proposed. In defense of the United States against Loewen's claim, DOJ would like to argue that the arbitral tribunal lacks jurisdiction because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the judgments of domestic courts are not "measures" as that term is used in the NAFTA. State and USTR do not want us to invoke this defense. Because the deadline for making any jurisdictional arguments is approaching (December 17, 1999) and much work remains to be done, we need a prompt resolution of

this disagreement, no later than September 1, 1999.

BACKGROUND

1. NAFTA Chapter 11

Chapter 11 of the NAFTA was designed to encourage investment in Canada, Mexico and the United States by establishing rules of fair treatment of foreign investment and investors, and by providing a means for resolving disputes between investors and their host governments. See Daniel M. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Lawyer 727 (1993). Among other things, the Chapter authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11. See NAFTA Article 1116(1). The scope of the Chapter is limited, however, to "measures adopted or maintained" by a government relating to the investor or investment at issue. See NAFTA Article 1101(1).

2. The Loewen Claim

Loewen's NAFTA claim is based on a lawsuit in Mississippi state court in which a Mississippi businessman sued Loewen and its United States subsidiary for $16 million as a result of a failed business deal. After a controversial trial, during which Loewen contends the court improperly permitted the plaintiff's lawyer to inflame the jurors with anti-Canadian, racial and class rhetoric, the jury returned a verdict of $500 million against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims that it was unable to post a supersedeas bond in the amount of 125% of the judgment, as required under Mississippi law to stay the judgment pending appeal. In January 1996, after the Supreme Court of Mississippi upheld the imposition of the 125% bond requirement and ordered Loewen to post the full bond within seven days, Loewen settled the case for structured payments of $175 million (which, at the time, had a net present value of approximately $85 million), arguing that the bond requirement effectively denied it the opportunity to appeal.

Loewen contends that the jury verdict and the Mississippi courts' refusal to waive or reduce the bond requirement were unjust and discriminatory, in violation of several standards set forth in NAFTA Chapter 11 for the equitable treatment of foreign investors. Loewen claims that the United States is liable under the NAFTA for violations committed by individual states and, therefore, seeks to hold the United States liable for damages allegedly caused by the Mississippi judgments. Loewen submitted its claim to arbitration with the Additional Facility of the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C., seeking at least $725 million in damages.

STATEMENT OF THE ISSUE

DOJ proposes to argue, among other things, that Loewen's claim is not arbitrable under the NAFTA because the judgments of domestic courts (as opposed to actions of other organs of government) are not "measures" within the scope of NAFTA Chapter 11. State and USTR, however, oppose our advancing such an argument. According to State and USTR, the argument is not likely to prevail and, in any event, would undermine the ability of U.S. investors to challenge irregular and

arbitrary court judgments abroad.

While we understand State's and USTR's concern as a policy matter, we believe that the proposed argument is legally sound and, moreover, that allowing foreign investors to attack the decisions of our domestic courts through international arbitration could severely undermine our system of justice and, as a result, threaten continued public and political support for the NAFTA and, perhaps, other international agreements as well. Given the real possibility of an adverse decision in the Loewen case if we reach the substantive merits, we believe, for several reasons, that the balance of these policy concerns weighs heavily in favor of advancing our argument that court judgments are not "measures."

1 First, a loss on the merits of the Loewen case — which we believe is quite possible in the absence of a favorable ruling on jurisdiction — would establish a dangerous precedent whereby the United States could, as a result of the NAFTA, face international arbitration with respect to any judgment rendered against a foreign investor (or against any entity in which a foreign investor has a significant interest) in the courts of the United States. This could result in a flood of arbitrations against the United States, the cost of which could be extraordinary.

2 Second, a loss on the merits in Loewen is also likely to generate a great deal of political hostility toward the NAFTA. The case has already received significant media attention as a "potent back-door way for corporations to challenge the American legal system." William Glaberson, *Nafta Invoked to Challenge Court Award in U.S.*, N.Y. Times (Jan. 28, 1999) at C1; see also, e.g., E. Iritani, *Trade Pacts Accused of Subverting U.S. Policies, Commerce*, L.A. Times (Feb. 28, 1999) at A1. Many individuals, both in and out of government, are likely to be surprised and offended if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors. Cf. Glaberson, supra ("[Loewen] is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination.") (quoting Prof. David W. Leebron, dean of Columbia Law School).

3 Third, we believe that the argument that court judgments are not "measures" is our strongest jurisdictional argument. Although we have some subsidiary arguments, such as that the judgments complained of are not "measures" because Loewen failed to exhaust the domestic judicial process, we feel that these arguments derive much of their force from the principal argument that court judgments are not "measures" and that, standing alone, these subsidiary arguments may not succeed. Professor David Bederman of the Emory University School of Law, an international law expert whom we have consulted at the suggestion of the State Department, agrees that the principal argument is legally viable and that, if not advanced, our subsidiary arguments are less likely to prevail.

4 Fourth, we question whether the policy concerns raised by State and USTR are sufficient to justify leaving U.S. court decisions open to attack under the NAFTA. According to State and USTR, allowing challenges to court decisions under NAFTA Chapter 11 would provide a significant incentive for Mexico to improve its judicial system, which is widely viewed as corrupt and ineffective. As a practical matter, however, it appears that far less litigation involving foreign interests occurs in Mexico than in the United States (in part because of the perceived limitations of the Mexican judiciary). Given this substantial imbalance in the amount of litigation, as well as the fact that the United States is alone

in its recognition of large punitive damages awards, the domestic cost to the U.S. of allowing challenges to our court judgments may outweigh the benefits that the U.S. investment community may gain from being permitted to challenge Mexican court judgments. Indeed, this imbalance in litigation and punitive damages suggests that permitting review of court judgments under the NAFTA may be *contrary* to the interests of the U.S. investment community, as it would confer a competitive advantage on foreign investors to obtain review of U.S. court decisions in international arbitration, whereas U.S. investors cannot obtain such review of U.S. court decisions.

Fifth, the argument that we propose is consistent, as a practical matter, with the policy concerns raised by State and USTR. According to State and USTR, it is important to preserve the ability of U.S. investors to challenge court decisions that result from corrupt, arbitrary or irregular actions of foreign government officials. Although we argue that court judgments are not "measures" for purposes of NAFTA Chapter 11, our argument does not foreclose a NAFTA Chapter 11 challenge to the sort of government actions about which State and USTR appear to be concerned. Rather, because administrative government actions are plausibly construed as "measures" under the NAFTA, an aggrieved investor can still proceed to arbitration to challenge the actions of government officials that lead to adverse court decisions, even though the resulting court decisions themselves are not "measures."

Finally, even if our subsidiary jurisdictional arguments were to prevail in Loewen, we will soon be forced to revisit this same question in another NAFTA arbitration that will be filed against the United States in the next few weeks.[1] In that case, Mondev International Ltd. v. United States, a Canadian investor challenges a decision of the Massachusetts Supreme Judicial Court ("SJC") that reversed a breach of contract judgment that the Canadian investor had obtained against the City of Boston after a jury trial. Arguing that the SJC's decision improperly altered settled common law rules governing public contracts, the investor filed a petition for certiorari with the Supreme Court of the United States, which was denied. The investor now argues that the SJC's reversal of the breach of contract judgment was discriminatory, expropriatory and violated minimum international law standards of fair treatment, which are incorporated in the NAFTA. We cannot argue, as we intend to do in Loewen, that Mondev failed to exhaust the domestic judicial process, nor does it appear that we could argue that the alleged harm resulted from a private action rather than a court judgment. As we currently see it, the only way in which the United States can avoid addressing the merits of the Mondev case is if the tribunal finds that domestic judicial decisions are not "measures" for purposes of the NAFTA.

ALTERNATIVES

DOJ, State and USTR have worked diligently over the past eight months to resolve this disagreement. As a result of these efforts, we have identified four possible alternative approaches to this jurisdictional issue, as follows:

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[1] A ninety-day notice of the prospective claimant's intent to file an arbitration was provided pursuant to NAFTA Article 1119. The prospective claimant's counsel informed us that they intend to file their claim in early August 1999.

The United States should argue that domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.

2. The United States should argue that domestic court judgments are not "measures," but point out that proceedings initiated by a government entity that result in court judgments (such as enforcement actions) are subject to challenge under NAFTA Chapter 11 because the government action that initiated the proceeding is itself a "measure."

3. The United States should argue that, although some domestic court judgments could be challenged as "measures" under NAFTA Chapter 11, a judgment rendered in a civil proceeding between private parties in which no government was involved is not a "measure."

4. The United States should concede that court judgments can be "measures," but only when rendered by the highest available court in a judicial system.

Our views with respect to each of the four alternative approaches are set forth below. A preliminary draft of the jurisdictional argument that we would like to advance is attached at Tab 1. A copy of a letter from Professor David Bederman endorsing DOJ's proposed argument is attached at Tab 2.

ANALYSIS

Alternative 1: *The United States should argue that domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.*

This alternative is the one that we believe should be pursued. As explained in greater detail above, any concession that our court judgments can be "measures" subject to review under NAFTA Chapter 11 could severely undermine our system of justice and, as a result, threaten continued public and political support for the NAFTA and other international agreements.

We recognize, of course, that the argument we propose is not unassailable. For example, the Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998), which we cite for its observation that the term "measures" is typically used in its broadest sense in international agreements "to encompass statutes, regulations and administrative action," id. at ¶ 65, also found that the ordinary meaning of the term is "wide enough to cover any act, step or proceeding . . ." Id. at ¶ 66. Similarly, although we have strong evidence from the NAFTA's negotiating history that the drafters expressly sought to prevent the review of domestic court decisions in international proceedings, we have also identified one document (an "investment questionnaire" form that was sent to each of the fifty U.S. states) that, unlike the NAFTA, includes "judicial decisions" within its definition of "measure." We have carefully considered such materials, however, as well as the textual arguments raised by State and USTR, and believe that, at most, the NAFTA is ambiguous as to whether the drafters intended to include court judgments within the definition of "measures" that could be challenged under Chapter 11. Because ambiguities in international agreements are generally

construed in favor of sovereignty, we believe that our argument should still prevail even in the face of such arguments. We would be happy to provide you with more detailed analyses of the criticisms that State and USTR have made of our argument in this regard, if you feel that it would be helpful.

Alternative 2: *The United States should argue that domestic court judgments are not "measures," but point out that proceedings initiated by a government entity that result in court judgments (such as enforcement actions) are subject to challenge under NAFTA Chapter 11 because the government action that initiated the proceeding is itself a "measure."*

While we do not believe that it is necessary to offer views regarding matters that are not raised in the Loewen case, we do not oppose this alternative approach. Indeed, it is consistent with our interpretation of the NAFTA to say that Chapter 11 does not permit arbitral review of court judgments, but would permit arbitral review of government enforcement actions that result in court judgments. Nevertheless, because such a statement would be dictum insofar as the Loewen case does not involve any government-initiated proceedings, we believe that Alternative 1 would be the more appropriate approach.

Alternative 3: *The United States should argue that, although some domestic court judgments could be challenged as "measures" under NAFTA Chapter 11, a judgment rendered in a civil proceeding between private parties in which no government was involved is not a "measure."*

We do not view this approach as legally defensible. While it may be desirable as a policy matter for court judgments other than those in private civil cases to be covered by NAFTA Chapter 11, there is no basis either in the text of the NAFTA or in customary international law for distinguishing between court judgments in private civil cases and court judgments in other cases for purposes of State responsibility. For example, as we note in our draft argument, international law recognizes a distinction between wrongs committed by courts ("denials of justice") and wrongs committed by all other organs of government. See, e.g., A. Freeman, The International Responsibility of States for Denial of Justice 146 (1938). This distinction supports our argument that the term "measures" in the NAFTA refers only to actions of organs of government other than courts.

In contrast, international law does not appear to distinguish between denials of justice in private civil cases and denials of justice in government-initiated cases. To the contrary, it appears to be settled that where "the conduct of the proceedings in [a] private litigation is internationally deficient, a duty [of the State] to make reparation for the denial of justice will arise under the law of nations." Freeman at 71. Similarly, nothing in the text of the NAFTA would support the argument that the NAFTA parties intended to treat court judgments in private civil actions any differently than judgments in other actions. Once we have conceded that *some* court judgments are "measures" subject to challenge under Chapter 11, therefore, there appears to be no legal basis to avoid the conclusion that *all* court judgments, including those in private civil cases, can be "measures."

Moreover, the argument that we propose achieves the same practical goal of this alternative

(i.e., preserving the ability of U.S. investors to challenge arbitrary enforcement actions initiated by foreign governments), although in a far more defensible way. Although we contend that court judgments are not "measures" for purposes of NAFTA Chapter 11, our argument does not foreclose a NAFTA Chapter 11 challenge to an arbitrary government enforcement action. Rather, because an administrative enforcement action itself (as opposed to the court judgment on the merits of such an action) is plausibly viewed as a "regulation" or "procedure" within the definition of a "measure," it can be challenged under NAFTA Chapter 11. See NAFTA Articles 201 & 1101(1). Even if an arbitrary enforcement action results in an adverse court judgment, therefore, the aggrieved investor can still proceed to arbitration to challenge that administrative action under NAFTA Chapter 11, even though the court judgment that resulted from the action is not itself a "measure" that is subject to challenge.

For example, State points out that one U.S. investor has filed a NAFTA Chapter 11 claim against Mexico to challenge government actions that resulted in an unfavorable court injunction. In that case, Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, a U.S. waste management company complains that local government officials expropriated its investment in a landfill project in Mexico by declaring the site an ecological preserve, thereby preventing the landfill from opening. As part of its claim, the company alleges that the local municipality obtained an injunction in a court proceeding that the municipality initiated against the federal Mexican government to resolve whether it had jurisdiction over the landfill site. According to Metalclad, the effect of the injunction was to prevent the commercial use of the site by anyone, including Metalclad. Although Metalclad does not appear to allege any procedural irregularities in the judicial proceeding, it complains that the Mexican court process was susceptible to abuse in this case, as the municipality was, under Mexican law, able to freeze the use of the property for the many-years pendency of the case merely by initiating the proceeding.

Under our proposed argument, Metalclad's claim against Mexico would not be undermined. As we noted above, an administrative action to initiate proceedings is itself a "measure" subject to challenge under Chapter 11, even if the court judgment that results from that action is not. Thus, even under our proposed argument, Metalclad could still proceed to challenge the actions of the municipality that led to the injunction, even though the court's order itself may not be challenged as a "measure." The substance of Metalclad's claim, therefore, would remain intact.

Alternative 4: *The United States should concede that court judgments can be "measures," but only when rendered by the highest available court in a judicial system.*

We oppose any concession that court judgments can be "measures" subject to review under NAFTA Chapter 11. As we explain in greater detail above, such a concession could severely undermine our system of justice and would likely generate considerable political hostility toward the NAFTA. Because we have a viable legal argument that domestic court judgments are not "measures" at all, we believe that such a concession is neither necessary nor desirable. Instead, we believe that the argument that a court judgment is not a "measure" unless rendered by the highest available court should be made only in the alternative, as a subsidiary argument.

Moreover, although we intend to advance the subsidiary argument that a court judgment can

only be a "measure" when rendered by the highest available court, this subsidiary argument has several weaknesses. For example, because NAFTA Article 1121 explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to international arbitration, we may have some difficulty persuading the Loewen tribunal that exhaustion of the judicial process is required before resort may be had under the NAFTA. Although our arguments on this point are compelling, our success is far from assured.

In addition, even if we persuade the tribunal that Loewen must have exhausted the judicial process before a "measure" could be said to exist, the strength of this argument will ultimately rest on the viability of exhaustion in this particular case. Our strongest arguments in this regard are that: (1) Loewen could have petitioned the U.S. Supreme Court for an emergency stay of enforcement of the underlying judgment and for a writ of certiorari on the question of the Mississippi courts' refusal to waive the supersedeas bond requirement, and (2) Loewen could have filed for bankruptcy protection (which grants an automatic stay) and pursued its appeal in bankruptcy. As to the former option, Loewen could have a strong "futility" argument, inasmuch as emergency relief and petitions for certiorari are rarely granted. As to the latter, it may be difficult to persuade the Tribunal that it is reasonable to require a foreign investor to declare bankruptcy in order to be said to have exhausted the judicial process for purposes of an international claim. The subsidiary argument on its own, therefore, may not succeed in avoiding a ruling on the merits of the case.

Finally, as noted above, we question the policy justification for conceding that court judgments can be challenged as "measures" under NAFTA Chapter 11. While the U.S.'s interest in improving the conditions of the Mexican judiciary for the benefit of U.S. investors is undeniably valid, the cost of allowing U.S. court judgments to be challenged under NAFTA Chapter 11 may be too high to justify such an effort. Indeed, given the apparent fact that more litigation affecting foreign interests occurs in United States courts than in the courts of Mexico or Canada, as well as the fact that the United States is alone in its recognition of large punitive damages awards, it may well be contrary to the overall interests of the U.S. investment community to concede that court judgments are "measures."

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August 3, 1999

ARGUMENT

Claimants' grievance arises from a private contractual dispute that was partially adjudicated in the courts of Mississippi. In that lawsuit, which was never completed, a jury found that Claimants were liable for damages resulting from their willful violations of contracts that they had entered into with a Mississippi businessman. Although Claimants initially appealed the verdict, they chose instead to settle the dispute out of court rather than continue with the appellate process. Following this resolution, in which no government was involved, claimants have constructed a claim against the United States under the NAFTA, an international trade agreement among three nations that has no application to the purely private dispute and settlement agreement that form the basis of Claimants' complaint.

According to Claimants, the United States is liable under the NAFTA because, they claim, the Mississippi court proceedings that preceded their settlement agreement resulted in a judgment that Claimants argue, in essence, was unfair.[1] To be specific, Claimants first contend that the trial court violated the NAFTA by allowing the jury to consider biased testimony and counsel comments. Second, Claimants contend that the trial court violated the NAFTA by accepting the jury's verdict, which, according to Claimants, was excessive. Third, Claimants contend that both the trial court and the Mississippi Supreme Court violated the NAFTA by refusing to depart from the statutory requirement of a supersedeas bond to effectuate a stay of the

[1]Notably, Claimants do not maintain that their conduct could not have given rise to liability under Mississippi law, but contend only that other factors made the jury's verdict unfair.

judgment pending appeal. Even if these allegations could establish a sufficient degree of the United States' involvement to justify this claim, which they cannot, see, e.g., Restatement (Third) of Foreign Relations Law § 207, comment c ("the state is not responsible for injuries caused by private persons that result despite [reasonable] police protection."), they are not within the scope of Chapter 11 of the NAFTA and, therefore, are not arbitrable in this forum.

I. THE CLAIM IS NOT ARBITRABLE BECAUSE THE JUDGMENTS OF DOMESTIC COURTS ARE NOT "MEASURES ADOPTED OR MAINTAINED BY A PARTY" WITHIN THE SCOPE OF NAFTA CHAPTER 11

It is a familiar and well-settled principle of international law that international agreements are to be "interpreted . . . in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, Article 31; I. Brownlie, Principles of Public International Law, p. 627 (4th ed., 1990). In substance, these principles require that the NAFTA be interpreted to effectuate the express agreement of the parties; here, the governments of Canada, Mexico and the United States. See R. Jennings & A. Watts, eds., Oppenheim's International Law, 9th ed. at 1267 (1996). Thus viewed, it is readily apparent from the text of the NAFTA that Chapter 11 does not apply to the judgments of domestic courts, but is instead concerned only with legislative and regulatory actions that affect trade and investment. Other evidence and principles of construction further reinforce the fact, made clear by the express terms of the NAFTA, that the parties never intended Chapter 11 to apply to judgments of domestic courts. Claimants' challenges to the judgments of the Mississippi courts, therefore, are not arbitrable under the NAFTA.

A. The Ordinary Meaning Of The Phrase "Measures Adopted or Maintained" Does Not Include Court Judgments

Article 1101 of the NAFTA limits the application of Chapter 11 only to "measures adopted or maintained by a Party . . . ." See NAFTA Article 1101(1). Article 201, which sets forth the general definitions of the terms in the NAFTA, defines "measure" to include "any law, regulation, procedure, requirement or practice." On its face, this definition does not include jury verdicts or court judgments and, instead, includes only legislative or administrative rules and requirements. The Mexican and French-Canadian versions of the NAFTA similarly do not include court judgments in their definitions of "measure." See Tratado de Libre Comercio de América del Norte, Artículo 201 ("medida incluye cualquier ley, reglamento, procedimiento, requisito o práctica"); Accord de libre-échange nord-américain, Article 201 ("mesure s'entend de toute législation, réglementation, procédure, prescription ou pratique").

This understanding of "measure" is consistent with the ordinary usage of the term, which does not refer to court judgments, but instead contemplates only legislative or regulatory actions. Indeed, every major dictionary of the English language makes clear that, in the context of government action, the word "measure" has the specific meaning of "[a] legislative bill or enactment." Webster's II, New Riverside University Dictionary (1994); see also Webster's Third New International Dictionary (1986) ("Step; *specif.* a proposed legislative act: Bill"); The New Shorter Oxford English Dictionary, (3d ed. 1993) ("A plan or course of action intended to attain some object, a suitable action; *spec.* a legislative enactment proposed or adopted."); The Random House Dictionary of the English Language, 2d ed. (1987) ("a legislative bill or enactment: *The senate passed the new measure.*") (emphasis in original). Significantly, none of these dictionaries

includes anything even approximating jury verdicts or court judgments within the definition of a "measure."

The term "measure" is also routinely used in international agreements to refer exclusively to legislative or regulatory actions rather than court judgments. For example, Canada regularly includes references in its international agreements to "measures of nationalization, expropriation, taking under administration or *any other similar legislative or administrative measures*." Agreement Between the Government of Canada and the Government of the Czechoslovak Socialist Republic Relating to the Settlement of Financial Matters (April 18, 1973) (emphasis added). See also, e.g., Agreement Between the Government of Canada and the Government of the Polish People's Republic Relating to the Settlement of Financial Matters (Oct. 15, 1971) (requiring payment on claims concerning "property, rights or other interests nationalized or otherwise taken by the application of Polish *legislation or administrative decisions*") (emphasis added); Agreement Between the Government of Canada and the Government of the Socialist Republic of Romania Concerning the Settlement of Outstanding Financial Problems (July 13, 1971) (requiring payment on claims concerning "Canadian property, rights and interests affected by Romanian measures of nationalization, expropriation, taking under administration, and *any other similar legislative or administrative measures* . . . .") (emphasis added).[2]

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[2]The General Agreement on Trade and Services ("GATS"), which appears as an annex to the General Agreement on Tariffs and Trade ("GATT"), defines the term "measure" more broadly to include "any measure . . . whether in the form of a law, regulation, rule, procedure, *decision*, administrative action, or any other form." GATS Article XXVIII(a) (emphasis added). Of course, the drafters of NAFTA chose not to include such a definition, even though it was in existence at the time. Moreover, even this broad definition does not include court judgments on its face, as the term "decision" in this context is typically used to refer to administrative, rather than judicial, decisions. See, e.g., Agreement Between the Government of Canada and the Government of the Polish People's Republic Relating to the

Although Claimants correctly observe that court judgments have, in a few extreme and unusual cases, risen to the level of a "denial of justice" that implicate the responsibility of nations under international law, see Notice of Claim ¶ 146, that observation is irrelevant, as it confuses the concept of "denial of justice" with the entirely separate concept of "measures." It has long been recognized in international law that actions of the judiciary, by which a "denial of justice" may be effected, are entirely distinct from actions of all other organs of government. As one leading treatise explains, "the *popular* meaning of denial of justice . . . seems to be that relating to court action. . . . Although one cannot be too certain that this is the term's 'natural' meaning, it is undoubtedly the one which is usually favored by textwriters on international law." A. Freeman, The International Responsibility of States for Denial of Justice, 31 (1938) (emphasis in original). It is well-established that this "popular" understanding of denials of justice "omits wrongs by any organs of the State other than courts or bodies acting in purely judicial capacity." Id. at 146.

Given this settled conceptual distinction between denials of justice (i.e., wrongs committed by courts) and wrongs committed by all other organs of government, it would be unreasonable to construe the term "measures" to include court judgments in addition to legislative and regulatory actions. This is particularly so in this case, given that the definition of "measure" in NAFTA Article 201, on its face, does not include court judgments or any reference to a "denial of justice."

Settlement of Financial Matters (Oct. 15, 1971) (requiring payment on claims concerning "property, rights or other interests nationalized or otherwise taken by the application of Polish *legislation or administrative decisions*") (emphasis added).

The distinction between "measures" and court judgments is also supported by international decisional law, even in cases where the broadest possible definition of "measures" is urged. In the recent Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998), for example, Canada argued that the International Court of Justice ("ICJ") lacked jurisdiction to hear a dispute concerning a particular Canadian statute because Canada had reserved from the ICJ's jurisdiction any "disputes arising out of or concerning *conservation and management measures* taken by Canada" with respect to fishing vessels in certain regions. Because a broad interpretation of the term "measures" was more protective of Canada's sovereignty, Canada "stress[ed] the very wide meaning of the word 'measure'" in arguing that the statute in question was reserved from the ICJ's jurisdiction. Id. at ¶ 65. The Court agreed that the statute was a "measure," noting that the broadest meaning of the term "is used in international conventions to encompass statutes, regulations and administrative action." Id. (emphasis added). Although the question of whether court judgments are "measures" was not at issue in the case, the ICJ's explanation of even the "very wide meaning" of the term significantly did not include court judgments, but was instead limited to "statutes, regulations and administrative action." See also Fisheries Case, Counter-Memorial of Canada on Jurisdiction, Feb. 29, 1996 ("Canada's Brief") at ¶ 96 (The term's "most common usage is in relation to *legislative* measures.") (emphasis in original).[3] The Court's understanding reflects the ordinary meaning of the term

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[3]It is also worth noting that Canada urged the broadest possible construction of the term "measures" because the law requires an "unequivocal indication" of a "voluntary and indisputable" acceptance of an international tribunal's jurisdiction. Canada's Brief at ¶¶52-53 (citing ICJ cases). Had the issue been presented where a *narrow* reading was necessary to protect sovereignty — as it is in this case, see infra at [ ] — the ICJ would likely have construed the term narrowly. See, e.g., Fisheries Case at ¶ 71 (noting that narrower interpretation "would deprive the reservation of its intended effect.").

"measures," which does not include court judgments.

That "measures" do not include court judgments is further underscored by the fact that the scope of Chapter 11 is limited only to "measures *adopted or maintained*" by a NAFTA country. See NAFTA Article 1101(1). As a matter of common usage, legislative proposals are "adopted," and pre-existing rules or practices are "maintained." See, e.g., Webster's Third New International Dictionary of the English Language at 29 (1986) ("adopt" refers to "a bill or measure passed or accepted formally"); id. at 1362 ("maintain" means to "keep up" or "continue"). Court judgments, in contrast, are neither "adopted" nor "maintained," but instead are "issued," "rendered," "entered" or "made." See, e.g., id. at 585 (a "decision" is "arrived at after consideration"); id. at 1223 (a "judgment" is "pronounced" or "given in a cause by a court of law or other tribunal . . . ; a legal judgment entered for one party . . . ."). [4] The plain text of Article 1101(1), therefore, does not bring court judgments within the reach of Chapter 11.

B. The Meaning Of "Measures Adopted or Maintained" In The Context Of The NAFTA

As noted above, NAFTA Article 201 defines "measure" to include "any law, regulation, procedure, requirement or practice." Although the the drafters of NAFTA clearly were capable

[4] The Mexican and French-Canadian versions of the NAFTA support this same distinction. Compare, e.g., The Oxford-Hachette French Dictionary at 13 (2d ed. 1997) (illustrating meaning of "adopter" with "adopter une loi -- to pass a law"); id. at 486 ("maintenir" means "to keep") with id. at 219 (one can "make or take" a "décision;" "prendre une décision"); id. at 452 (to "give one's verdict" or "to pass judgment;" "prononcer un jugement"); id. at 1156 ("se décider" means "to reach or come to a decision"); id. at 1387 ("prononcer/rendre un jugement" means "to pass/give a judgment"); id. at 1652 ("rendre une décision" means "to give a ruling"). Compare also, e.g., The Oxford Spanish Dictionary at 18 (1994) ("adoptar" means "to take," as in "drastic measures will have to be taken"); id. at 479-80 ("mantener" means "to keep," as in "keep up the old traditions") with id. at 227 (one can "make" a "decisión"); id. at 441 (one can "express" or "form" a "juicio"); id. at 1524 (one can "give" or "make" a judicial ruling, or "fallo").

of identifying court judgments with specificity when they wanted to do so, Article 201 does not include court judgments in its definition of a "measure." For example, NAFTA Article 1109(4)(e) permits each NAFTA government to apply its laws to "ensur[e] the satisfaction of judgments in adjudicatory proceedings." By the principle of *expressio unius est exclusio alterius*, which is well-recognized in the law of treaty interpretation, see Oppenheim's at 1279-80, one can fairly infer that the drafters of NAFTA did not intend to include "judgments in adjudicatory proceedings" within the definition of "measures" in Article 201.

Indeed, the term "measures" appears frequently throughout NAFTA Chapter 11 and, without exception, is not used to refer to the judgments of domestic courts. To the contrary, the provisions of NAFTA Chapter 11 appear clearly to exclude domestic court judgments from the Chapter's scope.

Most notable in this regard is NAFTA Article 1121, which sets forth the conditions that an aggrieved investor must satisfy before it may challenge a government measure through international arbitration. Principal among these "conditions precedent" is the requirement that investors "waive their right to initiate or continue before any administrative tribunal or court . . . any proceedings with respect to the measure of the disputing Party that is alleged to be a breach" of Chapter 11. NAFTA Article 1121(1)(b). In other words, to make a claim in arbitration challenging a "measure," the investor must, inter alia, elect to abandon any domestic court challenge to that measure. Because this provision plainly distinguishes between judicial proceedings and the measure challenged in those proceedings (i.e., "proceedings with respect to the measure"), the language of Article 1121 makes clear that a court proceeding itself was not understood by the parties to be a "measure" subject to challenge in international arbitration.

In fact, the parties to the NAFTA appear to have included this requirement in Article 1121 precisely because it "forces investors to choose between local remedies and international arbitration so that international panels cannot act as a court of appeals" over domestic judicial decisions. U.S. White Paper of Talking Points for Carla Hills in Negotiations with Mexico and Canada. As the United States argued in the course of the NAFTA's negotiations, it was necessary to eliminate the requirement that an investor exhaust all local remedies before proceeding to international arbitration because such a requirement, "far from helping to minimize the political problems associated with investment disputes, could actually heighten them, as most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." Id.

If "measures" were construed to include domestic court judgments, the purpose of Article 1121's election-of-remedies provisions would be undermined, as it would allow an international tribunal to sit, in effect, as a "court of appeals" over domestic court judgments. See, e.g., A. Freeman, The International Responsibility of States for Denial of Justice, 170 (1938) (in denial of justice cases, "what would actually happen is that an international tribunal would operate by way of a court of appeals."). Such a result would be inconsistent not only with the plain language of the NAFTA, but with the clear intent of the parties, as well as common-sense principles of international law. See, e.g., Barcelona Traction, Light and Power Co., Ltd., 1970 I.C.J. 3, 157-58 ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.")

(separate opinion of Judge Tanaka). Because the parties to the NAFTA drafted the agreement expressly to avoid such a scenario, it would be unreasonable to conclude that they intended the term "measure" to include domestic court judgments. See L. Sohn & R. Baxter, Responsibilities of States for Injuries to the Economic Interests of Aliens, 55 Am. J. Int'l L. 545, 571 (1961) ("In order to avoid putting an international tribunal in the position of a court of appeal from the courts of the State which is a party to the agreement, a 'clear' departure from the proper law of the contract is requisite to the establishment of responsibility.").

Other uses of the term "measure" in Chapter 11 underscore that the term was intended to refer only to trade-related legislative or regulatory actions. Article 1106(2), for example, refers to "measure[s] that require[] an investment to use a technology to meet generally applicable health, safety or environmental requirements," a reference that plainly does not include court judgments. Similarly, Article 1108 refers to the "continuation," "prompt renewal" or "amendment" of any non-conforming measures, while Article 1111 speaks of measures prescribing special formalities in connection with the establishment of foreign investments, "such as a requirement that investors be residents of the Party or that investments be legally constituted under the laws or regulations of the Party . . . ." Such uses of the term "measures" are consistent only with legislation or regulation and do not refer to court judgments. See also, e.g., NAFTA Article 1114(2) ("[I]t is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.").

The term "measure" also appears several hundred times in other parts of the NAFTA, each time making clear that the agreement as a whole is concerned only with trade- and investment-related legislative and regulatory actions, and not court judgments. Article 2103, for

example, speaks of regulatory measures aimed at the imposition and collection of taxes, setting forth the extent to which such measures are subject to Chapter 11's arbitration provisions. See NAFTA Article 2103(6). The entirety of Chapter 7 of the NAFTA is devoted to "Agriculture and Sanitary and Phytosanitary Measures," while all of Chapter 9 is devoted to "Standards-Related Measures," which are defined as "standard[s], technical regulation[s] or conformity assessment procedure[s]." NAFTA Article 915. "Measures" is used in Article 302 to refer to rules for allocating in-quota imports, and in Articles 309-315 to refer to non-tariff export restrictions "such as licenses, fees, taxation and minimum price requirements." See also NAFTA Article 605. The term appears countless times in similar fashion throughout the NAFTA, reinforcing a definition of "measures" that includes only legislative or regulatory actions that concern trade and investment.[3]

Indeed, in the more than one thousand pages that constitute the NAFTA, including nearly 300 separate Articles as well as numerous annexes and supplemental agreements, the sole use of the term "measures" in the context of judicial action is a reference in only four Articles to

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[3] See, e.g., NAFTA Articles 315 & 605 (using "export measures" as synonymous with export restrictions, such as higher prices on certain goods); NAFTA Article 512 (administrative customs "determinations, measures and rulings"); NAFTA Articles 602(1), 606 (energy regulatory measures); NAFTA Article 607 (national security measures); NAFTA Article 904(1) (measures relating to safety, the protection of human, animal or plant life or health, the environment or consumers, including prohibitions on importation of goods and services); NAFTA Article 1201 (measures relating to cross-border trade in services); NAFTA Article 1210 (preventing measures relating to licensing and certification from becoming barriers to trade); NAFTA Article 1304 (discussing measures "adopted or maintained" to prevent interference with public telecommunications networks); NAFTA Article 1305 (requiring NAFTA parties to adopt antitrust measures, "such as accounting requirements, requirements for structural separation" and other "rules" to prevent anticompetitive conduct); NAFTA Article 1406 (equating "measures" with "regulation, oversight, implementation of regulation and . . . procedures . . ."); NAFTA Article 1502(3) (requiring action through "regulatory control, administrative supervision or the application of other measures . . . .").

"provisional" or "interim" measures issued by international tribunals, see Article 1134, and by domestic courts in the specific context of intellectual property proceedings. See Articles 1715, 1716, 1718. These scant references to "provisional" or "interim measures," however, do not expand the scope of Chapter 11 to include jury verdicts or other domestic court judgments.

"Provisional" or "interim measures" are well-recognized as having a specialized meaning in the field of international arbitration that bears no relation to the "measures" that are covered by NAFTA Chapter 11. The terms generally refer to preliminary actions taken "to preserve the respective rights of the parties" pending a decision by a court or tribunal where necessary to prevent a party from suffering "irreparable prejudice." Paraguay v. United States, 37 I.L.M. 810, 818 (I.C.J. 1998); see also, e.g., D.A. Redfern, Arbitration and the Courts: Interim Measures of Protection -- Is the Tide About to Turn?, 30 Tex. Int'l L. J. 71, 78 (1995); C. Brower & W.M. Tupman, Court-Ordered Provisional Measures Under the New York Convention, 80 Am. J. Int'l L. 24 (1986) ("[T]he rules of most international arbitral regimes authorize a tribunal to order interim or provisional measures . . . .").

This is precisely the manner in which the terms "provisional" or "interim measures" are used in the NAFTA. Article 1134 authorizes international arbitral tribunals to "order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction." Similarly, Article 1716, which applies only to intellectual property disputes, requires each NAFTA party to "provide that its judicial authorities . . . have the authority to order prompt and effective provisional measures" to enjoin an alleged infringement of intellectual property rights and "to preserve relevant

evidence in regard to the alleged infringement." NAFTA Article 1716(1). See also NAFTA Article 1715(2)(f) (judicial authorities must have power to order a party who improperly requested provisional measures in an intellectual property dispute to compensate the party "wrongfully enjoined or restrained . . . .").

Clearly, the recognition of an international arbitral tribunal's authority to issue interim measures of relief does not imply that the judgments of domestic courts are "measures" subject to arbitration under Chapter 11. Nor do the references to court-ordered provisional measures in intellectual property disputes suggest that court judgments are subject to arbitration under Chapter 11. Indeed, under the terms of Chapter 17 ("Intellectual Property"), even provisional measures issued in intellectual property cases are not subject to arbitration under Chapter 11. Article 1716 makes clear that arbitration was not intended as the proper course for challenging a provisional measure, as it requires NAFTA parties to allow defendants to "have those measures reviewed by [the relevant NAFTA party's] judicial authorities . . . ." NAFTA Article 1716(5)(b).

Moreover, in drafting Chapter 17, the parties to the NAFTA were careful to avoid imposing obligations that would subject a court judgment (as opposed to other forms of government action or inaction) to challenge under the agreement. In each of Chapter 17's references to court-ordered provisional or interim measures, the only obligations imposed are those that require the parties to ensure that their courts are *empowered* to take particular action. See, e.g., NAFTA Article 1715(2), (5); Article 1716(1) ("Each Party shall provide that its judicial authorities shall have the authority" to issue certain orders). While a government could be challenged under the NAFTA for failing to empower its judicial authorities as required in Chapter 17, in no case does the Chapter impose requirements that would subject a court

judgment itself to challenge as a "measure."

In any event, even if court-ordered provisional measures in intellectual property cases could somehow be challenged in an arbitration under NAFTA Chapter 11, such provisional measures are entirely distinct from the sort of court judgments that Loewen challenges here. Article 1716(6), for example, provides that the judicial authorities of the NAFTA parties must "revoke or otherwise cease to apply the provisional measures . . . if proceedings leading to a decision on the merits are not initiated" within a certain period of time. In the event that proceedings leading to a decision on the merits of the case are initiated, NAFTA Article 1718(7) requires the NAFTA parties to provide for a "review" to determine whether the provisional measures should be modified, revoked or confirmed. Both of these provisions show that the issuance of provisional measures is entirely independent of court proceedings on the merits and, indeed, that a proceeding on the merits need not even exist for provisional measures to be issued in the first instance. Thus, even if Chapter 17 could be construed to include court-ordered "provisional measures" within the scope of the term "measures" in Chapter 11, it makes clear that court judgments on the merits of a given case — such as the court judgments challenged here — are not arbitrable "measures" for purposes of Chapter 11. Cf., e.g., C. Higgins, Interim Measures in Transnational Maritime Arbitration, 65 Tul. L. Rev. 1519, 1523-24 (1991) ("Provisional or interim measures of relief are distinguishable from interim awards. Generally interim awards involve rulings on the merits or substance of the dispute," whereas interim measures of relief are merely "orders given by the arbitrator/s for the preservation of rights and property" pending the proceedings on the substance of the case) (quoting ICC Arb. Comm'n, Report on the Problems of Interim/Partial Awards § 1.1 (1985)); P. Essoff, Finland v. Denmark: A Call to Clarify the

International Court of Justice's Standards for Provisional Measures, 15 Fordham Int'l L. J. 839, 841 (1992) (the ICJ's "power to hear a case on the merits is distinct from its power to indicate provisional measures.").

It is also significant that the term "measures" in NAFTA Article 1101(1) is modified by the phrase "adopted or maintained." As noted above, this additional limitation is inconsistent with court judgments, as court judgments are not "adopted or maintained," but instead are "rendered," "issued" or "made." See supra at ___. Although the phrase "adopted or maintained" is used throughout the NAFTA, it refers in each instance only to legislative or regulatory rules or actions that concern trade and investment, and never to court judgments. See, e.g., Supplemental Agreement on Environmental Cooperation, Annex 36A, ¶ 4 (Sept. 13, 1993) ("procedures adopted or maintained" by Canada); NAFTA Article 2104(3) (requiring certain "measure[s] adopted or maintained" to be "temporary and be phased out progressively"); NAFTA Article 314 (conditions under which a Party "may adopt or maintain any duty, tax or other charge on the export" of goods); NAFTA Article 906(4) ("technical regulation adopted or maintained"); NAFTA Article 910(3)(a) ("any standard or conformity assessment procedure proposed, adopted or maintained"); NAFTA Annex 301.3, § B(2)(b) ("tariff rate quotas adopted or maintained"); NAFTA Article 1210 ("any measure adopted or maintained by a Party relating to the licensing or certification of nationals of another Party"); NAFTA Article 1302(7)(d) ("a licensing, permit, registration or notification procedure which, if adopted or maintained, . . ."); NAFTA Article 2005(4)(a) ("a measure adopted or maintained by a Party to protect its human, animal or plant life or health . . . ."); NAFTA Article 719 ("any control or inspection procedure or approval procedure, proposed, adopted or maintained . . . ."); NAFTA Article 702(3) ("measures adopted

or maintained pursuant to an intergovernmental coffee agreement."). Such usage throughout the NAFTA merely underscores that Chapter 11 was not intended to apply to domestic court judgments.

In short, whether in the context of the NAFTA or in international practice generally, the limiting phrase "measures adopted or maintained" in NAFTA Article 1101 applies only to legislative or regulatory actions and excludes domestic court judgments from its scope. It is not surprising, therefore, that the President of the United States, when he transmitted the NAFTA to the U.S. Congress for approval, explained that "the NAFTA's rules generally cover state and local laws and regulations, as well as those at the federal level." NAFTA Implementation Act, Statement of Administrative Action, p.8 (Nov. 3, 1993) (emphasis added). Because Chapter 11 applies only to such "laws and regulations," this Tribunal lacks jurisdiction to address Loewen's challenges to the judgments of the Mississippi courts.

C. The Object And Purpose Of The NAFTA

The purpose of the NAFTA is quite clear: to enhance trade and investment among Canada, Mexico and the United States. See NAFTA Chapter 102 ("Objectives"). The agreement's principal goals are to "eliminate barriers to trade" among the three countries, to "promote conditions of fair competition in the free trade area," to increase "investment opportunities" and to "provide adequate and effective protection and enforcement of intellectual property rights" in each of the three countries. Id. To these ends, the NAFTA includes a mechanism for the resolution of disputes concerning government "measures" that pertain to trade and investment. Id.; see also NAFTA Chapter 11. Nowhere in these stated goals is there any suggestion that the NAFTA was intended to apply to court judgments, particularly where the

judgment is a jury's award of damages in a purely private contract dispute, unrelated to any government measures, that was eventually settled out of court.

In fact, the inclusion of such proceedings within the scope of Chapter 11's dispute resolution mechanism would be inconsistent with the stated goals of the NAFTA. As noted above, Chapter 11 seeks to facilitate the orderly resolution of trade and investment disputes by requiring aggrieved investors to waive their right to challenge a government measure in a domestic court. See NAFTA Article 1121(1)(b). In the view of the NAFTA's drafters, this requirement was appropriate because the more traditional requirement that an investor exhaust all local remedies before proceeding to international arbitration,"far from helping to minimize the political problems associated with investment disputes, could actually heighten them, as most governments would object strenuously to an international tribunal acting as an appeals court for domestic judicial decisions." U.S. White Paper of Talking Points for Carla Hills, supra. The NAFTA's drafters thus made clear that the inclusion of domestic court judgments within the scope of "measures" that could be challenged in arbitration would frustrate the very purpose of the dispute resolution mechanisms that are vital to the NAFTA's success. Cf., e.g., D. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Law. 727 (1993) (Chapter 11 "was an essential element of an agreement that was to provide the basis for hemispheric free trade.").

Because Loewen's challenge is so contrary to the expressed intent of the NAFTA parties, representatives of the NAFTA governments have spoken out against the filing of such lawsuits. For example, Canadian trade officials recently complained that Chapter 11 was never intended to permit lawsuits like the Loewen claim and are seeking an interpretive agreement among the three

NAFTA nations to confirm this point. See I. Jack, *Ottawa Pushes for Reform of NAFTA Lawsuit Provisions: $1-Billion in Claims*, Fin. Post (Apr. 20, 1999) at C03; P. Morton, *Washington Cool to Rewriting Key NAFTA Clause: Canada Urged Review: Aim is to Limit Firms' Ability to Sue Governments*, Financial Post (Jan. 23, 1999) at D09. Such an effort only underscores that the inclusion of court judgments within the meaning "measures" would be inconsistent with the object and purpose of the NAFTA.

D. Even If The Meaning And Scope of The Term "Measures" Were Ambiguous, Canons Of Treaty Interpretation Require That The Term Be Interpreted To Exclude Domestic Court Judgments

It has long been a principle of customary international law that treaties are to be interpreted in deference to the sovereignty of states. See, e.g., EC Measures Concerning Meat and Meat Products (Hormones), 1998 WL 25520, Report of the Appellate Body at *71 n.154 (WTO Jan. 16, 1998); Nuclear Tests Case (Australia v. France), 1974 I.C.J. 267 (1974). International tribunals repeatedly insist on an "unequivocal indication" of a "voluntary and indisputable" acceptance by a sovereign of the tribunal's jurisdiction. Case Concerning Maritime Delimitation and Territorial Questions Between Qatar and Bahrain (Qatar v. Bahrain), 1995 I.C.J. 6, 63-64; Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, 1993 I.C.J. 325, 341-42. Given this strong deference to sovereignty, "[i]f the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties." R. Jennings and A. Watts (eds.), Oppenheim's International Law, 9th ed., Vol. I, p. 1278 (Longman 1992).

Clearly, an unwelcome review of a country's domestic court judgments through international arbitration would significantly interfere with that country's territorial supremacy. As one noted scholar has observed, "[a] concept of denial of justice which exposes to investigation the substance of the judgment rendered is an evisceration of the very *corpus* of the sovereignty doctrine and its precious tenet of freedom from interference on the part of other States. In cases of this kind, what would actually happen is that an international tribunal would operate by way of a court of appeals." A. Freeman, The International Responsibility of States for Denial of Justice, 146 (1938). The parties to the NAFTA recognized as much in the course of the negotiations of the agreement, and included provisions in Chapter 11 expressly to avoid such interference. See U.S. White Paper, supra. See also, e.g., Barcelona Traction, 1970 I.C.J. at 157-58 ("If an international tribunal were to . . . examine the regularity of the decisions of municipal courts, the international tribunal would turn out to be a 'cour de cassation', the highest court in the municipal law system. An international tribunal, on the contrary, belongs to quite a different order; it is called upon to deal with international affairs, not municipal affairs.") (separate opinion of Judge Tanaka).

Because the parties to the NAFTA expressly sought to prevent international review of domestic court judgments, it would be unreasonable to construe the phrase "measures adopted or maintained" in Chapter 11 to refer to domestic court judgments. Even if the term could plausibly be so construed, settled principles of international law require that such an ambiguity (if it can be said to exist at all) must be resolved to exclude domestic court judgments from Chapter 11's scope. To infer the parties' consent to have their court judgments challenged in international proceedings on the basis of such language would ignore the "fundamental principle of

international judicial settlement" that a tribunal "not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt." Qatar v. Bahrain, 1995 I.C.J. at 64.

II. EVEN ASSUMING THAT A COURT JUDGMENT COULD BE A "MEASURE" WITHIN THE SCOPE OF CHAPTER 11, THE COURT JUDGMENTS COMPLAINED OF HERE ARE NOT "MEASURES" BECAUSE THEY WERE NOT RENDERED BY THE HIGHEST AVAILABLE COURT

Although the majority of Loewen's complaint concerns actions of purely private entities as to which the NAFTA as no application, Loewen bases its claim, in part, on judgments of the trial court and Supreme Court of the State of Mississippi. Because Loewen chose to settle the Mississippi litigation, however, thereby denying higher courts any opportunity to review and, if necessary, correct the judgments that Loewen now seeks to challenge, those judgments cannot constitute "measures adopted or maintained by a Party" for purposes of NAFTA Chapter 11, even assuming that a court judgment could ever be viewed as a "measure."

It is well-settled in international law that "[j]udicial action is a single action from beginning to end and it cannot be said that the State has spoken finally until all appeals have been exhausted." E. Borchard, "'Responsibility of States' at the Hague Codification Conference," 24 Am. J. Int'l L. 517, 532 (1930) (citing Belgian delegate). This is so because, until the judicial system as a whole has had the opportunity to act, the result is subject to change. "It cannot be determined whether there is any international responsibility until it is known what the final state action will be, a fact which cannot be known until available appeals and local opportunities for correction of the error or wrongful act, if any, have been exhausted." Id. at 533. Because an international obligation can only be breached when it becomes "definitively impossible for the State" to comply with that obligation, see Yearbook of the Int'l L. Comm'n of 1978 at 95, a

judicial action could only be a "measure" for purposes of NAFTA Chapter 11 when it is the final act of the judicial system from which no further appeal is possible. See, e.g., E. Borchard, The Diplomatic Protection of Citizens Abroad 198 (1915) ("It is a fundamental principle that . . . only the highest court to which a case is appealable may be considered an authority involving the responsibility of the state."); Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 45-46 ("Before the tribunals of the respondent State have handed down its final decision, the State may not be considered liable internationally because and for the simple and good reason that the damage has not as yet been consummated."); Freeman at 634 ("It is not disputed that courts are able to involve the State in responsibility, but the judicial decision with which it is confronted must be final and without appeal.") (quoting League of Nations Publications, Basis of Discussion, Vol. III Responsibility of States pp. 41-51 (1929)).

In this case, several avenues of appeal were available to Loewen that the company, for its own private reasons, elected not to pursue. For example, rather than settle the case, Loewen could have sought review of the Mississippi Supreme Court's decision to uphold the full supersedeas bond requirement in the United States Supreme Court. Indeed, the United States Supreme Court has already once granted a petition for review in virtually identical circumstances. See Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) (reviewing claim that Texas court violated constitutional right to due process by requiring Texaco to post an appeal bond in excess of $13 billion in order to obtain stay of execution of judgment on jury verdict of $10.53 billion).

In addition, if, as Loewen claims, the Mississippi judgment truly represented the majority of the company's net worth, Loewen could have petitioned for reorganization under the

bankruptcy laws of the United States. In so doing, Loewen would have obtained an automatic stay of execution of the Mississippi judgment (the very aim of the supersedeas bond) and would have been free to pursue an appeal of the Mississippi judgment while in the reorganization proceedings. See 11 U.S.C. § 362; Pennzoil, 481 U.S. at 22 (Brennan, J., concurring) ("Texaco clearly could exercise its right to appeal in order to protect its corporate interests even if it were forced to file for bankruptcy under Chapter 11 [of the U.S. bankruptcy laws]. Texaco, or its successor in interest, could go forward with the appeal, and if it did prevail on its appeal . . . the bankruptcy proceedings could be terminated.") Of course, this is precisely what Texaco and countless other companies have successfully done when confronted with large judgments. See In re SGL Carbon Corp., 233 Bankr. Rep. 285, 289 (D. Del. 1999) (a company "facing potentially devastating litigation" is well within its rights to file for protection under Chapter 11 of the U.S. bankruptcy laws).

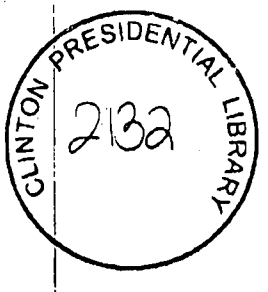
Loewen can offer no reason why it could not have pursued these and other remedies rather than settle the case. Indeed, Loewen itself made clear at the time of the underlying litigation that it was aware of these options, but that it elected to settle the case for its own private business reasons. See, e.g. Dow Jones, *TSE Sets Record Thanks To Golds*, Toronto Star (Jan. 26, 1996) (quoting Raymond Loewen as considering options of bankruptcy protection, posting of the full bond, or appealing the Mississippi Supreme Court's bond ruling to the U.S. Supreme Court). Having made its choice to forego the appellate process, Loewen cannot now attribute its injury to any "measure adopted or maintained" by the United States.

III. THE CLAIM IS NOT ARBITRABLE BECAUSE A PRIVATE AGREEMENT TO SETTLE A PRIVATE LITIGATION MATTER OUT OF COURT IS NOT A "MEASURE" WITHIN THE SCOPE OF NAFTA CHAPTER 11

As already noted, NAFTA Chapter 11 authorizes an investor to initiate arbitration proceedings against a NAFTA country only with respect to "measures adopted or maintained" by that country that are alleged to be in breach of the NAFTA. See NAFTA Articles 1101(1), 1116, 1117. The injury that Claimants allege in this case, however, resulted directly from their own, unilateral decision to forego their appeal of the O'Keefe jury verdict and to settle the litigation out of court, and not from any government "measure." Even if the court judgments that preceded the settlement agreement could be construed as "measures" for purposes of Chapter 11 -- which, as explained above, they cannot be -- the voluntary settlement agreement that imposed a legal obligation on Claimants to pay money to O'Keefe surely cannot be considered a government "measure" under the NAFTA.

The international law of state responsibility has long recognized that an "act or omission shall not be imputable to the State if it was provoked by some fault on the part of the injured alien himself." International Law Comm'n, Revised Draft on Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, U.N. Doc. A/CN.4/134/Add.1, art. 17(3) (1961); see also D. Bederman, Contributory Fault and State Responsibility, 30 Va. J. Int'l L. 335, 342, 346 (1990) ("State responsibility is only engaged when an act or omission is attributed to a state.") (citing treatises). Contrary to the allegations set forth in their Notice of Claim, and as illustrated above, Claimants were not "coerced" by the Mississippi court judgments to settle the O'Keefe litigation and were free to pursue numerous domestic avenues of appeal. For their own private reasons, Claimants chose not to do so and, instead, entered into an agreement to settle their differences with the injured party, Jerry O'Keefe. Because the assumption of the obligation to pay O'Keefe pursuant to the terms of the settlement

agreement — which is the injury complained of here — was thus entirely Claimants' own choice, Claimants have not asserted an arbitrable claim against the United States under the NAFTA.



Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (5 pages)	02/10/1999	P5 Dup
002. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (5 pages)	01/2000	P5 2133
003. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (5 pages)	01/2000	P5 Dup
004. email	Steve Fabry to John D. Duncan re: Loewen: Investment agencies' contribution (1 page)	12/16/1999	P5 2134
005. memo	To Lael Brainard from Holly Hammonds, John Duncan re: Interagency Dispute Over Whether to Advance Jurisdictional Defense on Behalf of the U.S. in an NAFTA Arbitration - The Loewen Goup, Inc. v. United States NAFTA Arbitration (3 pages)	08/04/1999	P5 Dup
006. memo	To Charles F.C. Ruff from Raymond C. Fisher re: The Loewen Group, Inc. v. United States NAFTA Arbitration (8 pages)	08/05/1999	P5 Dup
007a. memo	From Steven F. Fabry to John Duncan re: background materials (1 page)	08/04/1999	P5 Dup
007b. report	[Enclosure] USTR Concerns with the DOJ Argument (August 4, 1999 3 pm) (10 pages)	08/04/1999	P5 Dup
008. memo	Matheson, Michael J. to Mills, Cheryl D. re: Interagency Dispute Regarding Proposed Jurisdictional Arguments in the Loewen Group, Inc. v. United States, NAFTA Arbitration (9 pages)	08/09/1999	P1/b(1), P5

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NAFTA [North American Free Trade Agreement]-Arbitration, Loewen Group

2010-0021-F
eh650

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009a. memo	Ogden, David W. to Mills re: Further Comments Concerning The Loewen Group, Inc. v. United States NAFTA Arbitration (6 pages)	08/18/1999	P1/b(1), P5
009b. memo attachment	[Excerpt of United Mexican States Rejoinder Relating to a NAFTA Arbitration (4 pages)	n.d.	P1/b(1)
010. letter	To Ms. Cheryl Mills from David R. Andrews re: the Loewen case (1 page)	08/26/1999	P5 Dup
011. letter enclosure	[Comments from the Legal Adviser at Dept. of State on Points Made by Justice Dept.] (2 pages)	08/26/1999	P1/b(1), P5
012. memo	Bettauer, Ronald J. to Interested Agencies re: Potential U.S. Submission in Metaclad Corp. v. United Mexican States, NAFTA Arbitration [faxed copy to Duncan, John from Francisco, Cynthia S.] (2 pages)	09/16/1999	P1/b(1), P5
013. note	[Handwritten note re: Chap 11 of NAFTA (1 page)	n.d.	P5 2135
014. fax	To Cynthia Stewart Francisco, Steve Fabry from Kenneth L. Doroshow (with memo attachment) re: Loewen case (10 pages)	08/04/1999	P5 2136
015. briefing paper	"Talking Points" (1 page)	08/04/1999	P5 2137
016. email	Lael Brainard to Holly Hammonds re: Can you check this very quick (1 page)	08/04/1999	P5 2138
017. note	[Handwritten notes re: Interagency Dispute] (3/4 pages)	08/04/1999	P5 2139

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018. memo	For John D. Podesta from Beth Nolan, et al., re: Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in Loewen NAFTA Arbitration (6 pages)	02/2000	P5 Dup
019. report	Re: Is it a realistic opinion to make no jursidictional argument in the Loewen case? (1 page)	02/28/2000	P5 Dup
020. report	Summary of Justice Department and State/USTR Arguments in Loewen (3 pages)	n.d.	P5 2140
021. note	[Handwritten notes re: NAFTA Arbitration (2 pages)	11/19	P5 2141
022. memo	To John Podesta Through Gene Sperling, Beth Nolan From John Duncan, Peter Rundlet re: Attempt to Resolve Interagency Litigation Strategy Dispute - The Loewen Group, Inc. v. United States NAFTA Arbitration (3 pages)	12/17/1999	P5 2142
023. memo	To Gene Sperling, Lael Brainard, Holly Hammonds From John Duncan re: Meeting of Senior Agency Officials in Attempt to Resolve Interagency Litigation Strategy Dispute - The Loewen Group, Inc. v. United States NAFTA Arbitration (4 pages)	11/18/1999	P5 2143
024. letter	To Kenneth L. Doroshow from David J. Bederman re: the Loewen case (4 pages)	06/07/1999	P5 Dup
025. memo	Robert G. Dreher to Peter Rundlet re: Exhaustion of Local Remedies in NAFTA Chapter 11 Claim (1 page)	11/18/1999	P5 Dup

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January ___, 2000

MEMORANDUM FOR JOHN D. PODESTA

FROM: **BETH NOLAN**
GENE SPERLING
PETER RUNDLET
JOHN DUNCAN

SUBJECT: **Urgent Need for Policy Guidance to Resolve Interagency Litigation Strategy Dispute in *Loewen* NAFTA Arbitration**

The purpose of this memorandum is to seek your guidance in helping us resolve an interagency dispute that raises important policy considerations over the appropriate jurisdictional defense to advance on behalf of the United States in the Loewen Group, Inc. v. United States NAFTA arbitration. As outlined below, there are strong equities favoring the different jurisdictional arguments in this case, and the approach we take likely will have significant implications on the nature and extent of investor protections afforded by the NAFTA -- including, possibly, the long-term viability of the NAFTA itself. Because the Department of Justice must file its brief by February 15, we must resolve this issue as soon as possible.

Background

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Chapter 11 was designed to encourage trilateral investment by establishing rules of fair treatment of foreign investment and investors, and by establishing a means for resolving disputes between investors and their host governments. Among other things, Chapter 11 authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11 to the Additional Facility of the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C.

Loewen contends that the United States is liable under the NAFTA for $725 million in damages that resulted from court judgments rendered against Loewen in a Mississippi state court proceeding in which a businessman sued Loewen for $16 million as a result of a failed business deal. After a controversial trial, during which Loewen contends the court improperly permitted the plaintiff's lawyer to inflame the jurors with anti-Canadian, racial and class rhetoric, the jury returned a verdict of $500 million against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims that it was unable to post a supersedeas bond in the amount of 125% of the judgment, as required under Mississippi law to stay the judgment

pending appeal. After the Mississippi Supreme Court upheld the bond requirement, Loewen settled the case for structured payments of $175 million (which at the time had a net present value of $85 million), arguing that the bond requirement effectively denied it the opportunity to appeal. Thereafter, Loewen submitted its claim for arbitration, contending that the large jury verdict and the Mississippi courts' refusal to waive or reduce the bond requirement were unjust and discriminatory, in violation of several standards set forth in NAFTA Chapter 11.

The Issue

The Department of Justice is defending the United States in this matter, coordinating with its client agencies, the Department of State and the Office of the United States Trade Representative ("USTR"). Although there appears to be a general consensus among the agencies that the United States is in a weak position with respect to the underlying merits of the case, State and USTR are more sanguine about our chances for success on the merits.

The gravamen of the current dispute is over how broad the jurisdictional argument the United States makes in this case should be. Justice feels that our strongest defense is to put forward a broad jurisdictional argument -- that the arbitral tribunal lacks jurisdiction in this case because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the judgments of domestic courts are not "measures" as that term is used in NAFTA. State and USTR oppose advancing one of the broader jurisdictional arguments (which are outlined below), because they feel a jurisdictional argument is not likely to prevail and, in any case, would undermine the ability of U.S. investors to challenge unfair and discriminatory court judgments abroad.

Resolving this question requires a careful balancing of policy and political concerns on the one hand, against the probability of success of different legal arguments, on the other. With the exception that everyone agrees that "we want to win this case," Justice and State/USTR -- despite months of discussions -- have been unable to reach agreement on the substance and relative importance of the legal and policy arguments. Most recently, we chaired a meeting with senior officials from Treasury, State, USTR, Justice, and Commerce that resulted in no appreciable movement toward resolving these issues. Because of the complexity of the issues and the importance of resolving them appropriately and in a timely fashion, we felt your guidance was necessary.

Policy Considerations

It is important to outline the primary policy concerns and disputes that are the backdrop to the alternative legal arguments. Everyone agrees that winning this case is important. In addition to the cost of a high damage award, Justice feels a loss is likely to generate a great deal of political hostility toward the NAFTA, particularly if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors. Justice has noted that the case already has received significant media attention and fears that the possible headline "NAFTA Panel Overturns Mississippi State Court Ruling; U.S. to Pay Millions" may threaten the continued existence of the NAFTA. Even if the NAFTA were not undermined, Justice

argues that a loss on the merits would establish a dangerous precedent whereby the U.S. could effectively become a guarantor with respect to any judgment rendered against a foreign investor in the state or federal courts of the United States. Further, Justice argues, given that the U.S. is alone in its recognition of large punitive damage awards, the cost of allowing challenges to our court judgments far outweighs the benefits that U.S. investors may gain from being able to challenge foreign court judgments. Because Justice feels that our best -- and possibly only -- chance to win this case is to win a jurisdictional argument, they would prefer to argue that court judgments are not "measures" under NAFTA Chapter 11.

State and USTR[1], on the other hand, feel that making this argument would severely undermine our policy of protecting U.S. investors abroad by limiting their flexibility to challenge arbitrary, expropriatory, or otherwise unfair court judgments in other countries (particularly Mexico, where the U.S. Government and World Bank reports have confirmed the continued existence of corruption). State and USTR point out that, because our pleadings will likely become public, the loss of investor protection will occur ~~regardless~~ irrespective of whether the U.S. prevails on this point, and further, that our arguments might eventually undermine protections we have under other trade agreements, such as our Bilateral Investment Treaties ("BITs"). While State and USTR recognize the danger to the NAFTA of losing this case, they feel that Justice overestimates the likelihood that we will lose on the merits and they argue that we will face certain criticism from the investment community if we argue that court judgments are not covered by Chapter 11.

The Alternative Jurisdictional Arguments

1. *Court judgments are not "measures" for purposes of NAFTA Chapter 11.*

The broadest possible jurisdictional argument is that domestic court decisions can never be "measures" as defined by NAFTA Chapter 11. Because Justice believes that the United States' best hope for success in *Loewen* is through a jurisdictional defense, its preferred argument is the broadest jurisdictional bar. Although Justice recognizes that it is not unassailable, it feels that the argument is strong for the following reasons: (1) Chapter 11 applies only to "measures *adopted or maintained*" by a government, (emphasis added), and although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice," the definition makes no mention of court judgments and, on its face, appears to contemplate only legislative and executive acts as opposed to verdicts rendered by the judiciary which are not "adopted or maintained"; (2) because Chapter 11 is, at most, ambiguous as to whether the drafters intended to include court judgments within the definition of "measures," and because it is a canon of treaty interpretation that ambiguities in international agreements are to be resolved in favor of sovereignty, court judgments should not be included within the definition of "measures"; (3) State and USTR could not identify a single occasion in which an international tribunal used the term "measures" to conclusively refer to domestic court judgments; and (4) Professor David Bederman, an international law expert whom Justice consulted upon the

[1] Although this memorandum refers only to the positions of State and USTR -- the client agencies in this matter -- Commerce and Treasury appear to concur with the State/USTR position, based on our senior-level meeting which included these agencies.

recommendation of the State Department, "fully endorsed" Justice's approach and agreed that this argument is legally viable.

State and USTR have strong reservations about Justice's approach, even from a strictly legal point of view. They argue that this jurisdictional argument is unlikely to prevail in an international tribunal because this definition of "measures" requires a radical departure from customary international law (and the BITs) and there was no indication by the parties to the NAFTA that they clearly intended this result. They point out that the definition of "measures" is illustrative, not exhaustive, and that the term is commonly understood to include all actions by a state. State and USTR also argue that Justice misapplies the "ambiguity favoring sovereignty" doctrine here. Furthermore, because the Justice interpretation conflicts with the use of the word "measures" elsewhere in NAFTA, where it clearly includes court judgments, it could have negative consequences for other parts of the Agreement, such as Chapter 17, covering intellectual property.

Our close review of the legal arguments does not persuade us that Justice's approach is certain to prevail, nor does it appear to be frivolous. It may, in fact, be the best argument to win this case, but this possibility needs to be weighed against the probable costs of making it. Although both sides point to the NAFTA's drafting history in support of their views, what remains of the negotiating history is sparse and inconclusive.

2. *Court judgments in cases not initiated by the government are not "measures" for purposes of NAFTA Chapter 11.*

Even though Justice prefers the broadest jurisdictional argument (since arguments distinguishing between types of court judgments are unmoored from the text of the NAFTA), Justice is comfortable making the more narrow jurisdictional argument that only those court judgments that result from executive action, including an enforcement action, would be a "measure" subject to NAFTA Chapter 11. Justice argues that this compromise strikes the appropriate balance between winning this case and protecting U.S. investors abroad because, under this theory, the only situation in which there would be no "measure" that could be challenged by a foreign investor is the situation in *Loewen* -- where the only government action is judicial action in a lawsuit between private parties.

State and USTR argue that most of the failings of the first argument apply here, as well. First, they believe that this argument will be unlikely to prevail and that we will diminish the protections for U.S. investors (not only under the NAFTA, but potentially in the BITs, and in future investment negotiations, as well) just by making the argument. Second, even if we win, State and USTR believe this approach provides inadequate protection to U.S. investors because the dangers of unfair or corrupt court judgments in private disputes abroad are real and far-reaching, and will ultimately harm our efforts to promote fair and transparent legal systems worldwide. In response to these concerns, Justice disputes the magnitude of this danger, noting that State and USTR did not identify any examples of harm to a U.S. investor from a court decision that did not involve improper influence by executive or administration officials.

3. *Court judgments can only be "measures" if the highest available court in a judicial system has been given an opportunity to review the decision.*

This is the only jurisdictional argument that State and USTR are willing to make.[2] State and USTR argue that requiring investors to appeal court judgments to the highest available court before they can be "measures" under the NAFTA has more support in customary international law. Although they concede that it is not clear that this jurisdictional argument would prevail in this case, for the reasons that Justice points to below, it does attack one of the most troubling aspects of Loewen's claim -- that it chose to settle instead of giving the higher courts an opportunity to correct any errors below. More importantly, this argument strikes a better balance between minimizing the impact on U.S. investors abroad, while advancing the rule of law through judicial accountability.

Although Justice is willing to make this argument as a subsidiary argument to a broader jurisdictional argument, they feel it has several weaknesses by itself. First, it is difficult to argue that a final trial court judgment -- which is a fully executable action -- is less "final" for purposes of state responsibility than a statute or regulation that has not been challenged in court. Second, since the NAFTA explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to arbitration, it would be difficult to persuade the tribunal that exhaustion of the judicial process is required before a court judgment becomes a measure under the NAFTA. Third -- and probably most damaging in this particular case, Loewen will have a strong futility argument since they would have been required to either petition the U.S. Supreme court for an emergency stay of enforcement of the underlying judgment and for a writ of certiorari on the question of the Mississippi Supreme Court's refusal to waive the bond requirement -- both of which are rarely granted, or Loewen could have filed for bankruptcy protection, which provides for an automatic stay, but which the tribunal would likely find unreasonable to require in order to have exhausted the judicial process.

Conclusion

As stated at the outset, the equities favoring different jurisdictional arguments are strong, and the consequences of different approaches are significant. While weighing the options, it may be helpful to keep the following foundational question in mind: *If we were negotiating the NAFTA today, would we seek to include court judgments within the definition of "measures," thereby gaining greater protection for U.S. investors (primarily in Mexico) while risking the consequences of a loss in a case like Loewen, or would we prefer a narrower definition of "measures" that excluded some or all court judgments?*

At your request, we are willing to meet with you to discuss this at your earliest convenience, to coordinate a principal's meeting to more fully air all views, or redraft this memorandum for the President's decision.

[2] Indeed, at one point, USTR suggested that making no jurisdictional argument was preferable. However, the United States has already filed notice with the ICSID that we intend to make a jurisdictional argument.

Steve Fabry <SFABRY@ustr.gov>
12/16/99 06:15:12 PM

Record Type: Record

To: John D. Duncan Jr/NSC/EOP

cc: N Non Federal Record <N@ustr.gov>
Subject: Loewen: Investment agencies' contribution

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is attached, in Word Perfect format. Don't hesitate to call if you have questions.

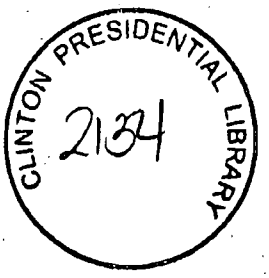
You'll see we've used the terms "first", "second" and "third" arguments to mean the arguments that Peter and I talked about -- first means the broad argument that court judgments are never measures, second means the argument that only private cases are subject to NAFTA rules, and third means the argument that decisions fall under NAFTA rules only when they have been appealed to the highest court. You may very well have used a different set of shorthand names for the arguments.

The first paragraph is a super-short summary of our concerns about the legal arguments' strength. This is for context -- to explain why we think the "upside" of making the arguments is small. The rest of the paper is about the "downside" -- the effects on U.S. investment policy. Up to you, of course, whether you need that first paragraph if it's redundant of what you've already done on the legal issues.

Finally, as I said to John, this is close-to-final draft. If anyone in the agencies wants to make more changes, I'll provide you a redline showing our suggestions.

--Steve Fabry

 - SF LCID LOEWEN DR6.wpd



Chap 11 of NAFTA designed to encourage investment in Canada, Mexico & U.S. by establishing rules of fair treatment of foreign investment of investors, and by providing a means for resolving disputes between investors and their host state

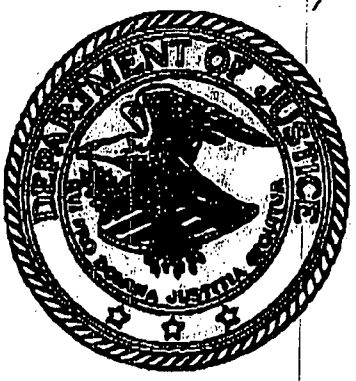
DOJ → NAFTA panel lacks jurisdiction to hear matter →
NAFTA Chap. 11 applies only to "measures adopted or maintained" by the U.S.
Judgments of domestic courts not "measures" as term is used in NAFTA
~~to have until tribunals~~
(cannot allow NAFTA provisions be construed to effect a waiver of sovereignty that would permit intl investors to have intl tribunals sit in review of U.S. Court decisions.)

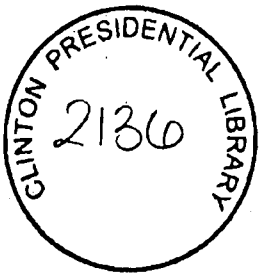
STATE/USTR → Prefer to argue court judgments can only be "measures" when rendered by highest available court in a judicial system.
(DOJ position would undermine ability of US investors to challenge unfair or arbitrary court judgments abroad.)

Loewen → Jury verdict and Mississippi Supreme Courts' refusal to waive or reduce the bond requirement are violation of NAFTA Chap 11 standards for the treatment of foreign investors.

To John Duncan
456-9280

From: Woo Scholz
70320





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NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 10

SPECIAL INSTRUCTIONS: Attached is a draft of the memo that we plan to send to the White House on the Loewen case, as well as our position statement with respect to the four alternatives that we discussed. I hope that this gives you a clear sense of what we envision. Please remember that we will be sending the memo to the White House this week. Thanks.

U.S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General Washington, D.C. 20530

not a USG classification

DRAFT

PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT

____, 1999

MEMORANDUM

To: Charles F.C. Ruff
Counsel to the President

From: Raymond C. Fisher
Associate Attorney General

Re: The Loewen Group, Inc. v. United States NAFTA Arbitration
re: whether to advance

Purpose: To resolve an interagency dispute over the ~~efficacy of advancing~~ a particular jurisdictional defense on behalf of the United States in this NAFTA arbitration.

Timing: Immediate.

INTRODUCTION

On October 30, 1998, the Loewen Group, Inc. ("Loewen"), a Canadian corporation, filed a Notice of Claim for arbitration against the United States under Chapter 11 of the North American Free Trade Agreement ("NAFTA"). Loewen contends that the United States is liable under the NAFTA for $725 million in damages that allegedly resulted from court judgments rendered against Loewen in a Mississippi state court proceeding. The Civil Division of the Department of Justice ("DOJ") is defending the United States in this matter.

DOJ and our client agencies in this case — the Department of State ("State") and the Office of the United States Trade Representative ("USTR") — currently disagree over the wisdom of advancing a jurisdictional argument that we have proposed. In defense of the United States against Loewen's claim, DOJ would like to argue that the arbitral tribunal lacks jurisdiction because NAFTA Chapter 11 applies only to "measures adopted or maintained" by the United States and that the judgments of domestic courts are not "measures" as that term is used in the NAFTA. State and USTR do not want us to make this defense. Because the deadline for making any jurisdictional arguments is approaching (December 17, 1999) and much work remains to be done, we need a prompt resolution of this

disagreement, no later than September 1, 1999.

BACKGROUND

1. NAFTA Chapter 11

Chapter 11 of the NAFTA was designed to encourage investment in Canada, Mexico and the United States by establishing rules of fair treatment of foreign investment and investors, and by providing a means for resolving disputes between investors and their host governments. See Daniel M. Price, An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement, 27 Int'l Lawyer 727 (1993). Among other things, the Chapter authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11. See NAFTA Article 1116(1). The scope of the Chapter is limited, however, to "measures adopted or maintained" by a government relating to the investor or investment at issue. See NAFTA Article 1101(1).

2. The Loewen Claim

Loewen's NAFTA claim is based on a lawsuit in Mississippi state court in which a Mississippi businessman sued Loewen and its United States subsidiary for $16 million as a result of a failed business deal. After a controversial trial, during which Loewen contends the court improperly permitted the plaintiff's lawyer to inflame the jurors' anti-Canadian, racial and class sentiments, the jury returned a verdict of $500 million against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims that it was unable to post a supersedeas bond in the amount of 125% of the judgment, as required under Mississippi law to stay the judgment pending appeal. In January 1996, after the Supreme Court of Mississippi upheld the imposition of the 125% bond requirement and ordered Loewen to post the full bond within seven days, Loewen settled the case for $175 million, arguing that the bond requirement effectively denied it the opportunity to appeal.

Loewen contends that the jury verdict and the Mississippi courts' refusal to waive or reduce the bond requirement were unjust and discriminatory, in violation of several standards set forth in NAFTA Chapter 11 for the equitable treatment of foreign investors. Loewen claims that the United States is liable under the NAFTA for violations committed by individual states and, therefore, seeks to hold the United States liable for damages allegedly caused by the Mississippi judgments. Loewen submitted its claim to arbitration with the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C., seeking at least $725 million in damages.

STATEMENT OF THE ISSUE

DOJ proposes to argue, among other things, that Loewen's claim is not arbitrable under the NAFTA because the judgments of domestic courts (as opposed to actions of other organs of government) are not "measures" within the scope of NAFTA Chapter 11. State and USTR, however, oppose our advancing such an argument. According to State and USTR, the argument is not likely to prevail and, in any event, would undermine the ability of U.S. investors to challenge irregular and arbitrary court judgments abroad.

While we understand State's and USTR's concern as a policy matter, we believe that the proposed argument is legally sound and, moreover, that allowing foreign investors to attack the decisions of our domestic courts through international arbitration could severely undermine our system of justice and, as a result, threaten the continued existence of the NAFTA. Given the real possibility of an adverse decision in the Loewen case if we reach the substantive merits, we believe, for several reasons, that the balance of these policy concerns weighs heavily in favor of advancing our argument that court judgments are not "measures."

First, a loss on the merits of the Loewen case — which we believe is quite possible in the absence of a favorable ruling on jurisdiction — would establish a dangerous precedent whereby the United States could, as a result of the NAFTA, effectively become a guarantor with respect to any judgment rendered against a foreign investor (or against any entity in which a foreign investor has a significant interest) in the courts of the United States. This could result in a flood of arbitrations against the United States, the cost of which could be extraordinary.

Second, a loss on the merits in Loewen is also likely to generate a great deal of political hostility toward the NAFTA. The case has already received significant media attention as a "potent back-door way for corporations to challenge the American legal system." William Glaberson, *Nafta Invoked to Challenge Court Award in U.S.*, N.Y. Times (Jan. 28, 1999) at C1; see also, e.g., E. Iritani, *Trade Pacts Accused of Subverting U.S. Policies, Commerce*, L.A. Times (Feb. 28, 1999) at A1. Many individuals, both in and out of government, are likely to be surprised and offended if the NAFTA is construed to effect a waiver of sovereignty that would permit an international tribunal effectively to sit in review of decisions of United States courts at the election of foreign investors. Cf. Glaberson, supra ("[Loewen] is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination.") (quoting Prof. David W. Leebron, dean of Columbia Law School).

Third, we believe that the argument that court judgments are not "measures" is our strongest jurisdictional argument. Although we have some subsidiary arguments, such as that the judgments complained of are not "measures" because Loewen failed to exhaust the domestic judicial process, we feel that these arguments derive much of their force from the principal argument that court judgments are not "measures" and that, standing alone, these subsidiary arguments may not succeed. Professor David Bederman of the Emory University School of Law, an international law expert whom we have consulted at the suggestion of the State Department, agrees that the principal argument is legally viable and that, if not advanced, our subsidiary arguments are less likely to prevail.

Fourth, neither State nor USTR has been able to identify any case in which a U.S. investor has attempted to arbitrate a claim challenging a foreign court judgment under any investment treaty. Although the United States clearly has an interest in affording its investors maximum flexibility to protect their investments abroad, we question whether the concern raised by State and USTR is of sufficient practical significance to justify withholding the argument that court judgments are not "measures." This is particularly so given the apparent fact that more litigation involving foreign interests occurs in U.S. courts than in the courts of Mexico or Canada, and that the United States is alone in its recognition of large punitive damages awards. Indeed, this imbalance in litigation and punitive damages suggests that permitting review of court judgments under the NAFTA may be

contrary to the interests of the U.S. investment community, as it would confer a competitive advantage on foreign investors to obtain review of U.S. court decisions in international arbitration, which U.S. investors cannot do.

Fifth, the argument that we propose is consistent, as a practical matter, with the policy concerns raised by State and USTR. According to State and USTR, it is important to preserve the ability of U.S. investors to challenge court decisions that result from corrupt, arbitrary or irregular actions of foreign government officials. Although we argue that court judgments are not "measures" for purposes of NAFTA Chapter 11, our argument does not foreclose a NAFTA Chapter 11 challenge to the sort of government actions about which State and USTR appear to be concerned. Rather, because administrative government actions are plausibly construed as "measures" under the NAFTA, an aggrieved investor can still proceed to arbitration to challenge the actions of government officials that lead to adverse court decisions, even though the resulting court decisions themselves are not "measures."

Finally, even if our subsidiary jurisdictional arguments were to prevail in Loewen, we will soon be forced to revisit this same question in another NAFTA arbitration that will be filed against the United States in the next few weeks.[1] In that case, Mondev International, Ltd. v. United States, a Canadian investor challenges a decision of the Massachusetts Supreme Judicial Court, from which a petition for certiorari was filed and denied by the Supreme Court of the United States. Unlike the Loewen case, we cannot argue that Mondev failed to exhaust the domestic judicial process, nor does it appear that we could argue that the alleged harm resulted from a private action rather than a court judgment. As we currently see it, the only way in which the United States can avoid addressing the merits of the Mondev case is if the tribunal finds that domestic judicial decisions are not "measures" for purposes of the NAFTA.

ALTERNATIVES

DOJ, State and USTR have worked diligently over the past eight months to resolve this disagreement. As a result of these efforts, we have identified four possible alternative approaches to this jurisdictional issue, as follows:

1. The United States should argue that domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.

2. The United States should argue that domestic court judgments are not "measures," but point out that proceedings initiated by a government entity that result in court judgments (such as enforcement actions) are subject to challenge under NAFTA Chapter 11 because the government action that initiated the proceeding is itself a "measure."

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[1] A ninety-day notice of the prospective claimant's intent to file an arbitration was provided pursuant to NAFTA Article 1119. The prospective claimant's counsel informed us that they intend to file their claim in early August 1999.

3. The United States should argue that, although some domestic court judgments could be challenged as "measures" under NAFTA Chapter 11, a judgment rendered in a civil proceeding between private parties in which no government was involved is not a "measure," and not address the question of whether

4. The United States should concede that court judgments can be "measures," but only when rendered by the highest available court in a judicial system.

DOJ's views with respect to each of the four alternative approaches are summarized at Tab 1 attached hereto. State's views with respect to these alternatives are summarized at Tab 2, and USTR's views are summarized at Tab 3. A preliminary draft of the jurisdictional argument that DOJ would like to advance is attached at Tab 4. A copy of a letter from Professor David Bederman endorsing DOJ's proposed argument is attached at Tab 5.

DRAFT

DOJ's Views On The Alternative Approaches To The Jurisdictional Issue

Alternative 1: *The United States should argue that domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.*

This alternative is the one that we believe should be pursued, essentially for the reasons stated in the cover memorandum to which this summary is appended. As explained in greater detail in the cover memorandum, any concession that our court judgments can be "measures" subject to review under NAFTA Chapter 11 could severely undermine our system of justice and, as a result, threaten the continued existence of the NAFTA. A preliminary draft of the argument that we propose is appended at Tab 4. Professor David Bederman of the Emory Law School, an international law expert whom we have consulted at the suggestion of the State Department, agrees that our proposed argument is legally viable and should be advanced. A copy of a letter reflecting Professor Bederman's opinion in this regard is appended at Tab 5.

We recognize, of course, that the argument we propose is not unassailable. For example, the Case Concerning Fisheries Jurisdiction (Spain v. Canada), I.C.J. Gen. List No. 96 (Dec. 4, 1998), which we cite for its observation that the term "measures" is typically used in its broadest sense in international agreements "to encompass statutes, regulations and administrative action," id. at ¶ 65, also found that the ordinary meaning of the term is "wide enough to cover any act, step or proceeding . . . ." Id. at ¶ 66. Similarly, although we have strong evidence from the NAFTA's negotiating history that the drafters expressly sought to prevent the review of domestic court decisions in international proceedings, we have also identified one document (an "investment questionnaire" form that was sent to each of the fifty U.S. states) that, unlike the NAFTA, includes "judicial decisions" within its definition of "measure." We have carefully considered such materials, however, as well as the textual arguments raised by State and USTR, and believe that, at most, the NAFTA is ambiguous as to whether the drafters intended to include court judgments within the definition of "measures" that could be challenged under Chapter 11. Because ambiguities in international agreements are generally construed in favor of sovereignty, we believe that our argument should still prevail even in the face of such arguments. We would be happy to provide you with more detailed analyses of the criticisms that State and USTR have made of our argument in this regard, if you feel that it would be helpful.

Alternative 2: *The United States should argue that domestic court judgments are not "measures," but point out that proceedings initiated by a government entity that result in court judgments (such as enforcement actions) are subject to challenge under NAFTA Chapter 11 because the government action that initiated the proceeding is itself a "measure."*

While we do not believe that it is necessary to offer views regarding matters that are not raised in the Loewen case, we do not oppose this alternative approach. Indeed, it is consistent with our interpretation of the NAFTA to say that Chapter 11 does not permit arbitral review of court judgments, but would permit arbitral review of government enforcement actions that result

in court judgments. Nevertheless, because such a statement would be dictum insofar as the Loewen case does not involve any government-initiated proceedings, we believe that Alternative 1 would be the more appropriate approach.

Alternative 3: *The United States should argue that, although some domestic court judgments could be challenged as "measures" under NAFTA Chapter 11, a judgment rendered in a civil proceeding between private parties in which no government was involved is not a "measure."*

We do not view this approach as legally defensible. While it may be desirable as a policy matter for court judgments other than those in private civil cases to be covered by NAFTA Chapter 11, there is no basis either in the text of the NAFTA or in customary international law for distinguishing between court judgments in private civil cases and court judgments in other cases for purposes of State responsibility. For example, as we note in our draft argument, international law recognizes a distinction between wrongs committed by courts ("denials of justice") and wrongs committed by all other organs of government. See, e.g., A. Freeman, The International Responsibility of States for Denial of Justice 146 (1938). This distinction supports our argument that the term "measures" in the NAFTA refers only to actions of organs of government other than courts.

In contrast, international law does not appear to distinguish between denials of justice in private civil cases and denials of justice in government-initiated cases. To the contrary, it appears to be settled that where "the conduct of the proceedings in [a] private litigation is internationally deficient, a duty [of the State] to make reparation for the denial of justice will arise under the law of nations." Freeman at 71. Similarly, nothing in the text of the NAFTA would support the argument that the NAFTA parties intended to treat court judgments in private civil actions any differently than judgments in other actions. Once we have conceded that *some* court judgments are "measures" subject to challenge under Chapter 11, therefore, there appears to be no legal basis to avoid the conclusion that *all* court judgments, including those in private civil cases, can be "measures."

Moreover, the argument that we propose achieves the same practical goal of this alternative (i.e., preserving the ability of U.S. investors to challenge arbitrary enforcement actions initiated by foreign governments), although in a far more defensible way. Although we contend that court judgments are not "measures" for purposes of NAFTA Chapter 11, our argument does not foreclose a NAFTA Chapter 11 challenge to an arbitrary government enforcement action. Rather, because an administrative enforcement action itself (as opposed to the court judgment on the merits of such an action) is plausibly viewed as a "regulation" or "procedure" within the definition of a "measure," it can be challenged under NAFTA Chapter 11. See NAFTA Articles 201 & 1101(1). Even if an arbitrary enforcement action results in an adverse court judgment, therefore, the aggrieved investor can still proceed to arbitration to challenge that administrative action under NAFTA Chapter 11, even though the court judgment

that resulted from the action is not itself a "measure" that is subject to challenge.

Alternative 4: *The United States should concede that court judgments can be "measures," but only when rendered by the highest available court in a judicial system.*

We oppose any concession that court judgments can be "measures" subject to review under NAFTA Chapter 11. As we explain in greater detail in the cover memorandum, such a concession could severely undermine our system of justice and would likely generate considerable political hostility toward the NAFTA. Because we have a viable legal argument that domestic court judgments are not "measures" at all, we believe that such a concession is neither necessary nor desirable. Instead, we believe that the argument that a court judgment is not a "measure" unless rendered by the highest available court should be made only in the alternative, as a subsidiary argument.

Moreover, although we intend to advance the subsidiary argument that a court judgment can only be a "measure" when rendered by the highest available court, this subsidiary argument has several weaknesses. For example, because NAFTA Article 1121 explicitly waived the traditional requirement that a claimant must first exhaust domestic legal remedies before proceeding to international arbitration, we may have some difficulty persuading the Loewen tribunal that exhaustion of the judicial process is required before resort may be had under the NAFTA. Although our arguments on this point are compelling, our success is far from assured.

In addition, even if we persuade the tribunal that Loewen must have exhausted the judicial process before a "measure" could be said to exist, the strength of this argument will ultimately rest on the viability of exhaustion in this particular case. Our strongest arguments in this regard are that: (1) Loewen could have petitioned the U.S. Supreme Court for an emergency stay of enforcement of the underlying judgment and for a writ of certiorari on the question of the Mississippi courts' refusal to waive the supersedeas bond requirement, and (2) Loewen could have filed for bankruptcy protection (which grants an automatic stay) and pursued its appeal in bankruptcy. As to the former option, Loewen could have a strong "futility" argument, inasmuch as emergency relief and petitions for certiorari are rarely granted. As to the latter, it may be difficult to persuade the Tribunal that it is reasonable to require a foreign investor to declare bankruptcy in order to be said to have exhausted the judicial process for purposes of an international claim. The subsidiary argument on its own, therefore, may not succeed in avoiding a ruling on the merits of the case.

Finally, as noted in the cover memorandum, we question the policy justification for conceding that court judgments can be challenged as "measures" under NAFTA Chapter 11. Although State and USTR contend that such a concession is necessary to preserve the ability of U.S. investors to challenge arbitrary court judgments abroad, no U.S. investor to date has attempted to arbitrate a claim challenging a foreign court judgment under any investment treaty. Given the apparent fact that more litigation affecting foreign interests occurs in United States

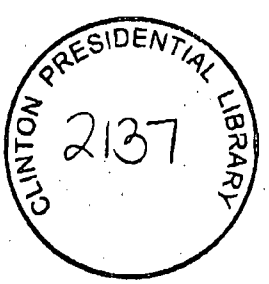
courts than in the courts of Mexico or Canada, as well as the fact that the United States is alone in its recognition of large punitive damages awards, it may well be contrary to the overall interests of the U.S. investment community to concede that court judgments are "measures."

Talking Points

- If states cannot be held liable for the actions of their court systems, U.S. investors will have no remedy for final court decisions resulting from corruption or anti-American bias.

- Wrongful expropriation has been a key investment policy concern in the post-colonial era; court decisions can play an important role in the expropriation of foreign property, by, for example, implementing wrongful expropriation decrees and statutes; under-assessing value for purposes of determining compensation; favoring local disputants over foreigners in property title disputes; or by destroying foreign enterprises by colluding with local competitors to restrict their operations.

- At least one U.S. investor is currently using NAFTA Chapter 11 procedures to challenge a Mexican court decision which it alleges has effected an unlawful expropriation.



Lael Brainard
08/04/99 10:32:08 AM

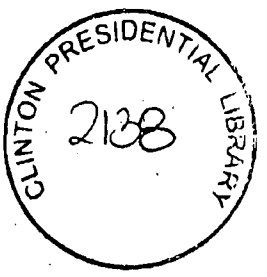
Record Type: Record

To: D Holly Hammonds/OPD/EOP@EOP, Matthew P. Schaefer/NSC/EOP@EOP

cc: Sharon H. Yuan/OPD/EOP@EOP
Subject: Can you check this very quick

Major interagency storm brewing over NAFTA court ruling. Apparently WH Counsel & DOJ Civil want to issue a statement arguing that a court ruling is not considered a "measure" for purposes of NAFTA. USTR, State & Treasury feel strongly that this will work against us in the long run. They would prefer not to pronounce on this. There is also an issue of timing. Ruff wants to issue statement this week; USTR claims we have until December.

I have no clue what this is about, but apparently has aroused concerns at highest levels & I am being asked to host a meeting on this tomorrow. Could you do a quick call around & get me some background so we can figure out how to proceed? Thanks.



4 Aug 99

Interagency Dispute between DOJ and State/USTR over Argument to Make in the NAFTA Arbitration Matter

~~Rachel Stub USTR 5-9618 7305 (Secretary)~~

NAFTA Court Ruling

Meeting - USTR/DOJ/Treasury/WH Counsel

~~Wes Scholz State Scholz 736-4247~~

Meg Ludziger 622-0168
Treasury

Gary Sells 622-9066
Treasury - Head of Investment Measures

Wes Scholz - 736-4247
State - Investment Office

DOJ has done its own paper
State/USTR will send their own (ready this afternoon)

State Clerk Claims — Mark Cladfelter - State/L 736-8344
Steve Fabre [working directly] USTR 395-9512

Origin

7-8460

arbitration / investment provisions / Co. subject of civil
500M punitive damage award
appealed to Miss Sup Ct ~ bonding requirement
forced them to settle for 125M
Started out as contract dispute over hundreds of thousands
investors under NAFTA
DOJ handling case / w USTR at State
DOJ wants to make argument that NO Court judgment

2

court decision can never be a measure
view of USTR/State
got expropriation provisions
quite often expropriation handled thru court rulings

(w) 744-8578

State opposes a narrower argument
ct decision not appealed to a panel and the ~~not~~ can not be
considered a measure under NAFTA
that would provide adequate protection
but not create enormous loophole
corrupt legal system
expropriation - intl law ignored

DOJ feels that essentially legal issue to be decided
in WH Counsel
NEC context - policy issues involved
WH Counsel should offer views
rush to get decided this week
Phil Baxty leaving to join Gore campaign
Chad Riff leaving this week (no evidence
there's rush here)

needs to be a deliberate decision (policy)

briefs due Dec 17TH - DOJ arguing in brief

Taken to arbitration by Canadian Co
under provision of NAFTA investment
jurisdictional phase - preparing views whether panel has jurisdiction
to hear

ct decision cannot be "measure" NAFTA - Dis... ...to measure

much more convincing argument
once you calculate ct decision can be a measure

Prob not a winning argument in any case ⇒ prob not good

What investment treaties also use the term "measures"

Ct cant Decision are not measures.

Italy drops out NAFTA

5/8/97 Dan Phillips
USTR

expropriate - imp to do business

Ethyl case - settled by Canada
US Company arguing Trade issue but wrapping into investment (only apply to investment provisions)
just additive - environmentally unsound
restrict imports while allowing manufacturing of use in Canada.

Fair and equitable Treatment provisions

hope that arbitral panels will not expand beyond customary int'l law
a duty law or threat on Expropriation (US class claims)

Problems - 3 comments

1. why we think [illegible] model - Steve
2. prob w/ deputy minister overseas - Mark-[illegible]
3. other chapter of NAFTA - Steve - USTR

Summary of Justice Department and State/USTR Arguments in Loewen

DOJ proposes to argue that Loewen's claim is not subject to arbitration under the NAFTA because the judgments of domestic courts are not "measures" within the scope of NATA Chapter 11. Subsidiary arguments are:

- at most NAFTA is ambiguous as to whether the drafters intended to include court judgements within the definition of "measures."
- not persuaded that the term "measures" is ordinarily used in the international law community to refer to court judgments.
- argument that an investor could challenge any action under NAFTA Chapter 11, even if it is not a "measure adopted or maintained" by a NAFTA country, is meritless and dangerous as it would render Chapter 11 limitless in its scope.
- allowing foreign investors to attack domestic court judgments through international arbitration would undermine our system of justice and thereby threaten continued public support for NAFTA and other agreements; also could result in a flood of arbitrations and extraordinary liabilities against the government.
- domestic cost to U.S. of allowing challenges to our court judgments may outweigh the benefits that the U.S. investment community may gain from being permitted to challenge Mexican or Canadian court judgments (where far less litigation occurs).
- jurisdiction argument does not foreclose U.S. investor challenges abroad to actions of officials that lead to adverse court decisions, as administrative government actions are plausibly construed as "measures" even though resulting court decisions are not.
- even if our argument would affect the ability of a U.S. investor to bring a private "denial of justice" claim, OPIC insurance coverage may still provide a remedy.
- given the posture of the Mondev case (Mondev International , Ltd. v. United States) (Dispute with City of Boston over redevelopment project that resulted in breach of contract judgment against City reversed by highest court in Massachusetts and certiorari was denied by Supreme Court) only way we can avoid addressing the merits of the case is if tribunal finds domestic judicial decisions are not measures.
- While it is correct that the bond rule is itself a "measure" that could be separately challenged under Chapter 11, our argument would nevertheless succeed in defeating the most troubling of Loewen's claims that pertain to trial process and the jury verdict. If those claims are out, we will be on stronger footing defending the case.
- State underestimates the risk of an adverse decision in the Loewen case, and State has previously advised us that the international standards of treatment incorporated in the NAFTA are largely untested and suffer from a severe lack of precision.

State and USTR Arguments

State and USTR oppose the DOJ jurisdictional argument, arguing that it would undermine the ability of U.S. investors to challenge irregular and arbitrary court judgments abroad. They propose, instead, to argue that Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

- the U.S. interest in protecting American investors from arbitrary or discriminatory decisions by foreign courts outweighs the concerns that Justice has articulated about NAFTA provisions permitting review of American court decisions by arbitration.
- exempting judicial action from international review would be a serious step backward in our advocacy of U.S. investor interests abroad.
- scrutiny of U.S. domestic court decisions by international tribunals for compliance with international obligations is not a new concept.
- NAFTA Article 201 does not support DOJ's position on "measures," as it merely provides a non-exhaustive list of what the term includes, and DOJ has not articulated any reason to exclude court judgments from that definition.
- a number of provisions of Chapter 11 do not make sense unless court judgments can be "measures."
- there are provisions in other Chapters of the NAFTA that do not make sense unless court judgments are "measures," and those provisions could be undermined by advancing the DOJ argument (Chapter 17 – protection of intellectual property rights).
- there are several prominent instances in international case law, other provisions of NAFTA and elsewhere in which the term "measure" is clearly used in a manner that encompasses judicial actions.
- even if court judgments are found not to be "measures," the Mississippi bond rule is clearly a "measure" because it fits within the definition in NAFTA Article 201, hence if at least some part of the case remains viable after the DOJ jurisdiction argument, and the tribunal finds it has jurisdiction to proceed why make the argument at all.
- DOJ's argument implies that NAFTA Chapter 11 provides less protection to investors than our Bilateral Investment Treaties an outcome not intended by our negotiators.
- even if we win on DOJ's argument, we will still face the wrath of the investment community for unduly narrowing the scope of NAFTA's investor protections.
- our proposed argument presents a reasonable compromise between international investment policy concerns and protection of sovereignty because it permits court decisions to be challenged, but only after the party's higher courts have an opportunity to correct whatever irregularities that may have occurred.
- argument is distinguishable from a simple exhaustion of remedies (waived in NAFTA) as it is typically considered to cover situations where the executive takes an action and courts are asked to remedy that action, but will only do so after all administrative recourse has been pursued. Here the injury first arose through the action of the court, hence only fair to let highest court review and correct if appropriate.
- DOJ overemphasizes the danger of having to address NAFTA cases on the merits as international law standards applicable to the merits at issue are high ones; hence, it is

extremely rare that violations of these standards are found, especially in a well-developed, constitutionally-based legal system

NAFTA ARBITRATION

Friday 19 NOV
5-7807

GS, SE, Dan Marcus, Bob Osden, Pete Rundlet
andy Pincus, USTR

SE

saying not a measure not supported by NAFTA
devastating for our people in Mexico

very bad precedent to set

our system is pretty good

State alternative w/ twist
L denial of justice to highest court in the land
L ... expropriation ... [illegible] treatment argument
L better than

alternative 4 - notice requirement
L

alternative 5 -

other proposals ... consequences for us

DU

articles imp + avoid losing
very dependent on the merits

floodgates problem - NAFTA

best ... argument

appropriate [illegible]

Policy concerns - unlike statute, ... measure, no control over them
acts of private persons

Dec 17 -> Feb (60 days)

Gore ?.

strength memo – they & gore + John ?
Larry Stein

maybe not a decision. both sides ?
1) how many paid
2) how much a blow up is this
may not be determinative

if not overwhelming political argument push for with
"effective appeal is denied"

~~but~~ Gov Lott mtg the black helicopter crowd

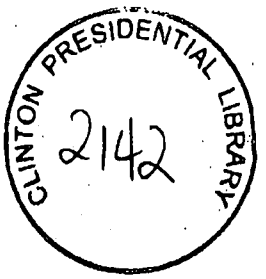
SE – 1) appropriations

2) business community – to the issue

3) Chris Lehat. / to NTC

how distinguishable this is from Lott
would a Gov hunt on his own well

OPIC – State expropriation
not private parties



MEMORANDUM

TO: John Podesta

THROUGH: Gene Sperling
~~Cheryl Mills~~ Beth Nolan

FROM: John Duncan
Peter Rundlet

DT: December 17, 1999

RE: Attempt to Resolve Interagency Litigation Strategy Dispute – The Loewen Group, Inc. v. United States NAFTA Arbitration

INTRODUCTION

Loewen is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination. White House Counsel and the NEC met on October 7, 1999, to review the positions of the agencies involved in the dispute over the appropriate jurisdictional defense to advance in the Loewen NAFTA arbitration case, and to explore whether a compromise could be reached. After reviewing the arguments, and the history of the inter-agency dispute, we were of the opinion it was unlikely that agency attorneys would reach agreement. As a result, a policy level meeting was held on November 19, with a small group of senior officials from the agencies most effected (USTR, State, Treasury), in order to think through the policy implications of advancing particular jurisdictional arguments and in an attempt to break the stalemate. Despite the presence of senior policy-makers, the meeting concluded without appreciable movement on either side of the argument. A decision must be reached in the near future as the extended briefing period expires in February 2000.

ISSUE

Justice wishes to advance an argument that the NAFTA tribunal lacks jurisdiction because Chapter 11 applies only to "measures adopted or maintained" by the U.S., and that judgments of domestic courts are not "measures" as that term is used in NAFTA. State and USTR disagree over the wisdom of DOJ advancing this argument and would prefer making the narrower argument that court judgments can only be measures when rendered by the highest available court in a judicial system (essentially, an exhaustion of domestic legal remedies argument).

BACKGROUND

On October 30, 1998, the Loewen Group, Inc., a Canadian corporation, filed a Notice of Claim for arbitration against the U.S. under Chapter 11 of the North American Free Trade Agreement (NAFTA). Loewen contends the U.S. is liable under the NAFTA for damages that resulted from court judgments rendered against Loewen in a Mississippi state court proceeding. The Civil Division of DOJ is defending the United States in the matter.

Loewen's NAFTA claim is based on a lawsuit in state court in which a Mississippi businessman sued Loewen and its U.S. subsidiary for $16 million as a result of a failed business deal. Loewen contends during trial the court permitted plaintiff's lawyer to appeal to jurors' alleged anti-Canadian racial and class sentiments. The jury returned a $500 million verdict against Loewen, including $400 million in punitive damages. Loewen attempted to appeal the verdict, but claims it was unable to post a supersedeas bond in the amount of 125% of the judgment. After the Supreme Court of Mississippi upheld the bond requirement, Loewen settled the case.

Loewen contends that the Mississippi jury verdict was excessive, especially given that the initial damage claim was only for $16 million. Loewen also argues that the Mississippi Supreme Court's refusal to waive or reduce the bond requirement, was unjust and discriminatory and in violation of several standards set forth in NAFTA Chapter 11. Loewen eventually settled the case for structured payments of $175 million (with a net present value of approximately $85 million). Loewen claims the jury's verdict and the appellate court's decision constituted an expropriation in violation of Chapter 11. As a result, Loewen seeks $725 million in damages from the U.S. Government.

Respective Jurisdictional Argument Proposals

DOJ – Domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.

State/USTR – Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

DOJ Defense of its Position

DOJ believes our best hope for success in the Loewen case is to argue that domestic court judgments, particularly those in cases involving only private parties, are not "measures" under the NAFTA. If we do not make the argument, there is a substantial risk we will lose the Loewen case which, in turn, would create significant policy problems for us. The tribunal's assertion of jurisdiction in Loewen would establish a dangerous precedent whereby we could face international arbitration with respect to any state or federal court judgment adversely affecting the interests of foreign investors. The result would likely be a great deal of political hostility toward NAFTA and other international agreements. Our interpretation will not cause significant loss of protection for U.S. investors abroad because executive action, including an enforcement action, that results in a court judgment would still be a "measure" subject to the NAFTA.

NAFTA Chapter 11 applies only to "measures adopted or maintained" by a government. Although the term "measures" is defined non-exhaustively to "include[] any law, regulation, procedure, requirement or practice, " the definition makes no mention of domestic court judgments and, on its face, appears to contemplate only legislative and executive acts as opposed to verdicts rendered by the judiciary. This understanding is supported by the NAFTA's drafting history, which suggests that the U.S. sought to foreclose international review of domestic court judgments. Because international tribunals cannot assert jurisdiction on the basis of ambiguous treaty terms, our argument should present a complete bar to the Loewen claim.

Given that we are alone in our recognition of large punitive damage awards, we believe that the cost to the U.S. of allowing challenges to our court judgments far outweighs the benefits that U.S. investors may gain from being permitted to challenge foreign court judgments. A case such as Loewen highlights that the NAFTA provides foreign investors with more rights than Americans have and arguably gives foreign companies an advantage over domestic companies.

State and USTR Defense of Their Position

Our investment treaties specifically provide protection for U.S. investors where a host country's judicial system is seriously deficient, prejudiced or corrupt. Excluding judicial decisions from the scope of Chapter 11 "measures" would conflict with this goal. This is true whether or not the DOJ argument prevails, since our pleadings will almost certainly be made public and other countries will cite our arguments to the detriment of U.S. investors. For NAFTA in particular, the DOJ argument would deny Chapter 11 remedies against abuses in Mexican and Canadian courts such as local bias, unconscionable delays, or outright corruption. A 1994 World Bank report found that Mexico had "an unacceptable level of competence and integrity of the judges." Our 1999 investment climate statement confirmed that corruption is a severe problem. Exempting judicial action from investment rules -- even in private cases only -- would leave a large category of state action un-addressed.

Moreover, we are extremely unlikely to convince the Tribunal that "court judgments are never measures. They would have to believe that the NAFTA Parties intended a radical departure from customary international law (and the BITs) without clearly indicating such an intent. The common understanding of negotiators is that Chapter 11 covers "denials of justice" involving court decisions. The DOJ argument also conflicts with use of the word "measure" elsewhere in NAFTA where it clearly includes court actions. Because the word "measures," is used throughout the NAFTA, the DOJ interpretation could have negative consequences for other parts of the Agreement as well. The term is used in the intellectual property chapter (Chapter 17) in provisions that relate to domestic court enforcement of intellectual property rights. Nearly identical provisions appear in the WTO TRIPS Agreement. Our BIT partners may also try to use the position against our investors. Finally, the argument is inconsistent with analysis under traditional canons of treaty interpretation.

The argument that court judgments cannot form the basis of a NAFTA claim until they have been appealed fully, has the best chance of success. It strikes a better balance between the dual interests of protecting U.S. investors abroad and defending against claims based on U.S. court actions, because it preserves the right of investors to challenge court action (albeit after delays occasioned by appeals). It has much more support in customary international law, and would not have as widespread an effect on other parts of NAFTA. Admittedly, it is not clear that this argument will prevail in the Loewen case, because Loewen will argue that as a factual matter its ability to appeal was limited. We should, however, advance no other jurisdictional argument than this one at this phase of the case because it alone minimizes the adverse effects on the foreign investment environment while advancing the rule of law through judicial accountability.

MEMORANDUM

TO: Gene Sperling
Lael Brainard
Holly Hammonds

FROM: John Duncan

DT: November 18, 1999

RE: Meeting of Senior Agency Officials in Attempt to Resolve Interagency Litigation Strategy Dispute – The Loewen Group, Inc. v. United States NAFTA Arbitration

Purpose of Meeting

You met with White House Counsel on October 7, 1999, to review the legal positions of the various agencies involved in the dispute over the appropriate jurisdictional defense to advance on behalf of the U.S. in the Loewen arbitration case, and to explore whether White House Counsel believed a compromise position could be reached. All participants agreed that it was unlikely that agency attorneys would reach agreement on this matter. You suggested that a policy level meeting be put together consisting of a small group of senior agency officials in order to help think through the policy implications of advancing a particular jurisdictional argument. The importance of reaching a decision increases as the December 17, 1999, filing deadline for making jurisdictional arguments approaches.

While my August 4, 1999, memorandum captures the overall issues, I thought a paper that broke down in detail the particular arguments might be useful as a reference/guide for the meeting.

NAFTA Provisions at Issue

NAFTA Chapter 11 was designed to encourage investment in Canada, Mexico and the U.S. by establishing rules of fair treatment of foreign investors and their host governments.

NAFTA Article 1116 (1) authorizes an aggrieved investor to "submit to arbitration under this Section a claim" that a host government has breached its obligations of fair treatment under Chapter 11.

NAFTA Article 1101 (1) appears to limit the scope of Chapter 11 to "measures adopted or maintained" by a government relating to the investor or investment at issue, but it is unclear whether a non-measure that would otherwise violate the provisions of Chapter 11 is exempt from coverage simply because it is not a measure.

NAFTA Article 1105 states that "each party shall accord to investments of investors treatment in accordance with international law, including fair and equitable treatment and full protection and security" (the term "measure" is not found in Article 1105).

NAFTA Arbitration claims are submitted to the Additional Facility of the international Centre for Settlement of Investment Disputes (ICSID) in Washington, D.C.

Loewen's Claim and Potential Effect on U.S. Judicial System

Loewen contends that the Mississippi jury verdict of $500 million ($400 of which constituted punitive damages) in a case in which the initial damage claim was only for $16 million, and the Mississippi Supreme Court's refusal to waive or reduce the bond requirement (125% of the judgment amount), were unjust and discriminatory and in violation of several standards set forth in NAFTA Chapter 11. Loewen eventually settled the case for structured payments of $175 million (with a net present value of approximately $85 million). As a result, Loewen claims the court decision constituted an expropriation in violation of Chapter 11 and seeks $725 million in damages from the U.S. Government.

Loewen is an important case because it raises the question of the extent to which domestic civil judicial proceedings will be subject to international re-examination.

Jurisdictional Arguments Proposed

DOJ – Domestic court judgments are not "measures" for purposes of NAFTA Chapter 11.

State/USTR – Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

DOJ Proposed Arguments

DOJ proposes to argue that Loewen's claim is not subject to arbitration under the NAFTA because the judgments of domestic courts are not "measures" within the scope of NATA Chapter 11. Subsidiary arguments are:

- at most NAFTA is ambiguous as to whether the drafters intended to include court judgements within the definition of "measures."
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- argument that an investor could challenge any action under NAFTA Chapter 11, even if it is not a "measure adopted or maintained" by a NAFTA country, is meritless and dangerous as it would render Chapter 11 limitless in its scope.
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- domestic cost to U.S. of allowing challenges to our court judgments may outweigh the benefits that the U.S. investment community may gain from being permitted to challenge Mexican or Canadian court judgments (where far less litigation occurs).

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- even if our argument would affect the ability of a U.S. investor to bring a private "denial of justice" claim, OPIC insurance coverage may still provide a remedy.
- given the posture of the Mondev case (Mondev International , Ltd. v. United States) (Dispute with City of Boston over redevelopment project that resulted in breach of contract judgment against City reversed by highest court in Massachusetts and certiorari was denied by Supreme Court) only way we can avoid addressing the merits of the case is if tribunal finds domestic judicial decisions are not measures.
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State and USTR Arguments

State and USTR oppose the DOJ jurisdictional argument, arguing that it would undermine the ability of U.S. investors to challenge irregular and arbitrary court judgments abroad. They propose, instead, to argue that Court decisions can be "measures" only if the highest available court in a judicial system has been given an opportunity to review the decision.

- the U.S. interest in protecting American investors from arbitrary or discriminatory decisions by foreign courts outweighs the concerns that Justice has articulated about NAFTA provisions permitting review of American court decisions by arbitration.
- exempting judicial action from international review would be a serious step backward in our advocacy of U.S. investor interests abroad.
- scrutiny of U.S. domestic court decisions by international tribunals for compliance with international obligations is not a new concept.
- NAFTA Article 201 does not support DOJ's position on "measures," as it merely provides a non-exhaustive list of what the term includes, and DOJ has not articulated any reason to exclude court judgments from that definition.
- a number of other provisions of Chapter 11 do not make sense unless court judgments can be "measures."
- there are provisions in other Chapters of the NAFTA that do not make sense unless court judgments are "measures," and those provisions could be undermined by advancing the DOJ argument (Chapter 17 – protection of intellectual property rights).
- there are several prominent instances in international case law, other provisions of NAFTA and elsewhere in which the term "measure" is clearly used in a manner that encompasses judicial actions.
- even if court judgments are found not to be "measures," the Mississippi bond rule is clearly a "measure" because it fits within the definition in NAFTA Article 201, hence

if at least some part of the case remains viable after the DOJ jurisdiction argument, and the tribunal finds it has jurisdiction to proceed why make the argument at all.

- DOJ's argument implies that NAFTA Chapter 11 provides less protection to investors than our Bilateral Investment Treaties (BITs) an outcome clearly not intended by our NAFTA negotiators.
- even if we win on DOJ's argument, we will still face the wrath of the investment community for unduly narrowing the scope of NAFTA's investor protections.
- our proposed argument presents a reasonable compromise between international investment policy concerns and protection of sovereignty because it permits court decisions to be challenged, but only after the party's higher courts have an opportunity to correct whatever irregularities that may have occurred.
- argument is distinguishable from a simple exhaustion of remedies requirement (which appears to have been waived in the NAFTA) as it is typically considered to cover situations where the executive takes an action and courts are asked to remedy that action, but will only do so after all administrative recourse has been pursued. Here the injury first arose through the action of the court, hence only fair to let highest court review and correct if appropriate.
- DOJ overemphasizes the danger of having to address NAFTA cases on the merits as international law standards applicable to the merits at issue are high ones; hence, it is extremely rare that violations of these standards are found, especially in a well-developed, constitutionally-based legal system.