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# International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade

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## International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade

*Renée Lettow Lerner\**

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[I]t is at least problematical whether an unjust sentence against a foreigner . . . would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations.<sup>1</sup>

— *Alexander Hamilton*

## I. INTRODUCTION

The United States has long lectured about the rule of law to other countries—traditionally to Latin America, but lately also to Asia, Africa, and eastern Europe.<sup>2</sup> Americans emphasize that the rule of law is necessary to those who participate in the global economy. The U.S. government and private organizations have done more than lecture; they have devoted considerable resources to helping other countries establish effective legal systems.<sup>3</sup> Public and private

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1. THE FEDERALIST NO. 80, at 476–77 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

2. See, e.g., Remarks on the New Markets Legislation Agreement, 36 WKLY. COMP. PRES. DOC. 1192 (May 23, 2000) (President Clinton urging the importance of advancing the rule of law in China); *Development Beyond Economies*, THE GLEANER, May 11, 2000, available in 2000 WL 12119344 (describing Economic and Social Progress Report of the Inter-American Development Bank, arguing that Latin America must improve its adherence to the rule of law and strengthen weak judiciary); Thaksina Khaikaew, *U.S. Urges Asia to Tackle Cronyism for Economic Stability*, Associated Press, July 28, 2000 (Secretary of State Madeleine Albright urging Southeast Asian countries to strengthen the rule of law and curb official corruption and cronyism); Al Laranjeiro, *U. Florida Conference Addresses State's Benefits from Latin American Trade*, U-WIRE, May 30, 2000, available in 2000 WL 21058142 (U.S. Special Envoy to the Americas Buddy McKay Jr. calling for “transparency and rule of law” in Latin America, stressing the relationship between the rule of law, democracy, and economic development, expressing concern that foreign investors are not able to turn to the courts for help).

3. See, e.g., *Testimony of Ann Van Dusen, Deputy Assistant Administrator, Bureau for Policy and Program Coordination, U.S. Agency for International Development: Before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 106th Cong. (1999) available in 1999 WL 20010787 (describing U.S. Agency for International Development's funding of rule of law initiatives in Latin America, Africa, Asia, and Eastern Europe); *FY 98 Foreign Operations Appropriations: Before the Subcomm. on Foreign Operations of the House Comm. on Appropriations*, 105th Cong. (1997) (statement of Lucinda A. Low on behalf of the American Bar Association) available in 1997 WL 10570218 (describing extensive ABA Global Rule of Law Projects in the context of the Foreign Operations Appropriations budget; projects cover Eastern Europe, Asia, Africa, the Middle East, and Latin America); Paula Dobriansky, *America's Most Rewarding Export*, WASH. TIMES, June 10, 1992, at G4 (associate director for policy and programs, United States Information Agency, describing extensive USIA efforts to assist other countries in establishing the rule of law); *US-China Legal Cooperation Fund Announces China Rule of Law Awards*, PR NEWSWIRE, May 23, 2000 (describing private busi-

groups regularly send lawyers and judges out to developing countries as missionaries preaching the importance of an independent judiciary, fair and settled substantive rules, and even-handed application of the law.<sup>4</sup> But it behooves us to set our own house in order, not to ignore problems with our justice system that themselves undermine international trade and our position as advocates of the rule of law in the world. We ourselves are less than perfect in this regard and may in fact be in violation of international agreements because of it.

While many American jury verdicts are reasonable, in cases involving foreign or out-of-state defendants, they can be very large and bear little relation to the actual injury suffered.<sup>5</sup> This is a recognized problem for American business and is increasingly a problem for foreign businesses too, as a result of greater global trade and investment.<sup>6</sup> The U.S. Supreme Court has thus far shown few signs of acting to resolve the problem.<sup>7</sup> The U.S. Congress has tried multiple

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ness-backed fund to encourage “stronger US-China cooperation in the field of law”).

4. See, e.g., *FY 98 Foreign Operations Appropriations: Before the Subcomm. on Foreign Operations of the House Comm. on Appropriations*, *supra* note 3 (describing ABA’s extensive funding of visits by American judges and lawyers to other countries to provide advice); Dobriansky, *supra* note 3, at G4 (describing USIA’s sending several delegations of American judges to Moscow to conduct workshops for Russian judges, sending legal experts to Kazakhstan, and a federal judge to Albania); *Kenyan System Stifles Rights, U.S. Jurists Say*, S.F. CHRON., July 20, 1991, at A10 (describing reactions of a delegation of U.S. jurists to Kenya).

5. Empirical studies of civil damages have concluded that, in effect, there are essentially two damages systems: a large realm of moderate awards and a smaller one of extraordinarily high awards. This is especially the case with punitive damages. See, e.g., STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* 231 (1995); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1135–36 (1996); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 IOWA L. REV. 1, 62 (1992) (referring to “a very few abnormally large jury awards”).

6. See, e.g., Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, LAW & CONTEMP. PROBS., Summer 1999, at 73, 74–75; Alfred W. Cortese, Jr. & Kathleen L. Blaner, *Civil Justice Reform in America: A Question of Parity with Our International Rivals*, 13 U. PA. J. INT’L BUS. L. 1, 1–4 (1992); Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. DAVIS L. REV. 95, 163 & n.270 (1996).

7. In its latest foray into the question of the constitutionality of punitive damages awards, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Supreme Court held a punitive damages award unconstitutional under the Due Process Clause because it was excessive but provided little guidance to courts on how to judge future cases. See, e.g., Jane Mallor & Barry S. Roberts, *Punitive Damages: On the Path to a Principled Approach?*, 50 HASTINGS L.J. 1001, 1010–14 (1999) (noting ambiguities in the *BMW* opinion); Leading Cases, *Punitive Damages—Grossly Excessive Awards*, 110 HARV. L. REV. 145, 145–46 (1996) (noting ambiguities in the *BMW* opinion). Based on empirical research, scholars have found that the *BMW v. Gore* opinion has had no significant effect on damage awards. Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions: The Im-*

times to pass tort reform bills, but it has failed.<sup>8</sup> Scholarly attention has focused on these two methods of solving the problem of excessive verdicts. However, where the Supreme Court and Congress have failed, a new group of international agreements might succeed. This article will focus on an agreement that may prove especially potent in reining in verdicts: the North American Free Trade Agreement (“NAFTA”). Since other trade agreements are likely to be patterned on NAFTA, including the proposed Free Trade Agreement of the Americas (“FTAA”),<sup>9</sup> it is important to understand NAFTA’s potential impact on the U.S. justice system. Our desire for international trade is starting to collide with our unusual (by international standards) system of civil justice, and that collision may generate tension that saps support for international trade agreements.

One of the key features of NAFTA is its provisions for individual investors to sue foreign nations directly to enforce the agreement’s guarantees.<sup>10</sup> These are known as investor-state provisions and are a change from the traditional international law system, in which only a state could bring an action against another state. Through investor-state provisions, “public” international law has become more private. The United States has long championed investor-state provisions as a way to prevent countries from expropriating U.S. citizens’ investments, particularly in Latin America. In general, capital-exporting countries favor investor-state provisions to protect their citizens from lesser-developed countries’ temptation to confiscate foreign assets.

In addition to this procedural mechanism, NAFTA encompasses a substantive doctrine that capital-exporting countries have invoked against less-developed countries: the prohibition of denial of justice.<sup>11</sup> Under this international law doctrine, a state is responsible for injustices committed by its courts as well as by its executive or legislature. Denial-of-justice claims were frequently brought when the underlying cause was physical harm to or incarceration of individuals;

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*fact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59, 59 (1999).

8. See Stephen D. Sugarman, *Should Congress Engage in Tort Reform?*, 1 MICH. L. & POL’Y REV. 121, 136–39 (1996) (discussing various tort reform proposals).

9. The FTAA appears to be moving steadily toward completion in the next few years. See Rossella Brevetti, *Proposal to Accelerate FTAA Talks To Be Discussed at Ministers’ Meeting*, 17 INT’L TRADE REP. (BNA) 1866, 1866 (Dec. 7, 2000).

10. See *infra* Part III.

11. See *infra* Part IV.

most of these situations are now covered by international human rights law. In civil cases, the main concern has traditionally been fear that the court system of a developing country will not provide adequate redress for economic harm, such as seizure of assets. Developing countries, particularly in Latin America, and capital-exporting countries such as the United States have disagreed strongly over the scope of the denial of justice doctrine. NAFTA firmly embraces the view of the capital-exporting countries.

While there was a flurry of scholarship on denial-of-justice claims in the 1930s, with some interest through the early 1960s, there has been little recently.<sup>12</sup> Academic interest in denial of justice questions has tended to wax and wane according to the frequency of expropriations of foreign investments. There ought to be greater interest in this doctrine now that international agreements such as NAFTA have the potential to create liability based on events other than outright seizure of assets and through claims brought by individual investors. This article will help address this gap by examining the extent to which certain American verdicts—awarded by state courts, in particular—may be judged denials of justice under international law.

It is especially ironic that the U.S. government faces potential liability for American verdicts thanks to a combination of the procedural mechanism of investor-state claims and the substantive doctrine of denial of justice, both championed by the United States to protect against the misdeeds of other countries. U.S. liability could be considerable; in certain respects, American verdicts are far out of step with those of other countries. State courts, especially, are apt to provide few checks on juries and judges determined to transfer large amounts of money from aliens to in-state plaintiffs through compensatory and punitive awards.<sup>13</sup>

There is currently an arbitration under NAFTA, *Loewen v. United States*,<sup>14</sup> brought by a Canadian individual and corporation against the United States based on a \$500 million verdict in Mississippi state court. This case provides a good example of how the investor-state provisions and the denial of justice doctrine may work together to create U.S. liability for state court judgments. Suits such

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12. See *infra* notes 89–104.

13. See *infra* Part IV.B.1.

14. The Loewen Group, Inc. v. United States of America, case no. ARB(AF)/98/3 (registered Nov. 19, 1998).

as these have potential to trouble free trade agreement negotiations and functioning because they may be seen as interfering with U.S. sovereignty, including federal-state relations and such tenacious institutions as civil jury trials and punitive damages.

Because of these sovereignty concerns, NAFTA as it currently exists is probably not the best way to address problems with state court judgments that harm aliens. Several possible strategies present themselves.<sup>15</sup> One approach, at the international level, is to return to the old method of requiring the investor's country to bring these claims on the investor's behalf. But this approach might allow many instances of discrimination against aliens to go uncompensated; often, nations may decide not to pursue claims for political reasons.

A better approach, at the national level, would help to prevent violations from occurring in the first place. The Founders, particularly Alexander Hamilton, were aware of the international problems an unjust decision against a foreigner could cause. Hamilton's solution, embodied in Article III of the U.S. Constitution, was to allow foreigners to remove their cases to federal court. The Founders' concerns about aliens are now more relevant than ever because of the global economy. Unfortunately, the rule requiring complete diversity prevents many foreigners from removing their cases to federal court and subjects them to the full force of local biases in state courts. By abandoning the complete diversity requirement as to aliens, the United States could restore Hamilton's solution and spare international and national strife.

The article begins in Part I by describing the *Loewen* case as an example of the challenges a foreign litigant may face in state court and how suits can be brought against the U.S. government to compensate the foreign investor under NAFTA. Part II outlines the investor-state provisions of NAFTA. It shows how these provisions originated in fears about expropriation of foreign assets, particularly in Latin America, but lately have been used to challenge government actions going beyond traditional expropriation, such as regulatory takings. Using the investor-state provisions to compensate for denials of justice in state courts is another means of expanding the scope of these provisions. Part III demonstrates that claims for denial of justice are well established in international law, and they may include both claims of procedural unfairness (lack of an impartial tribunal,

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15. *See infra* Part VI.



etc.) and claims of substantive injustice (a faulty decision on the merits or an excessive award of damages). Traditionally, denial-of-justice claims were brought by one state against another on behalf of its injured national. Part III also discusses the specific ways in which the U.S. civil justice system may be said to violate international standards and produce denials of justice. The most significant factor here, the article argues, is the use of elected judges and the relationships between these judges and plaintiffs' lawyers, focusing on the role of judicial campaign contributions.

Claims against the United States for denial of justice could potentially interfere with the right of U.S. states to organize their justice systems as they see fit and also could trouble the relations between the federal and state governments. Part IV outlines these concerns. Both the general principle of holding governments liable for decisions of the judicial branch and the specific mechanism of arbitration used under NAFTA pose problems. Ultimately, decisions against the United States under the investor-state provisions, particularly decisions based on denial of justice, may undermine support for international trade agreements. Part V addresses possible responses to these difficulties. It discusses both the international and national approaches mentioned above and concludes that the national solution of expanding diversity jurisdiction for aliens would best reduce domestic and international strife.

## II. OVERVIEW OF A NAFTA CLAIM UNDER THE INVESTOR-STATE PROVISIONS

### *A. The Civil Litigation in State Court*

The *Loewen* case is the sort of verdict that gives observers of the U.S. legal system pause. The plaintiff in the U.S. court proceedings, Jeremiah O'Keefe, owns a Mississippi funeral home and insurance company and sued The Loewen Group, Inc. for breach of contract in Mississippi state court.<sup>16</sup> The Loewen Group is based in Vancouver and is North America's second-largest funeral home and service company.<sup>17</sup> O'Keefe named as defendants not only The Loewen

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16. For a dramatic and detailed account of the proceedings in Mississippi state court, including profiles of the plaintiff, defendant, and their lawyers, see Jonathan Harr, *The Burial*, NEW YORKER, Nov. 1, 1999, at 70.

17. See *NAFTA: Canadian Funeral Company Uses NAFTA to Seek Damages for U.S.*

Group, Inc. and its subsidiary Loewen Group International, Inc. (incorporated in Delaware) but also local Mississippi corporations owned by Loewen Group International. By naming these Mississippi defendants, O'Keefe prevented Loewen from removing the case to federal court.<sup>18</sup> "The dispute centered on three contracts valued by O'Keefe at \$980,000 and one alleged contract involving a proposed exchange of two O'Keefe funeral homes, worth about \$2.5 million, for a Loewen insurance firm worth about \$4 million."<sup>19</sup> The total amount involved in the underlying transactions was considerably less than \$10 million. The lead plaintiff's lawyer was Willie E. Gary, a flamboyant figure who is a member of the "Million Dollar Verdict Club" and the "Golden Legal Eagles," both clubs whose members refuse cases alleging less than \$100 million in damages.<sup>20</sup>

At the 1995 trial, O'Keefe testified that "if the settlement was not carried out, he would have to fight for his life . . . against a rich and powerful international corporation."<sup>21</sup> The plaintiff's case featured the O'Keefe family's 130 year history of operating funeral homes and insurance companies in Mississippi as opposed to Loewen's "foreign" base.<sup>22</sup> There was considerable testimony to the effect that O'Keefe, who is white, was not a racist.<sup>23</sup> Four prominent Hinds County figures and Mike Espy, former Agriculture Secretary and friend of Mr. O'Keefe, testified to that effect. On cross examination, Espy testified about the alleged unfair trade practices of Cana-

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*Court Ruling*, 15 INT'L TRADE REP. (BNA) 1978 (Nov. 25, 1998). The company has about 13,000 employees and operates 1,100 funeral homes and more than 500 cemeteries in the United States, Canada, and the United Kingdom. According to the company, 90% of Loewen's revenue comes from the U.S. market. See Robert E. Lutz & Russell C. Trice, *NAFTA at Five and the Loewen Case: Is NAFTA the Blood Relative of Lady Justice or the Angel of Death for State Sovereignty?*, TRANSLEX, Oct. 1999, at 1 n.1.

18. See *infra* Part VI.B.2.

19. *NAFTA: Panel Expected To Be Constituted Soon in Canadian Firm's \$725 Million NAFTA Claim*, 16 INT'L TRADE REP. (BNA) 81 (Jan. 20, 1999) [hereinafter *Panel Expected*].

20. See Yvonne Samuel, *Florida Attorney to Receive State King Award*, ST. LOUIS POST-DISPATCH, Jan. 8, 1998, at B1. Gary's private jet is named "Wings of Justice." *Id.* Recently, he has become involved in a lawsuit alleging racial discrimination against Coca-Cola, in which he plans to ask for \$1.5 billion in damages. Betsy McKay, *Attorneys in Coke Race-Bias Settlement Assail Lawyer Who Filed Separate Suit*, WALL ST. J., Jun. 30, 2000, at B8.

21. Lutz & Trice, *supra* note 17, at 1.

22. See, e.g., Transcript, Jeremiah J. O'Keefe, et al. v. The Loewen Group, Inc., et al., No. 91-67-423 (Cir. Ct., 1st Judicial Dist. Hinds County), at 1998, 2000, 2010 (copy on file with author).

23. See *Panel Expected*, *supra* note 19, at 81. The presiding judge and eight of the twelve jurors were black. *Id.*

dian wheat farmers: "The Canadian wheat was underpriced. They would come in, flood our markets, our people would eat a lot of pasta, and they would not buy American wheat."<sup>24</sup> Besides issues of race and national origin, plaintiff's counsel emphasized Loewen's personal wealth. Cross-examination of Ray Loewen (during the liability, not punitive damages, phase) began with an extended discussion, covering three pages of trial transcript, of whether Loewen's boat was a yacht.<sup>25</sup> Plaintiff's counsel's closing argument referred to O'Keefe's service in the U.S. armed forces during World War II: O'Keefe "fought, and some died for the laws of this nation, and they're [Loewen] going to put him down for being American."<sup>26</sup> Counsel repeated Espy's testimony regarding Canadian wheat farmers<sup>27</sup> and concluded by drawing an analogy between Loewen's competition with O'Keefe and the Japanese bombing of Pearl Harbor.<sup>28</sup>

The jury awarded \$100 million in compensatory damages, of which \$75 million was for emotional distress, and \$400 million in punitive damages for a total of \$500 million.<sup>29</sup> Shortly after the verdict was handed down, the foreman of the jury (who, interestingly, was born in Canada but had moved to Mississippi thirty years before<sup>30</sup>) said that Ray Loewen "was a rich, dumb Canadian politician who thought he could come down and pull the wool over the eyes of a good ole Mississippi boy. It didn't work."<sup>31</sup> In order to appeal, Mississippi requires posting an appeal bond of 125 percent of the judgment amount.<sup>32</sup> This bond, however, may be reduced or waived for good cause.<sup>33</sup> According to Loewen, the verdict represented between 63 percent and 78 percent of the company's net worth.<sup>34</sup>

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24. Transcript, *supra* note 22, at 1101-02.

25. *See id.* at 5106-08. The following question is representative of the exchange: "Well, can you land a helicopter on your canoe, boat or yacht, which one? Can't you land a helicopter on it?" *Id.* at 5106.

26. *Id.* at 5588.

27. *See id.* at 5587-88.

28. *See id.* at 5593-94.

29. *See* Final Judgment, Jeremiah J. O'Keefe, et al. v. The Loewen Group, Inc., et al., No. 91-67-423 (Cir. Ct., 1st Judicial Dist. Hinds County) (copy on file with author).

30. Harr, *supra* note 16, at 91.

31. Nina Bernstein, *Brash Funeral Chain Meets Its Match in Old South*, N.Y. TIMES, Jan. 27, 1996, at A6.

32. *See* MISS. R. APP. P. 8(a) (1999).

33. *See id.* at 8(b).

34. *See* Loewen's Notice of Claim, Jeremiah J. O'Keefe et al. v. The Loewen Group, Inc. et al., No. 91-67-423 (Cir. Ct., 1st Judicial Dist. Hinds County), at 42 (copy on file with

Loewen claims its costs of posting a full appeal would have exceeded \$200 million, which it would not have been able to recover even if it had won the appeal.<sup>35</sup> The Mississippi Supreme Court refused to reduce the appeal bond, and, therefore, O'Keefe would have been able to levy on Loewen's assets within a week.<sup>36</sup> Loewen settled with O'Keefe for \$175 million.<sup>37</sup>

### *B. Claims Under NAFTA Chapter 11*

Loewen, already highly leveraged, was not willing to give up. In November 1998, Loewen filed for arbitration against the United States alleging violations of the investor-state provisions of NAFTA.<sup>38</sup> These provisions, found in NAFTA Chapter 11, provide a direct remedy for individual investors from one NAFTA Party against another NAFTA Party in cases where government actions have interfered with NAFTA guarantees.<sup>39</sup> Chapter 11 subchapter A sets out the substantive guarantees; subchapter B sets out the remedial procedure.

Claims under the investor-state provisions of NAFTA are arbitrated. Under Chapter 11 subchapter B, the individual investors have the choice of proceeding under one of the following methods of arbitration: (1) before the International Centre for Settlement of Investment Disputes ("ICSID"); (2) before an *ad hoc* arbitral body es-

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author).

35. *See id.* at 43-44.

36. Loewen had considerable assets in Mississippi and elsewhere in the United States that could be levied on. Harr, *supra* note 16, at 80, 94.

37. Gary reportedly received \$69 million in contingency fees from the settlement. Samuel, *supra* note 20, at B1. The second chair plaintiff's lawyer in the *Loewen* case, according to his testimony in a suit his ex-wife brought for increased child support, received the following fees from the *Loewen* settlement: a \$2 million cash payment in 1996; 60,000 shares of restricted Loewen stock valued at \$24 per share in 1997; and 4% ownership in a noninterest-bearing note of \$80 million from which he would receive twenty annual payments of \$160,000 starting in February 1997. *Cavanaugh v. Cavanaugh*, No. 97-CA-00553 COA, 1998 Miss. App. LEXIS 656, at \*4 (Miss. App. Aug. 18, 1998). In June 1999, the Loewen Group filed for bankruptcy protection to reorganize its debt. (The company had other woes; it fended off a takeover bid and faced additional litigation, including a securities class action.) The company's Chairman told shareholders in June that the reorganization could render Loewen's shares almost completely worthless. Lutz & Trice, *supra* note 17, at 2 n.3.

38. *See The Loewen Group, Inc. v. United States of America*, case no. ARB(AF)/98/3 (registered Nov. 19, 1998).

39. "NAFTA Party" is the technical term for countries that have joined NAFTA: the United States, Mexico, and Canada.

tablished pursuant to the United Nations Commission on International Trade Law (“UNCITRAL”) rules; or (3) before ICSID’s Additional Facility.<sup>40</sup> The Additional Facility was established to arbitrate disputes involving non-ICSID members or their nationals. Loewen brought its claim before the ICSID’s Additional Facility because, although the United States is an ICSID member, Canada is not.<sup>41</sup> Under NAFTA rules, arbitration panels normally consist of three arbitrators: “one . . . appointed by each of the . . . parties and the third, who [acts as] the presiding arbitrator, appointed by agreement of the disputing parties.”<sup>42</sup> The tribunal for the *Loewen* case was impaneled on March 17, 1999, and is made up of one arbitrator each from the United States, Canada, and Australia.<sup>43</sup> The tribunal held its first session in Washington, D.C., on May 18, 1999. The U.S. government responded to the claim in late February 2000, filing an objection to the panel’s jurisdiction. According to an associate general counsel of the Office of the U.S. Trade Representative speaking in April 2000, the panel decided to hear jurisdictional issues first, and so the U.S. government has not yet filed a memorial on the merits.<sup>44</sup> Arbitration hearings and filings are generally not available to the public.<sup>45</sup>

The actions of the Mississippi courts were alleged to have violated three provisions of NAFTA Chapter 11.<sup>46</sup> The first is Article 1102, which requires NAFTA governments to treat investors from other NAFTA Parties no less favorably than it treats its own inves-

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40. See North America Free Trade Agreement, Dec. 8, 1993, art. 1120, 107 Stat. 2057 [hereinafter NAFTA]. For an excellent overview of NAFTA arbitration procedures, see generally 1 Ralph H. Folsom et al., *NAFTA Dispute Panels: Structure and Procedures*, HANDBOOK OF NAFTA DISPUTE SETTLEMENT ch. 2 (1998).

41. “Canada is not a party to the case but the Canadian government will get copies of documents filed in the matter.” *Panel Expected*, *supra* note 19, at 81.

42. NAFTA, *supra* note 40, art. 1123.

43. See *List of Pending Cases* (visited Oct. 25, 2000) <<http://www.worldbank.org/icsid/cases/pending.htm>>. The arbitrators are: Anthony Mason, president, of Australia; L. Yves Fortier of Canada, and Abner J. Mikva, former chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, of the United States. See *id.*

44. See Rossella Brevetti, *NAFTA: U.S. Challenges NAFTA Panel’s Jurisdiction in Canadian Funeral Firm’s Chapter 11 Case*, 17 INT’L TRADE REP. (BNA) 637 (Apr. 20, 2000) (reporting remarks of Steven F. Fabry, associate general counsel of the Office of the U.S. Trade Representative, to the American Bar Association’s Section of International Law and Practice).

45. “Filings may be available through the Freedom of Information Act, counsel for Loewen [has noted].” *Panel Expected*, *supra* note 19, at 81. Public Citizen has filed a FOIA request for information about the arbitration. See *id.*

46. Loewen’s Notice of Claim, *supra* note 34, at 48–60.

tors. Article 1102 further specifically provides that a *state or province* must provide treatment no less favorable than the most favorable treatment they give to investors of the country of which it forms a part. The second provision is Article 1105, which sets out a minimum standard of treatment for NAFTA Parties' investors. This Article provides that investments by another NAFTA Party's investors must be treated "in accordance with international law, including fair and equitable treatment and full protection and security." Loewen alleges the trial court violated this provision "by allowing O'Keefe's lawyers to repeatedly elicit irrelevant and highly prejudicial testimony, and to make irrelevant and highly prejudicial comments, about the nationality, race, and class of the principal parties in the litigation."<sup>47</sup> Other violations of Article 1105 were the "grossly excessive verdict" and the Mississippi Supreme Court's application of the bonding requirement.<sup>48</sup> Third, the Mississippi courts were alleged to have violated Article 1110, which prohibits nationalization or expropriation (or actions "tantamount to nationalization or expropriation") of investments of NAFTA Parties' investors. (There is an exception to this provision, but only for takings done for a public purpose, on a nondiscriminatory basis, in accordance with due process of law and the principles of international law, and where payment of fair market compensation is made.<sup>49</sup>) Loewen claims this provision was violated in the trial judge's permission of discriminatory conduct at trial, the excessive verdict, the denial of a right to appeal, and the "coerced" settlement.<sup>50</sup>

Loewen also stresses NAFTA Article 105, which places an obligation on NAFTA Parties with respect to states and provinces. Article 105 provides that "the Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agreement, including their observance . . . by state and provincial governments." Because of this provision, Loewen argues, the United

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47. *Id.* at 57.

48. *Id.* at 54, 58.

49. Article 1110 of NAFTA is modeled on the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987), Economic Injury to Nationals of Other States: "A state is responsible under international law for injury resulting from: (1) a taking by the state of the property of a national of another state that (a) is not for a public purpose, or (b) is discriminatory, or (c) is not accompanied by provision for just compensation. . . ."

50. Loewen's Notice of Claim, *supra* note 34, at 59.

States government is responsible for Mississippi's violations of NAFTA.<sup>51</sup> Loewen cites a letter written by Michael Kantor, who was then U.S. Trade Representative, at the time NAFTA was signed by the United States. Kantor stated: "Article 105 . . . mean[s] that the federal government will be held accountable if it cannot secure state or provincial compliance with NAFTA obligations."<sup>52</sup>

To support its claims, Loewen has assembled a formidable legal team. The former president of the International Court of Justice, Sir Robert Jennings, declares in an appendix to Loewen's Notice of Claim that the jury's verdict constitutes a clear violation of international law since it was "so bizarrely disproportionate as almost to defy belief."<sup>53</sup> "Of a \$500 million judgment in a case involving property and assets in dispute of only a few million dollars, one might almost say *res ipsa loquitur*."<sup>54</sup> This verdict was the result, he says, of the plaintiff's counsel's "ruthless and blatant working up of both racial and nationalistic prejudice," unrestrained.<sup>55</sup> Loewen also secured an affidavit from Richard Neely, the colorful former Chief Justice of the West Virginia Supreme Court and a member of the Association of Trial Lawyers of America ("ATLA"). Neely is known for his blunt opinions on the treatment of out-of-state corporations by state courts.<sup>56</sup> In the *Loewen* case, Neely says, it is virtually certain that Loewen was "intentionally subjected to a complete denial of justice by the Mississippi trial court and the Mississippi Supreme Court" because of its Canadian citizenship.<sup>57</sup> Neely says that "even for a plaintiff's lawyer like me, the case . . . from beginning to end, descends to the level of a mockery of justice."<sup>58</sup> The claim also includes an October 29, 1998, letter by Mississippi Governor Kirk Fordice to the NAFTA Dispute Resolution Tribunal, maintaining that the Loewen verdict "stands as a vivid example of the continuing need for . . . re-

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51. *Id.* at 61-63.

52. Letter from Michael Kantor to Henry A. Waxman, Chairman, Subcomm. on Health and the Env't. (Sept. 7, 1993), H.R. REP. NO. 103-361(III), at 132 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2858, 2862.

53. Opinion of Sir Robert Jennings in The Loewen Group Case, Appendix A of Loewen's Notice of Claim, *supra* note 34, at 13.

54. *Id.* at 4.

55. *Id.*

56. *See infra* text accompanying notes 119-26.

57. Opinion of Richard Neely in The Loewen Group Case, Appendix B of Loewen's Notice of Claim, *supra* note 34, at 17.

58. *Id.* at 3.

form.”<sup>59</sup> He said that the trial appeared to have been “tainted by xenophobic rhetoric” and called the amount of the verdict “shocking.”<sup>60</sup> He wrote, “[i]t concerns me that Loewen’s status as a Canadian company may have deprived it of fundamental rights that would otherwise be guaranteed to the citizens of our state.”<sup>61</sup>

To compensate it for these various violations, Loewen is claiming a total of \$725 million in damages.<sup>62</sup> Of this total, \$175 million are to compensate for the amount Loewen claims it was coerced into paying to settle the case, and \$550 million are for reduction in the value of Raymond Loewen’s shares in the firm that resulted from the verdict and for harm to his reputation.<sup>63</sup>

The Loewen filing under NAFTA has not gone unnoticed by various advocacy groups. Public Citizen and Friends of the Earth have pointed to the Loewen arbitration as evidence of NAFTA’s infringement on U.S. sovereignty. Public Citizen held a press conference on the *Loewen* case and has devoted substantial parts of its website to information about it.<sup>64</sup> At the press conference, Public Citizen president Joan Claybrook called the *Loewen* arbitration “an all-out attack on democracy. If successful, it would undermine the jury system, which is fundamental to our system of justice.”<sup>65</sup> Both Public Citizen and Friends of the Earth are calling for the renegotiation of Chapter 11 to prevent such arbitrations in the future.<sup>66</sup>

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59. Letter from Governor Kirk Fordice to the NAFTA Dispute Resolution Tribunal, Oct. 29, 1998, in Appendix C of Loewen’s Notice of Claim, *supra* note 34, at 1–2.

60. *Id.* at 1.

61. *Id.* at 2.

62. See Loewen’s Notice of Claim, *supra* note 34, at 67.

63. See *id.* at 66–67; *Panel Expected*, *supra* note 19, at 81.

64. Public Citizen also has a joint website with Friends of the Earth entitled “NAFTA’s Corporate Lawsuits,” which discusses the *Loewen* case. See *NAFTA’s Corporate Lawsuits* (visited Jan. 26, 2000) <<http://www.citizen.org/pctrade/nafta/cases/fancy.pdf>>.

65. *NAFTA: Public Citizen Calls NAFTA Suit Attack on Democracy, Jury System*, 15 INT’L TRADE REP. (BNA) 2007 (Dec. 2, 1998).

66. See *NAFTA’s Corporate Lawsuits*, *supra* note 64.



III. CHANGING USES FOR INVESTOR-STATE PROVISIONS: FROM  
REMEDYING TRADITIONAL EXPROPRIATION TO ATTACKING  
ENVIRONMENTAL REGULATION

*A. Origins of Investor-State Provisions: U.S. Fears of Latin American  
Expropriation*

The ability of a private party to sue a foreign government directly is relatively recent in international law. Traditionally, states were the only actors who had a legal personality in international fora. If a state's national were injured by the acts of a foreign government, only the state itself could bring a claim, acting on its national's behalf.<sup>67</sup> The idea was to protect state sovereignty from attacks by private parties and to manage international disputes through orderly channels sensitive to larger issues between states.<sup>68</sup>

This concept of the state alone having a legal personality in international fora began to crumble with the advent of international arbitration conventions in the 1950s and 60s. Especially important was the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, which established the ICSID in 1966.<sup>69</sup> That convention provided a venue, rules of arbitration, an administrative counsel, a secretariat, and expertise to allow arbitrations between investors and foreign states to go forward. Before that time, World Bank staff members and particularly the president of the World Bank had served as mediators or conciliators of in-

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67. See, e.g., LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 677-78 (3d ed. 1993) (describing customary international law whereby a state only may assert a claim against another state on behalf of its national); James H. Carter, *Investor-Host State Investment Dispute Settlement Procedures*, in THE NORTH AMERICAN FREE TRADE AGREEMENT: ITS SCOPE AND IMPLICATIONS FOR NORTH AMERICA'S LAWYERS, BUSINESSES AND POLICYMAKERS § D.I (Claire Reade ed., 1993).

68. This concept of protecting state sovereignty from the incursions of private party suits lies behind the act of state doctrine, according to the U.S. Supreme Court. The Court has said that, under the act of state doctrine, "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1963) (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)). This doctrine deals with national, rather than international fora, but the same motivation to protect sovereignty is evident.

69. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar.18, 1965, art.1, 17 U.S.T. 1270, 1273.

vestor-state disputes on an ad hoc basis.<sup>70</sup> The ICSID was intended to relieve the World Bank staff and president of this burden and to promote greater flows of foreign investment.<sup>71</sup>

The United States has been particularly enthusiastic about investor-state provisions and use of the ICSID. The U.S. government has signed dozens of Bilateral Investment Treaties (“BITs”), which provide for investor-state disputes to be arbitrated under either ICSID or UNCITRAL rules.<sup>72</sup> The standard investor-state provision for arbitration in these U.S. BITs was the model for the investor-state provisions of NAFTA Chapter 11 subchapter B.<sup>73</sup> The United States has pushed for these provisions largely because of concerns with foreign expropriation of U.S. investor assets abroad.<sup>74</sup> This problem has plagued U.S. investments for some time, particularly in Latin America. The expropriations by the Cuban government following the revolution there were keenly felt by some Americans,<sup>75</sup> and “Mexico’s nationalization of the oil industry in 1938 is still part of the collective U.S. corporate memory.”<sup>76</sup> The main motivation behind NAFTA Chapter 11 was to protect U.S. and Canadian investments from seizure by the Mexican government.<sup>77</sup> It is therefore especially ironic that such a provision is now being used to attack a decision of an American court as a denial of justice.

### *B. Creative Uses of Chapter 11: Regulatory Takings*

NAFTA Chapter 11, like many BITs, has very broad protective language that would seem to encompass much conduct beyond traditional expropriation. It is now being used to get compensation for

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70. See ICSID’s website at <<http://www.worldbank.org/icsid/about/main.htm>>.

71. *See id.*

72. See Kenneth J. Vandavelde, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT’L L. 621, 632 (1998).

73. See Matthew Nolan & Darin Lippoldt, *Obscure NAFTA Clause Empowers Parties: Investor-Protection Clause Lets Companies Haul Signatories into Arbitration for Violation of Pact*, NAT’L L.J., Apr. 6, 1998, at B8.

74. See Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT’L LAW. 727 (1993).

75. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963) (holding that U.S. owners of sugar expropriated by the Cuban government were denied a remedy because of the act of state doctrine).

76. Nolan & Lippoldt, *supra* note 73, at B8.

77. *Id.*

a wide range of other harms.<sup>78</sup> This expansion is stirring up opposition that may ultimately lead to an overhaul of NAFTA or even put the entire agreement in jeopardy.<sup>79</sup> The *Loewen* case is but one example of the creative use of Chapter 11. The *Loewen* case so far is unusual in attacking a judicial decision of a NAFTA Party; more common are complaints about regulatory takings. To date, U.S. companies have filed for arbitration involving regulatory takings under Chapter 11 in about half a dozen known cases.<sup>80</sup> Most of these cases are still pending before arbitral boards. These claims would have little chance of success under domestic U.S. takings law.<sup>81</sup> Yet regulatory takings claims under NAFTA Chapter 11 have led to at least one significant settlement.

In *Ethyl Corp. v. Government of Canada*,<sup>82</sup> Virginia-based Ethyl Corporation achieved a settlement providing for payment of damages and repeal of a regulation. Ethyl was the sole manufacturer of the gasoline additive MMT,<sup>83</sup> used to reduce knocks in engines. The Canadian parliament became concerned about the possible health effects of MMT and enacted a ban on international and inter-provincial trade in the substance. Ethyl filed a claim for arbitration under NAFTA in April 1997, asking for \$250 million for expropriating anticipated profits and damage to its reputation based on parliamentary debate before the ban was imposed. To settle the case, in July 1998 the Canadian government agreed to lift its ban on trading the fuel additive, paid Ethyl \$10 million, and “issued a public statement that [MMT] posed no health risk.”<sup>84</sup>

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78. See, e.g., David A. Gantz, *Potential Conflicts Between Investor Rights and Environmental Regulation Under NAFTA's Chapter 11*, 33 GEO. WASH. INT'L L. REV. (forthcoming 2001), Part III.E (“Context and Process”), at 43–45 (manuscript on file with the George Washington International Law Review).

79. See *infra* note 232.

80. The actual number of cases filed for arbitration could be higher. The ICSID and its Additional Facility report a docket of pending arbitrations, but the UNCITRAL does not. See *List of Pending Cases*, *supra* note 43. In addition, cases could be settled before arbitration is formally begun.

81. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014–19 (1992); Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1369–71 (1993).

82. See Iris Winston, *Fueling the Debate Over MMT in Gasoline*, OTTAWA CITIZEN, Dec. 19, 1997.

83. Methylcyclopentadienyl Manganese Tricarbonyl.

84. See Samrat Ganguly, Note, *The Investor-State Dispute Mechanism (ISDM) and a Sovereign's Power to Protect Public Health*, 38 COLUM. J. TRANSNAT'L. L. 113, 152 (1999).

There is already considerable criticism of the use of the investor-state provisions in NAFTA to compensate regulatory takings, on the grounds that such use is an unwarranted infringement of national sovereignty.<sup>85</sup> As a result of the *Ethyl* case and other arbitrations for regulatory takings filed against it, Canada has expressed displeasure with the current form of Chapter 11. According to BNA, there are indications that Canadian officials have asked the United States and Mexico for discussions to clarify the Chapter 11 guarantees and that such discussions are underway.<sup>86</sup> Various top Canadian trade negotiators have expressed concern about Chapter 11's ambiguity and have said that none of the NAFTA parties had originally intended the provisions to be read so broadly. Some Canadians have said they hope the filing against the U.S. government in the *Loewen* case will help spur the United States to discuss clarifying Chapter 11.<sup>87</sup>

#### IV. USING NAFTA TO COMPENSATE FOR A U.S. VERDICT: DENIALS OF JUSTICE UNDER INTERNATIONAL LAW

The broadly-worded guarantees of Chapter 11 give a foreign entity that is situated similarly to Loewen respectable claims that state courts violated its NAFTA rights. The United States has long argued that nations should be liable for injustices committed in their courts, particularly in Latin American countries.<sup>88</sup> Now the United States must deal with the consequences of this doctrine being applied to its own courts. This Part explores features of the U.S. civil justice system that might be held to violate international law.

As Loewen's claims indicate, there are at least three provisions of NAFTA that may be invoked as a result of a judicial decision: (1) the obligation to treat investors from other NAFTA Parties no less favorably than its own investors (Article 1102), also known as the "nondiscrimination principle"; (2) the obligation to treat another NAFTA Party's investors "in accordance with international law, including fair and equitable treatment and full protection and security"

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85. *See generally id.*

86. *See U.S. Awaits Coming of "Millennium Round" of WTO Negotiations*, 16 INT'L TRADE REP. (BNA) 103 (Jan. 20, 1999) (reporting that the Canadian government has indicated displeasure with NAFTA Chapter 11 and in particular the Ethyl Corp. outcome); *NAFTA*, 17 INT'L TRADE REP. (BNA) 112 (Jan. 20, 2000) (reporting that NAFTA signatories had held a number of working group meetings to discuss clarification of Chapter 11).

87. *See Panel Expected*, *supra* note 19, at 81.

88. *See infra* text accompanying notes 96-99.

(Article 1105), known as the “minimum standard of treatment”; and (3) the obligation not to nationalize or expropriate the investments of another NAFTA Party’s investors unless this is done for a public purpose, in a nondiscriminatory way, with due process under international law, and paying fair market compensation (Article 1110). The discussion that follows will focus on the second of these claims, the “minimum standard of treatment” required by Article 1105. That minimum standard underlies Article 1110 claims for expropriation and also has much in common with Article 1102 claims about discriminatory treatment.

*A. The Definition of “Denial of Justice”*

The minimum standard of treatment for aliens is related to what is known in international law as “denial of justice.” “Denial of justice” is, however, much easier to state than to define. One prominent jurist has called this doctrine “one of the oldest and one of the worst elucidated in international law.”<sup>89</sup> As background to the discussion that follows, it is important to have some idea of how international law is made. In developed legal systems, there are definite means of identifying the law, such as reference to the constitution, statutes, and judicial decisions. Generally speaking, there is a well-defined hierarchy among them. However, the international arena lacks a hierarchical structure of institutions, and the problem of finding the law is much more complicated. Many accept the list of sources of international law enumerated in Article 38(1) of the Statute of the International Court of Justice.<sup>90</sup> The Article lists “international conventions” (treaties); “international custom, as evidence of a general practice accepted as law”; “the general principles of law recognized by civilized nations”; and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law” (the latter referring to the works of learned writers).<sup>91</sup>

89. Charles de Visscher, *Le déni de justice en droit international*, 52 RECUEIL DES COURS 369, 369 (1935 II) (translated by author); see also A.O. Adede, *A Fresh Look at the Meaning of the Doctrine of Denial of Justice Under International Law*, 14 CAN. Y.B. INT’L L. 73 (1976). For the early history of the concept, see Hans W. Spiegel, *Origin and Development of Denial of Justice*, 32 AM. J. INT’L L. 63 (1936).

90. See PETER MALANCZUK, *AKHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW* 36 (7th rev. ed. 1997).

91. Statute of the International Court of Justice art. 38(1); see also Maurice Mendelson,

Treaties are of growing importance in international law, but often they themselves refer to established principles of international law that are drawn from other sources. An example is the “minimum standard of treatment” in NAFTA Article 1105.<sup>92</sup> The second category, customary law, can be found in several sources. These include the actual practice of states—embodied in, among other things, correspondence with other states and the advice each state receives from its legal advisers—the decisions of international tribunals, and writings of international lawyers.<sup>93</sup> (There is considerable overlap in the categories listed in Article 38(1).) The third category, general principles of law, may involve principles specific to the international system or principles of domestic law common to most systems. Issues involving procedure, including denial of justice, tend to draw more heavily on domestic law principles.<sup>94</sup> As for the fourth category, including judicial decisions, in international law there is no formal *stare decisis* doctrine as known in common law countries, but international tribunals nearly always take previous decisions into account.<sup>95</sup>

A cluster of scholarship on denial-of-justice claims appeared in the 1930s, when expropriations were more common, and the topic continued to be of interest through the mid-1970s.<sup>96</sup> Recently there has been little, most likely because the numbers of expropriations have fallen.<sup>97</sup> In the earlier part of this century, there was considerable conflict between lesser-developed countries and capital-exporting countries over how the term was to be defined. Americans

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*The International Court of Justice and the Sources of International Law*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 63–89 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

92. See *supra* text accompanying notes 46–48.

93. See MALANCZUK, *supra* note 90, at 39.

94. See S. Verosta, *Denial of Justice*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Installment 1, 1007–10 (R. Bernhardt ed., 1992).

95. See MALANCZUK, *supra* note 90, at 51. My colleague Raj Bhala argues that there is *de facto* a *stare decisis* doctrine in certain areas of international law and that this should be recognized *de jure*. See Raj Bhala, *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AM. U. INT’L L. REV. 845, 849–52 (1999); Raj Bhala, *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 J. TRANSNAT’L L. & POL’Y 1 (1999).

96. See sources cited *supra* note 89 and *infra* note 104.

97. But see scholarship on the Iran-U.S. Claims Tribunal, the Libyan expropriations (especially Pat Norton in the American Journal of International Law), and the ELSI case (especially Sean D. Murphy, *The ELSI Case: An Investment Dispute at the International Court of Justice*, 16 YALE J. INT’L L. 391 (1991)), which involved other kinds of expropriation.

and British tended to define the term as broadly as possible, to include all sorts of injuries by whatever branch of government. Latin American writers, on the other hand, tended to define the term quite narrowly. In their view, it encompassed only denials of access to the courts; actual procedures and results could not be questioned. The Latin American view culminated in the “Calvo doctrine,” after the Argentinean Carlos Calvo, who formulated it. According to Calvo, “aliens who establish themselves in a country are certainly entitled to the same rights of protection as nationals, but they cannot claim any greater measure of protection.”<sup>98</sup> The view was that once access to the courts had been granted to a foreigner in the same manner in which it would be granted to a native, there could be no claim of denial of justice.<sup>99</sup>

The phrase “denial of justice” has been used in three senses. In the broadest sense, the phrase “seems to embrace the whole field of State responsibility, and has been applied to all types of wrongful conduct on the part of the State toward aliens.”<sup>100</sup> This might include conduct by the executive and the legislature as well as the judiciary. In the narrowest sense, the phrase is “limited to refusal of a State to grant an alien access to its courts or a failure of a court to pronounce a judgment.”<sup>101</sup> There is also an intermediate sense, in which the phrase “is employed in connection with the improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions.”<sup>102</sup> The first special rapporteur, charged with drafting a code on state responsibility to aliens for the International Law Commission, concluded that the intermediate sense was the most appropriate. It described a “particular . . . wrong for which no other adequate phrase exists” in the law<sup>103</sup> and, presumably, was broad enough to encompass a variety of wrongdoing by the courts.

It will be seen that this “intermediate sense” of denial of justice encompasses both procedural and substantive wrongdoing by the

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98. 6 M. CHARLES CALVO, *LE DROIT INTERNATIONAL* 231 (5th ed. 1896) (translation by author).

99. *See* Adede, *supra* note 89, at 78–79.

100. F.V. GARCÍA-AMADOR ET AL., *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 180 (1974).

101. *Id.*

102. *Id.*

103. *Id.*

court—both improper procedures and unjust decisions. This dual definition of denial of justice has become widespread in this century—in scholarly debate, in attempts to codify the law of state responsibility to aliens, and in arbitral decisions. One of the most influential treatises on denial of justice states that “steady international practice . . . as well as the overwhelming preponderance of legal authority, recognizes that not only flagrant procedural irregularities and deficiencies may justify diplomatic complaint, but also gross defects in the substance of the judgment itself.”<sup>104</sup>

### *B. Denial of Procedural Justice*

Much of what used to fall under the rubric of denials of procedural justice is now part of international human rights law and mainly concerns criminal cases.<sup>105</sup> Nevertheless, there are also procedural obligations to aliens in civil cases. One respected treatise writer

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104. ALWYN V. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* 309 (Kraus Reprint Co. 1970) (1938). One of the most prominent cases to make a distinction between procedural and substantive injustice, and to claim that international law prohibits both, was the *Cotesworth and Powell* case (Great Britain v. Colombia), in 2 JOHN BASSETT MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 2050 (1898) (the case, however, used the term “denial of justice” for procedural injustice alone and the term “notorious injustice” for substantive injustice). Other sources supporting the dual definition of denial of justice include *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* §§ 178–82 (1965); F.V. GARCÍA-AMADOR, *DRAFT ARTICLES ON THE RESPONSIBILITY OF THE STATE FOR INJURIES CAUSED IN ITS TERRITORY TO THE PERSON OR PROPERTY OF ALIENS*, arts. 5–8; Adede, *supra* note 89, at 76, 91 (submitted to the International Law Commission, 1957–1961) (reprinted in GARCÍA-AMADOR ET AL., *supra* note 100, at 139, 179–99). The Third Restatement of Foreign Relations Law is considerably vaguer on the subject of denial of justice. The Third Restatement simply provides, in section 712, titled “State Responsibility for Economic Injury to Nationals of Other States,” that

- [a] state is responsible under international law for injury resulting from:
- (1) a taking by the state of the property of a national of another state that
    - (a) is not for a public purpose, or
    - (b) is discriminatory, or
    - (c) is not accompanied by provision for just compensation; . . . or
    - . . . .
  - (3) other arbitrary or discriminatory acts or omissions by the state that impair property or other economic interests of a national of another state.

*RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 712 (1987). Comments to the Restatement briefly note that there is a relationship between economic injury and denial of justice and mention the requirement in international law that an “impartial determination” be made in the case of a taking. *Id.* cmt. j.

105. *See, e.g.*, *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 711 cmt. a (1987).



observes that “[i]n a general way, the conduct of a trial with palpable injustice or in violation of the settled forms of law or of those rules for the maintenance of justice which are sanctioned by international law warrants diplomatic interposition.”<sup>106</sup> These rules include, for example, the obligations to provide an alien access to the courts; to refrain from judicial action without giving an alien a hearing and time to prepare a defense; to allow an alien to produce evidence or to summon important witnesses; and to resolve the case with reasonable dispatch.<sup>107</sup> To be a violation of international law, a procedural deficiency must have “prejudiced materially the alien’s defense” or claim.<sup>108</sup>

### *1. Partiality of state judges and juries*

Especially significant regarding claims about American judgments are two internationally-recognized procedural rights: the right to an impartial tribunal<sup>109</sup> and to freedom from unfair discrimination against the alien because of alienage.<sup>110</sup> (Note the close relationship between the latter aspect of denial of procedural justice and the non-discrimination principle under NAFTA Article 1102.) The decisions of international tribunals concerning the right to an impartial court have tended to focus on executive pressure on the judiciary,<sup>111</sup> but

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106. EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* 338 (1922); see also Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, Article 9*, 23 AM. J. INT’L L. 133 (1929) (denial of justice includes “gross deficiency in the administration of judicial or remedial process”).

107. See GARCÍA-AMADOR, *supra* note 104, art. 7; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 181 (1965); FREEMAN, *supra* note 104, at 267–68.

108. FREEMAN, *supra* note 104, at 269.

109. See Wheelock case, 4 JOHN BASSET MOORE, *DIGEST OF INTERNATIONAL LAW* 769 (1906); GARCÍA-AMADOR, *supra* note 104, art. 7 (requirement of an “independent tribunal”); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 181(a) (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 cmt. j (1987); Fabiani case, 5 JOHN BASSET MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 4878 (1903).

110. See FREEMAN, *supra* note 104, at 268–69.

111. See The R.E. Brown claim (United States v. Great Britain 1923), NIELSON’S REPORT 163, 198 (1926); Fabiani case, *supra* note 109, at 4877, 4882, 4901; Idler v. Venezuela (United States v. Venezuela 1885), 4 JOHN BASSET MOORE, *HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY* 3491, 3516 (1898).

there is no logical reason why a denial-of-justice claim might not also be based on partiality toward a litigant in the absence of executive pressure, particularly if that partiality is due to financial incentives. It could be argued that some American state court judges, such as the Mississippi trial judge and appellate judges in the *Loewen* case, are not impartial but rather favor the plaintiff and (perhaps more significantly) the plaintiff's lawyer for reasons connected with judicial elections and campaign financing.<sup>112</sup>

The problem of bias is not the same in all American courts; the incentives of federal and state judges are somewhat different. There is a large literature on the relative merits of federal and state courts.<sup>113</sup> These scholars are addressing the question of whether state courts are capable of adequately enforcing federal rights and of deciding diversity cases.<sup>114</sup> Many writers have concluded that state judges are quite capable of handling these cases; a sizable contingent has argued the opposite.<sup>115</sup> However, scholars on both sides employ mostly abstract arguments and do not explore in detail the pressures on state judges created by processes such as judicial elections. If they discuss judicial elections at all, they tend to do so at an abstract level. But the specific forces in judicial election campaigns that operate on the ground are crucial to understanding the incentives of state judges.<sup>116</sup> This section explores these incentives and the impact they

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112. Interestingly, *Loewen* did not make this argument in its Notice of Claim.

113. The debate was given a great boost by an article written by Burt Neuborne in the late 1970s. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

114. The debate over diversity jurisdiction is discussed in more detail *infra* Part VI.B.

115. There is a good summary of the literature in a recent article by Brett Gerry. See Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 245-52 (1999).

116. See, e.g., Martha A. Field, *The Meaning of Federalism*, 23 OHIO N.U. L. REV. 1365, 1376 (1997) (briefly noting that judicial elections may make it difficult for judges to take a countermajoritarian position; in symposium on Fear and Federalism); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 971, 1014 (2000) (briefly noting that judicial elections may make it difficult for judges to take a countermajoritarian position). Two notable exceptions are Hans A. Linde, *The Judge as Political Candidate*, 40 CLEV. ST. L. REV. 1 (1992); Brittain Shaw McInnis, Comment, *The \$75,000.01 Question: What Is the Value of Injunctive Relief?*, 6 GEO. MASON L. REV. 1013, 1024-30 (1998). Also, the death penalty literature has spawned interest in judicial elections. See, e.g., Stephen B. Bright & Patrick K. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995); Norman Redlich et. al., *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 FORDHAM URB. L.J. 239, 280-98 (1994).

could have on U.S. liability under international law.

The daily practice of many lawyers indicates that local bias is a problem in certain areas. Empirical studies surveying lawyers confirm anecdotal evidence.<sup>117</sup> One study found that over fifty percent of defense lawyers reported bias against out-of-staters in their state cases. Over a quarter of plaintiffs' lawyers admitted this bias.<sup>118</sup> Lawyers for out-of-state defendants readily acknowledge that suits brought in certain areas of particular states command a "settlement premium" because of the native bias of judges and juries in these areas.<sup>119</sup> To collect this premium or a higher verdict, plaintiffs' lawyers take elaborate care to lay venue in one of these areas. The plaintiffs' bar also acknowledges that it often prefers to bring claims in state rather than federal court. Willie Gary himself, the plaintiffs' lawyer in the *Loewen* case, has said he generally brings his cases in state court and prefers that venue; he vigorously tries to defeat defendants' efforts to remove cases to federal court.<sup>120</sup>

A few elected state judges have been remarkably candid about the pressures they face. Formerly chief justice of the West Virginia

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117. See Kristin Bumiller, *Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform*, 15 L. & SOC'Y. REV. 749, 761-62 (1981) (finding that local bias was a significant factor in rural districts).

118. See Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 409, 411 (1992) (finding bias especially pronounced in southern states).

119. This point about settlement premiums is widely acknowledged in the literature aimed at practitioners but not so much discussed in academic literature. See, e.g., Kevin J. Conway et al., *Evaluation of a Premises Liability Case for Purposes of Settlement or Trial*, Illinois Institute for Continuing Legal Education, Premises Liability (Main Handbook) § 10.8 (noting that venue is an important consideration in evaluating a case for settlement; history of settlements and verdicts in various possible venues should be carefully researched); Susan M. Karten, *Evaluation of a Plaintiff's Case from the Plaintiff's Perspective*, 613 PRAC. L. INST. 7, 9 (1999) (noting that venue is an important consideration in evaluating a case for settlement); Anthony Scirica et al., *Debate: Punitive Damages*, 41 N.Y.L. SCH. L. REV. 577, 585-86 (1997) (remarks of Thomas Gottschalk, general counsel of General Motors: "Settlement costs are driven up by the threat of punitive damages awarded by juries sitting in these pro-plaintiff venues."); Beth Shapiro, *Evaluation of a Defendant's Case from a Defendant's Perspective*, 613 PRAC. L. INST. 15, 19 (1999) (noting that venue is an important consideration in evaluating a case for settlement).

120. "Mr. Gary said he prefers state courts and no wonder: With their local judges and juries, a state courtroom can be more familiar ground for lawyers used to pursuing compensation for injured workers or other similar plaintiffs. *And it is decidedly unfriendly terrain for a large corporation.*" McKay, *supra* note 20, at B1 (emphasis added); see also *Coca-Cola Files to Have Second Race-Bias Suit Moved to Federal Court*, WALL ST. J., July 17, 2000, at B7 (describing Coca-Cola's efforts to remove a \$1.5 billion suit filed by Willie Gary to federal court and Mr. Gary's intention to fight removal).

Supreme Court of Appeals and currently a plaintiffs' lawyer, Richard Neely—who gave an affidavit for Loewen submitted with its notice of claim—wrote several books while he was still a judge that described the incentives of state judges faced with out-of-state defendants. Based on many years' experience as a state elected judge and on discussions with numerous elected judges from other states, he described how elected judges depend on local support to win and keep a seat on the bench. Neely put it this way:

As long as I am allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone else's money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will reelect me.<sup>121</sup>

While he was a judge, Neely was rather careful in his books to avoid the topic of campaign contributions by lawyers. His Loewen affidavit, written since he has become a plaintiffs' lawyer, is more explicit on the subject. (Of course, Neely most likely did not write the affidavit for free.) Neely said, because of his experience and numerous discussions over the years with elected judges from other states, that the judicial campaign contributions of plaintiffs' lawyers are typically generous. “[T]he lawyers who regularly represent plaintiffs in personal injury, class action and toxic tort cases contribute handsomely to judicial campaigns.”<sup>122</sup> This is so because contingency fees give plaintiffs' lawyers a direct personal stake in the outcome of trials. “A judge can allow a plaintiffs' lawyer to retire early in life on a handsome income with one discretionary ruling! When multi-million dollar judgments are involved, a judge's decision not to set aside a

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121. RICHARD NEELY, *THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS* 4 (1988).

Obviously, in any elected system there is a strong temptation to decide cases in favor of the local folks who vote, rather than in favor of the out-of-state folks who do not. State judicial races (particularly at the appellate level where elections are statewide) are increasingly becoming high-profile, high-cost, media events. When this occurs, judges must raise money from somebody. Unfortunately, it is a rare judge who is so well loved that he can raise money from everyone in an evenhanded way. In fact, well-loved judges can't raise money from anyone at all. Litigants don't want judges who will be intelligent and fair; litigants want judges who will decide cases their way. *See id.* at 24.

122. Neely Opinion, *supra* note 57, at 5.

punitive damage award may make a plaintiff's lawyer millions of dollars after taxes."<sup>123</sup>

Defense lawyers, in contrast, are usually paid by some method that is independent of the outcome of a case. Consequently, they have less of a personal stake in currying favor with judges. "Although the defense bar can put together numerous modest and reluctant contributions, the plaintiffs' bar will cheerfully provide large individual contributions to their friends on the bench."<sup>124</sup> In a state like Mississippi that has officially nonpartisan elections, campaign contributions, ironically, are especially important. Candidates cannot rely for support on party affiliation but must become known by spending a great deal of money.<sup>125</sup> Local businesses can somewhat counteract the plaintiffs' bar's contributions because they too contribute to judicial campaigns and have a certain presence in the community. But out-of-state defendants are relatively defenseless. Neither they nor their lawyers contribute substantial sums, nor do they typically employ many people in the local community.<sup>126</sup> In addition to the incentives of elected judges, juries in certain areas have strong populist and local biases.<sup>127</sup> The result is large verdicts in favor of in-state plaintiffs against out-of-state defendants.<sup>128</sup> Other sources, examining the effects of contributions on judicial campaigns in Texas, Alabama, and Philadelphia, corroborate Neely's account.<sup>129</sup>

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123. *Id.*

124. *Id.*

125. *See id.* at 4. There is no conflict between this conclusion and the Helland and Tabarrok studies; Helland and Tabarrok lumped together all forms of judicial selection that did not involve partisan elections, including merit plan appointments and retention elections.

126. *See id.* at 5-6; NEELY, *supra* note 121, at 45 ("When all litigants live, vote, hire workers, and pay taxes in the same jurisdiction, the tension between firm rules and necessary flexibility can be kept within reasonable bounds. . . . In-state defendants are often protected by local juries, but out-of-state defendants have nothing to rely upon but a firm set of legal rules.").

127. *See* Neely Opinion, *supra* note 57, at 4 ("The populist disposition of juries in many Mississippi judicial districts makes Mississippi an attractive venue for high-stakes tort litigation . . .").

128. *See* NEELY, *supra* note 121, at 15, 24-17, 45.

129. *See, e.g.*, WINTHROP E. JOHNSON, *COURTING VOTES IN ALABAMA* (1999) (describing how the 1994 campaign for seats on the Alabama Supreme Court became a battle between plaintiffs' lawyers and business interests); Pamela Willis Baschab, *Putting the Cash Cow Out to Pasture: A Call to Arms for Campaign Finance Reform in the Alabama Judiciary*, 30 CUMB. L. REV. 11, 17-18 (2000); *Congress, Judicial Conference Mull Changes to Class Action, Mass Tort Rules*, 67 U.S.L.W. 2723, 2723 (June 8, 1999) (describing views that "[s]tate courts are the forum of choice for plaintiffs' attorneys . . . because they can capitalize on the political good-

Empirical work covering a broader geographical range—the entire United States—also corroborates Neely’s account. Until recently, empirical work on jury awards did not focus on the factors of in-state plaintiffs and out-of-state defendants, nor on judicial elections.<sup>130</sup> Recent studies by Eric Helland and Alexander Tabarrok

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will with their local elected judges.”). Several Texas Supreme Court justices accepted campaign contributions of nearly \$400 thousand from lawyers representing Pennzoil and Texaco during their famous \$11 billion lawsuit. Some of the justices who accepted contributions were not even up for reelection. Sheila Kaplan, *Justice for Sale*, COMMON CAUSE MAG., May/June 1987, at 29–32. In that case, in-state Pennzoil won a massive judgment against New York-based Texaco, and the Texas Supreme Court refused to reduce the appeal bond, effectively denying Texaco an appeal. The *Dallas Morning News* described how judges often heard cases argued by major contributors and even key fundraisers; lawyers frequently contributed money to a judge’s campaign just days before their cases were due to be heard by that judge. See Mark Edgar & Steve McGonigle, *Judges Routinely Hear Contributors’ Cases*, DALLAS MORNING NEWS, Mar. 22, 1987, at A1. A survey, which was supervised by the Texas Supreme Court and to which 51% of Texas judges responded, indicated that 48% of judges “considered campaign donations to be ‘fairly’ or ‘very’ influential” in affecting judges’ decisions. Osler McCarthy, *Campaign Gifts Sway Judges, 48% Say in Poll*, AUSTIN-AM. STATESMAN, June 10, 1999, at B1. A two-year study of Philadelphia’s municipal and common pleas courts found that attorneys’ judicial campaign contributions were linked to favorable decisions. H.G. Bissinger & Daniel R. Biddle, *Politics and Private Dealings Beset the City’s Justice System*, PHILADELPHIA INQUIRER, Jan. 26, 1986; see also HARRY P. STUMPF & JOHN H. CULVER, *THE POLITICS OF STATE COURTS* 43–45 (1992); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, L. & COMTEMP. PROBS., Summer 1998, at 75, 105–06; Roy A. Schotland, *Elective Judges’ Campaign Financing: Are State Judges’ Robes the Emperor’s Clothes of American Democracy?*, 2 J.L. & POL. 57 (1985).

130. Much empirical work has tended to focus on overall rates of punitive damages, with many authors arguing that punitive damages are neither as frequent nor as high as the popular view. See, e.g., Galanter, *supra* note 5; Rustad, *supra* note 5; Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 623–24 (1997); ERIK MOLLER, RAND INSTITUTE FOR CIVIL JUSTICE, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985*, xviii (1996). Others are concerned about the effects of punitive awards in certain areas of substantive law and about the unpredictability of punitive awards. See W. Kip Viscusi, *The Social Cost of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1988); Cass R. Sunstein et al., *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2078–79 (1988); ERIK MOLLER ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, *PUNITIVE DAMAGES IN FINANCIAL INJURY JURY VERDICTS* 22 (1997).

Previous empirical work did tend to show that mean jury awards in most categories of cases are vastly higher than median awards. In one study, which drew from a sample of the nation’s 75 largest counties in 1992, the median jury verdict (for all categories, not just tort) was \$50,000, while the mean was \$735,000. See Galanter, *supra* note 5, at 1133–35; see also David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 361 (1998) (summarizing studies). This suggests that there are in effect two damage systems in the country; a small world of very high damage awards and a larger one of lesser awards. It could be argued that drawing samples from the nation’s largest counties may underestimate jury verdicts, since some of the largest awards will probably come from rural areas where county population is low and populist feeling is strong. Of course, the statistics on jury awards are probably

show that where judges are elected in partisan contests the average tort award in a case involving an in-state plaintiff and an out-of-state defendant is 42% higher than in states that do not use partisan judicial elections.<sup>131</sup> The studies attempted to correct for differences in state law by examining diversity jurisdiction cases in federal court. The authors calculate that two-thirds of the 42% difference is due to bias against out-of-state defendants and the rest to generally higher awards against businesses in states that use partisan judicial election.<sup>132</sup> In explaining their findings, Helland and Tabarrok point to the likely powerful influence of trial lawyer donations to judicial campaigns.<sup>133</sup> The Texas Court of Appeals has stated, in a case in which billions of dollars were awarded against an out-of-state corporation, that “[i]t is not surprising that attorneys are the principal source of contributions in a judicial election,” and that “[a] candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring.”<sup>134</sup> In response to the out-of-state defendant’s argument that Texas judges who received campaign contributions from the plaintiff’s lawyers should have recused themselves, that court stated: “If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.”<sup>135</sup>

Various rulings by the elected trial judge in the *Loewen* case suggest that the judge was not impartial and may well have been affected by the dynamic explained above. The judge did not attempt to control plaintiff’s lawyer Mr. Gary in his numerous references to

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misleading as to what is actually happening in the legal system because the pressure to settle certain cases is immense; most of the most pro-plaintiff cases presumably never go to a jury. This would probably be especially true where the plaintiff is an in-state individual, the defendant an out-of-state corporation, the venue is known for populist juries, and the judges are elected.

131. Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, Independent Institute Working Paper #1 (visited Feb. 16, 2001) <<http://www.independent.org/tii/WorkingPapers/ElectoralInstitutions.pdf>> [hereinafter *Electoral Institutions*]; see also Eric Helland & Alexander Tabarrok, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 177–83 (1999) [hereinafter *Court Politics*].

132. Helland & Tabarrok, *Electoral Institutions*, *supra* note 131, at 28–29.

133. *Id.* at 6–7; Helland & Tabarrok, *Court Politics*, *supra* note 131, at 158–61.

134. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W. 2d 768, 843 (Tex. App. 1987), *cert. dismissed*, 485 U.S. 994 (1987).

135. *Id.*

race, wealth, and Canadian citizenship, despite repeated objections by defense counsel. Indeed, during a bench conference, the judge suggested that references to race were fair game,<sup>136</sup> although race had nothing to do with the issues in the case and both the parties were white. The trial judge also apparently did not consider Loewen's motion to reduce excessive punitive damages before he entered judgment, which was arguably required under the Due Process standards set out by the U.S. Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*.<sup>137</sup> Even apart from the U.S. Supreme Court's standards, basic fairness or the appearance of propriety would have suggested a hearing on the issue of reduction of punitive damages in a case of Loewen's magnitude.

Perhaps most telling was the trial court's handling of compensatory damages. After their initial deliberations, the jurors came in with a verdict of \$260 million. A note from the foreman explained that they intended \$100 million in compensatory damages and \$160 million in punitive damages.<sup>138</sup> At that point, the judge said that the trial had to be bifurcated between the compensatory and punitive damages phases, as had been agreed before trial but had not been reflected in his instructions.<sup>139</sup> The judge then, on the basis of the foreman's note and overruling Loewen's motion that the jury be polled, reformed the jury verdict to consist of \$100 million in compensatory damages.<sup>140</sup> The punitive damages phase then began. The plaintiffs, in their complaint, had asked for \$26 million in compensatory damages.<sup>141</sup> Mississippi rules provide that "final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings,"<sup>142</sup> so the judge actually reformed the jury verdict to an amount inconsistent with Mississippi law.

Although hard data are lacking, adding a defendant's foreign nationality to the mix would likely exacerbate the usual problems with

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136. See Transcript, *supra* note 22, at 3595-97.

137. 499 U.S. 1 (1991).

138. See Transcript, *supra* note 22, at 5739.

139. See *id.* at 5752-53.

140. See *id.* at 5753.

141. See Third Amended and Supplemental Complaint, Jeremiah J. O'Keefe, et al. v. The Loewen Group, Inc., et al., No. 91-67-423 (Cir. Ct., 1st Judicial Dist. Hinds County), at 79-82.

142. MISS. R. OF CIV. P. 54(c) (1999).



out-of-state defendants.<sup>143</sup> (It should be noted that under the NAFTA minimum treatment standard there is no precondition for recovery that a foreign defendant be treated worse than a U.S. one. If the tribunal is impermissibly partial, it does not matter whether it is more partial in a case involving an alien or not.)<sup>144</sup> Plaintiffs' lawyers would have an even easier target, being able to play on nationalist as well as local prejudices.

## 2. *Efforts by counsel to stir up prejudice*

Indeed, the *Loewen* case and several others suggest plaintiffs' lawyers take full advantage of the additional opportunities presented by a foreign defendant.<sup>145</sup> The Mississippi jury may well have been moved by what appear to have been plaintiff's counsel's frequent references to Loewen's Canadian connections as well as racial and class matters. In this area, as in others, the United States has brought claims against Latin American countries for similar problems in their courts. In several international arbitrations, inflammatory and prejudicial remarks at trial about defendant's citizenship were held to have violated international law. For instance, the Cuban trial of an American was held to have violated international law in part because it was conducted with "long political harangues" that were irrelevant and prejudicial.<sup>146</sup> A Panamanian trial was also found to have violated in-

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143. See Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 39-40 (1996). Kevin Clermont and Theodore Eisenberg have done an empirical study suggesting that xenophobia is not "rampant in American courts." Kevin M. Clermont & Theodore Eisenberg, Commentary, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121 (1996). On the contrary, they find that foreign plaintiffs and defendants win substantially more often than domestic litigants. *Id.* However, their data comes exclusively from federal civil cases and therefore says nothing about possible bias in state court. This data indicating lack of bias in federal court does suggest that removing state cases would be beneficial.

144. The minimum standard of treatment under NAFTA Article 1105 is independent of the requirement of equal treatment under Article 1102. See *supra* text accompanying notes 46-48.

145. See, e.g., *Haryanto v. Saeed*, 860 S.W.2d 913, 927-28 (Tex. App. 1993) (Robertson, J., dissenting) (quoting closing argument playing on nativist themes); *Brits Discover North Carolina*, WALL ST. J., Aug. 25, 1997, at A18 (\$600 million verdict awarded against British company in Meineke muffler franchise case; jurors were told that the British defendant is a "foreign company preoccupied with one thing: Money," and the jurors needed to "send a message to foreign companies").

146. *In the Matter of Jennie M. Fuller* (United States v. Cuba), 1971 FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES, ANNUAL REPORT TO CONGRESS 53, 58-59. See also 8 MARJORIE M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 720 (1967).

ternational law because the Panamanian government “denounced” the United States during the trial and “improperly went out of [its] way to excite hostility” against the American defendant.<sup>147</sup> In that case, the United States-Panama Claims Commission concluded that the trial had been influenced by “strong local sentiment”:<sup>148</sup>

The Commission cannot avoid the conclusion . . . that the claimant’s conviction was unconsciously influenced by strong popular feeling . . . . The unavoidable susceptibility of local judges to local sentiment is a matter of common knowledge. One of the primary purposes of international arbitration is to avoid just such susceptibility, and to remedy its consequences.”<sup>149</sup>

### *C. Denial of Substantive Justice*

#### *1. Unjust decisions*

Foreigners such as Loewen also may bring claims based on denial of substantive justice. This is not an easy standard to meet. International law sources agree that mere error in a decision is not enough to constitute a denial of substantive justice. Gross defects in the substance of the judgment must exist.<sup>150</sup> Most scholars and arbitral panels have taken a position similar to that of the British government in the *R.E. Brown* claim:

Even if the Honorable Arbitrators may think that if they had been sitting as members of the High Court of the South African Republic . . . they would have arrived at a different decision, that is not sufficient to constitute a denial of justice entitling an International Tribunal to award compensation. A decision does not constitute a denial of justice unless it is so obviously wrong and unjust that no court could honestly have arrived at such a conclusion.<sup>151</sup>

147. *Solomon v. Panama* (United States v. Panama), 6 R.I.A.A. 370, 373 (1933).

148. *Id.*

149. *Id.* at 479–81.

150. See FREEMAN, *supra* note 104, at 319.

151. *Answer of the British Government in the R.E. Brown Claim*, quoted in NIELSEN’S REPORT 252 (1926). See, e.g., *The Texas Company Claim*, Decision 32-B, AMERICAN MEXICAN CLAIMS REPORT, 142, 143 (1948) (“palpable injustice in the administration of law” violates international law); BORCHARD, *supra* note 106, at 340; Harvard Research in International Law, *supra* note 106 (“manifestly unjust judgment” violates international law); Adede, *supra* note 89, at 91.

This standard in effect uses the substantive injustice as indirect evidence of partiality or corruption in the tribunal. This limitation would seem to be necessary to prevent undue interference with a nation's sovereignty, discussed in more detail below.

The United States has repeatedly endorsed the view that denials of justice include manifestly unjust decisions. In the *Denham Claim* against Panama, the United States argued that "a nation is responsible for the *manifestly unjust* decisions of its courts."<sup>152</sup> Earlier in U.S. history, the U.S. Secretary of State wrote that judicial decisions violate international law "when palpable injustice had been done, or a manifest violation had been committed of the rules and forms of proceeding."<sup>153</sup> Alexander Hamilton also seems to have had this understanding of international law.<sup>154</sup>

The United States has benefited from this view of international law in several arbitrations, once again particularly those involving Latin American countries. For example, in the *Rihani Claim* (United States v. Mexico), an international arbitral panel held that a "clear and notorious injustice" violates international law.<sup>155</sup> Therefore, an international arbitral panel may "put aside a national decision presented before it" and "scrutinize its grounds of fact and law."<sup>156</sup> In that case, an international commission reviewed a decision by the Mexican Supreme Court in a civil case and found it to be "such a gross and wrongful error as to constitute a denial of justice."<sup>157</sup> In *Bronner v. Mexico* (United States v. Mexico), an international umpire awarded compensation to a claimant whose goods had been confiscated by Mexican customs authorities.<sup>158</sup> A Mexican court had decided that the confiscation was allowable, but the umpire found that the decision was "so unfair as to amount to a denial of

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152. *Denham Claim* (United States v. Panama 1933), HUNT'S REPORT 491, 506 (1934).

153. Letter from Mr. Forsyth, Secretary of State, to Mr. Welsh, Mar. 14, 1835, in 6 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 696 (1906).

154. See THE FEDERALIST NO. 80, *supra* note 1, at 476-77.

155. *Rihani Claim*, Decision 27-C, AMERICAN MEXICAN CLAIMS REPORT 254, 257 (1948).

156. *Id.*

157. *Id.*

158. *Bronner v. Mexico* (United States v. Mexico 1874), 3 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3134 (1898).

justice.”<sup>159</sup>

A NAFTA tribunal has actually addressed allegations that the Mexican courts denied justice to U.S. investors in *Azinian v. United Mexican States*.<sup>160</sup> In that case, a unanimous ICSID Additional Facility panel discussed the possibility of challenging a court’s decision as a violation of NAFTA. The panel’s consideration of the subject was not central to the decision, since the claimant had not directly alleged such a violation. But the panel addressed the issue because it did not want to be perceived as closing off a claim because of improper pleading.<sup>161</sup> While NAFTA arbitration decisions do not have formal precedential value as in a common law system, the decision of such a panel is some indication of the approach other panels might take.

In *Azinian*, a group of American investors formed a California-based company called Desechos Solidos de Naucalpan (“DESONA”). The company bid on the management of a solid-waste landfill in Naucalpan de Juarez, Mexico. After spending \$3 million on bidding and negotiation, the company entered into a fifteen-year contract with the municipality. Shortly afterward, the municipality nullified the agreement. The principals of DESONA filed a claim against the Mexican government under NAFTA, alleging breaches of NAFTA Articles 1105 (minimum standard of treatment for foreign investors: compliance with international law) and 1110 (unlawful expropriation) and seeking over \$17 million in damages.<sup>162</sup> The Mexican government contended that nullification of the agreement was justified because the contract was invalid from the start under Mexican law governing public service contracts. (The contract was by its terms subject to Mexican law and to the jurisdiction of Mexican courts.) DESONA brought claims against the municipality in Mexican courts. After testing by three court levels, the Mexican courts declared that the municipality was justified in nullifying the contract for invalidity.

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159. *Id.*; see also the Burt Case (United States v. Great Britain 1923), NIELSEN’S REPORT 588, 596–97 (1926) (international tribunal held the result of a property adjudication by the Fiji Islands’ Board of Land Commissioners to be unjust and ordered that the claimant receive just compensation).

160. ICSID AF No. ARB(AF)/97/2 (ICSID-AF Arbitral Trib. 1999) (visited Feb. 16, 2001) <[http://www.worldbank.org/icsid/cases/robert\\_award.pdf](http://www.worldbank.org/icsid/cases/robert_award.pdf)> [hereinafter *Azinian*].

161. See *Azinian*, para. 101.

162. The arbitration panel consisted of Benjamin R. Civiletti, former Attorney General of the United States; Claus von Wobeser of Mexico; and Jan Paulsson of France, who presided.

The panel was at pains to emphasize it was not reviewing the Mexican court decisions as if it had plenary appellate jurisdiction. It insisted the DESONA claimants must show “either a denial of justice, or a pretence [sic] of form to achieve an internationally unlawful end.”<sup>163</sup> The award said denial of justice occurs if courts “refuse to entertain a suit, if they subject it to undue delay, or if they administer justice in a seriously inadequate way”<sup>164</sup> or if they engage in a “clear and malicious misapplication of the law.”<sup>165</sup> (The latter, the panel noted, would seem to overlap with the notion of “pretence of form” masking a violation of international law.)<sup>166</sup>

The *Azinian* panel concluded that the findings of the Mexican courts could not possibly be considered arbitrary, let alone malicious. As an example, the panel examined one of the twenty-seven irregularities upheld by the Mexican courts as a cause for nullifying the contract: that the municipality was misled about DESONA’s ability to perform the contract. Examining the record in some detail, the panel found ample evidence of material misrepresentations by DESONA before the contract was signed. The panel determined that claimants had failed to make the necessary showing that “the evidence for this finding was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious.”<sup>167</sup>

## 2. Excessive damages

An important problem with some American civil verdicts is the huge amount of damages awarded, especially punitive damages. The *Loewen* case serves as an example. An award of excessive damages could be a denial of substantive justice under international law. This conclusion is reached by analogy to the international law approach to criminal cases: courts are said to violate international law when they impose unreasonably harsh sentences on aliens.<sup>168</sup> Citing these prin-

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163. *Azinian*, para. 99.

164. *Azinian*, para.102. This definition was taken from the Harvard study.

165. *Azinian*, para. 103.

166. *Azinian*, para. 103.

167. *Azinian*, para. 105.

168. See, e.g., Bonhomme Case, 18 BRIT. AND FOR. STATE PAPERS 341–440 (1831); Dyches Claim (United States v. Mexico), OPINIONS OF THE COMMISSIONERS 193, 197 (1929); Quintanilla Claim (Mexico v. United States 1926), OPINIONS OF THE COMMISSIONERS 136, 138 (1927); Solomon v. Panama, 6 R.I.A.A. 370, 479–81 (1933); FREEMAN, *supra* note 104, at 348–51; 8 WHITEMAN, *supra* note 146, at 348–49 (claimant, who had been arrested for

principles, the U.S. government has taken the position that a judgment in a civil case that was disproportionate to the underlying breach of legal duty is a denial of justice under international law.<sup>169</sup> Punitive damages, in particular, are suspect under international law. Most countries do not recognize punitive damages at all.<sup>170</sup> Those that do allow punitive damages in some circumstances are concerned about the size of awards in the United States.<sup>171</sup> There is also concern about large awards for emotional distress or pain and suffering.<sup>172</sup> These differences in treatment of damages between the United States and other justice systems have been a major stumbling block to the development of a Hague Convention on the Recognition and Enforcement of Judgments. Other countries are frightened at the prospect of being required to enforce large U.S. punitive and compensatory damages, while the United States considers these to be important.<sup>173</sup> But international law “may be ascertained . . . by the general usage and practice of nations,”<sup>174</sup> and, regarding these issues,

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breach of public decency in company with Portuguese students, was sentenced to be publicly whipped and banished, unlike Portuguese companions).

169. See *Denham Claim* (United States v. Panama 1933), HUNT’S REPORT 491, 506 (1934).

170. See, e.g., Ronald A. Brand, *Punitive Damages and the Recognition of Judgments*, 43 NETH. INT’L. L. REV. 143, 165, 168 n.150 (1996); Cortese & Blaner, *supra* note 6, at 152; Takeshi Kojima, *Cooperation in International Procedural Conflicts: Prospects and Benefits*, 57 LAW & CONTEMP. PROBS. 59, 64 (1994).

171. See, e.g., RICHARD H. KREINDLER & JUDITH L. HOLDSWORTH, TRANSNATIONAL LITIGATION: A PRACTITIONER’S GUIDE, at CAN-82 (1997) (Canada would not enforce “[a]wards of punitive damages on the scale seen in some American jurisdictions”). Even the U.S. Supreme Court has said that punitive damages must be proportionate to the harm done. See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 574–75 (1996) (ruling that punitive damages of 500 times compensatory damages awarded in Alabama trial were so “grossly excessive” as to violate Fourteenth Amendment).

172. See, e.g., *Baird v. Bell Helicopter Textron*, 491 F. Supp. 1129, 1149 (N.D. Tex. 1980) (“However similar the laws of Texas and Canada may be with regard to compensatory damages, they are widely divergent in the areas of compensation for pain and suffering.”); *Re the Enforcement of a U.S. Judgment*, 3 INT’L LITIG. PROC. 430, 437–38 (1992) (German court refuses to recognize U.S. award for pain and suffering). See also the Warsaw Convention, prohibiting pain and suffering awards in airplane crash cases.

173. See Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 BROOK. J. INT’L L. 75, 109 (1998) (pointing out that one of the “largest obstacles to a successful Hague Convention” is “dealing with what some Member States regard as excessive damages awards,” which has been a bone of contention between the United States and Europe); Friedrich K. Juenger, *A Hague Judgments Convention?*, 24 BROOK. J. INT’L L. 111, 113 (1998).

174. *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820); see also *supra* text accompanying notes 91, 94.

many countries have adopted standards different from those in the United States.

### 3. *Jury verdicts*

The fact that an award was made by a jury does not exempt it from the international rule that nations are liable for denials of justice in their courts. "The jury, after all, is but a particular kind of accessory in a chosen mechanism of judicial administration, a link in the chain of justice which is ultimately open to inspection in all its constituents by the processes of international law."<sup>175</sup> Judges and juries "are inseparable parts of the judicial organ, and for the act of either when it constitutes a denial of justice the state, it would seem, should be equally responsible."<sup>176</sup>

#### D. *Denial of "Fair and Equitable Treatment"*

The basic denial of justice standard is heightened under NAFTA Chapter 11 by inclusion of a "fair and equitable treatment" requirement in Article 1105. This is another of the provisions favored by capital-exporting nations to protect their investments. The NAFTA requirement was taken from the Model United States Bilateral Investment Treaty ("BIT") and is found in several actual BITs. This standard is intended to provide additional protection beyond the normal baseline under international law.<sup>177</sup> Under "fair and equitable treatment" provisions, treaties are supposed to be interpreted in a manner most favorable to the investor.<sup>178</sup> Some commentators believe the standard goes much further in protecting foreign investments than the international minimum standard.<sup>179</sup> Thus, it is arguable that even if a foreigner fails to make a persuasive claim of denial of justice it would be protected by the "fair and equitable treatment" standard.

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175. FREEMAN, *supra* note 104, at 363.

176. J.W. Garner, *International Responsibility of States for Judgments of Courts and Verdicts of Juries Amounting to Denial of Justice*, 10 BRIT. Y.B. INT'L L. 181, 185 (1929).

177. See KENNETH J. VANDEVELDE, UNITED STATES INVESTMENT TREATIES: POLICY AND PRACTICE 2, 76 (1992).

178. See K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L TAX & BUS. LAW. 105, 125 (1986).

179. F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 52 BRIT. Y.B. INT'L L. 241, 244 (1981).

*E. Exhaustion of Local Remedies*

These standards for denial of justice and fair and equitable treatment may suggest that international law sharply restricts state sovereignty by carefully probing judicial decisions. However, state sovereignty is in part preserved by a threshold requirement for bringing an international claim: a claimant must have exhausted local remedies. (This rule applies only to acts by a state that injure private parties and not to acts by a state that directly injure another state.)<sup>180</sup> Besides limiting international interference with national sovereignty, which spares interstate friction, the rule spares the resources involved in litigating a claim in an international forum when national courts might have provided redress instead.<sup>181</sup> Domestic tribunals therefore perform an international function in the sense of providing the first phase of enforcement of international law.

It is possible that the United States government in its response to Loewen's Notice of Claim is arguing an exhaustion of local remedies problem as a basis for the NAFTA panel's lack of jurisdiction.<sup>182</sup> However, according to the analysis in this section, such a claim likely will not prove successful.

The usual requirement for exhaustion of local remedies is that "[t]he alien must have unsuccessfully pursued all available modes of appellate revision and have been brought face to face with a definitive pronouncement of the highest judicial body before such a complaint will be receivable."<sup>183</sup> In seeking review, a claimant is required to use "reasonable diligence."<sup>184</sup> An alien need not try to resort to extraordinary judicial remedies. The rule does not apply where there are no regularly constituted courts to which access is open and practical.<sup>185</sup>

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180. See de Visscher, *supra* note 89, at 425; FREEMAN, *supra* note 104, at 405.

181. See FREEMAN, *supra* note 104, at 416.

182. See *supra* text accompanying note 44.

183. FREEMAN, *supra* note 104, at 415; see also *Ambatielos Case*, 12 R.I.A.A. 82 (1956); Adede, *supra* note 89, at 76 n.16; A.O. Adede, *A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies*, 18 HARV. INT'L L.J. 1 (1977); Ivan L. Head, *A Fresh Look at the Local Remedies Rule*, 5 CAN. Y.B. INT'L L. 142 (1967).

184. FREEMAN, *supra* note 104, at 423.

185. Stelio Sefériadès, *Le problème de l'accès des particuliers à des juridictions internationales*, 51 RECUEIL DES COURS 5 (1935).



*1. Appeal bond requirements*

This last exception—for cases where access to the courts is not practical—may be very important for aliens bringing denial-of-justice claims against the United States. Appeal bond requirements in some southern states are high and serve to restrict access to appeal.<sup>186</sup> The problem famously arose in the 1987 *Pennzoil Co. v. Texaco, Inc.*<sup>187</sup> case, in which a Texas jury found a \$10.53 billion verdict against New York-based Texaco and Texaco was required to post an appeal bond of over \$13 billion in order to have the case heard by the Texas Supreme Court.<sup>188</sup> Loewen found itself in a similar predicament. It argues that it was effectively denied an appeal to the Mississippi Supreme Court because of the appeal bond requirement of 125% of the judgment—\$625 million in Loewen’s case. Loewen claims that it was not possible for it to finance this sum, neither through issuing new debt nor through issuing new securities.<sup>189</sup> Loewen filed motions with both the trial court judge and the Mississippi Supreme Court to reduce the amount of the bond. Both courts are authorized under Mississippi law to reduce the amount of the bond for “good cause.” Both courts ruled there was not good cause for any reduction in the bond.<sup>190</sup> Loewen, therefore, was faced with a set of unpalatable options: spending over \$200 million, unrecoverable, to try to finance the appeal bond; not posting the bond and allowing O’Keefe to begin levying on its assets in a week; or settling the case. Loewen chose the last option and settled for \$175 million. If

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186. The Florida legislature, however, has recently limited its appeal bond requirement. This was done in order to prevent private litigation from bankrupting tobacco companies, who are also subject to a suit by the state. See Milo Geyelin, *Florida Passes Measure Aiding Tobacco Firms*, WALL ST. J., May 8, 2000, at B16; Milo Geyelin & Gordon Fairclough, *Taking a Hit: Yes, \$145 Billion Deals Tobacco a Huge Blow, But Not a Killing One*, WALL ST. J., July 17, 2000, at A1.

187. 481 U.S. 1 (1987).

188. *Id.* at 4–5.

189. Issuing new debt would have violated covenants with existing creditors, making \$736 million immediately due and payable. Issuing new securities, Loewen says, would have cost at least \$200 million for the first two years, and the company could have recovered virtually none of these costs even if it had been successful on appeal. See Loewen’s Notice of Claim, *supra* note 34, at 43–44.

190. See *id.* at Appendix at A1078 (trial judge); Appendix at A1176 (Mississippi Supreme Court). The Mississippi courts’ decisions not to reduce the bond requirement were unusual in U.S. jurisprudence; typically courts do not require a full bond to be posted based on punitive damages if such a requirement would potentially bankrupt the company. See, e.g., *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 786 F.2d 794, 796–97 (7th Cir. 1986); *Trans World Airlines, Inc. v. Hughes*, 314 F. Supp. 94, 96 (S.D.N.Y. 1970).

chose the last option and settled for \$175 million. If Loewen's allegations are true, it is likely that an international tribunal would decide that access to the Mississippi Supreme Court was not "open and practical" under the circumstances.

## *2. Petitions for certiorari to the U.S. Supreme Court*

Ordinarily, a petition for certiorari to the U.S. Supreme Court might be required to exhaust local remedies under international law. U.S. constitutional violations are arguably involved, and a potential remedy for such violations is in the U.S. Supreme Court. If the treatment of an alien was so grave as to possibly constitute a denial of justice under international law, it almost certainly implicates the Due Process Clause and perhaps other guarantees of the U.S. Constitution. Although petitions for certiorari are rarely granted, an attempt may still be required under international law, even if the remedy does not have a good chance of success.<sup>191</sup> The normal requirement of petitioning to the U.S. Supreme Court becomes problematic, however, if a high state court appeal bond prevents normal review in state courts.

Before addressing the issue of procedural obstacles, it is worth considering the chances of success on the merits for a petition based on the Due Process Clause in a case such as Loewen's. Claims under the Due Process Clause might include the excessiveness of the punitive damages award, the impropriety of elected judges presiding over cases involving out-of-state defendants (or of electing judges generally), and the unfairness of the appeal bond requirement. To put the matter succinctly, none of these claims is especially likely to succeed. First, as noted above, the U.S. Supreme Court has refused to interfere to any great extent with punitive damage awards in state courts.<sup>192</sup> Although the Court did set out some guidelines for controlling punitive damages in *BMW of North America, Inc. v. Gore*,<sup>193</sup> commentators tend to agree that these guidelines are vague and provide little concrete guidance for state and lower federal courts to fol-

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191. "[T]he mere expectation that an injustice will be done by the courts is not enough to excuse a party's failure to test out remedies which are presumably sufficient." FREEMAN, *supra* note 104, at 421. *See also* Letter from Mr. Olney to Mr. Hamlin, July 16, 1896, *in* 6 MOORE, *supra* note 153, at 272.

192. *See supra* note 7.

193. 517 U.S. 559 (1996).

low.<sup>194</sup> Empirical studies have shown that punitive damage awards have not been significantly affected by *BMW v. Gore* thus far,<sup>195</sup> and the U.S. Supreme Court has shown itself unwilling to venture into the foray again recently. In Loewen's particular case, the "guideposts" set out in *BMW v. Gore* do not necessarily indicate the U.S. Supreme Court would reverse the decision below.<sup>196</sup> Looking at the second factor, the disparity between harm to the plaintiff and the punitive damages award, the Court noted that in an earlier case it had found that a punitive damages award of more than four times the amount of compensatory damages was "close to the line" but was not unconstitutional.<sup>197</sup> In any case, the Court refused to set a mathematical formula.<sup>198</sup> The punitive damages award in Loewen was four times the amount of compensatory damages.

Second, the Supreme Court has not questioned the constitutionality of electing judges. Commentators have been increasingly vociferous in arguing that electing judges denies litigants their due process right to an impartial tribunal, at least under certain circumstances such as when lawyers or parties have made contributions to a judge's campaign.<sup>199</sup> An ad hoc ABA committee has even recommended specific new rules for disqualification of judges resulting from contributions to judges' election campaigns.<sup>200</sup> But the U.S. Supreme Court

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194. See *supra* note 7.

195. See *id.*

196. The guideposts included "the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by [plaintiff] and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." 517 U.S. at 575.

197. *Id.* at 581 (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)).

198. *Id.* at 582.

199. See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 498 (1986); Stuart Banner, Note, *Disqualifying Elected Judges from Cases Involving Campaign Contributions*, 40 STAN. L. REV. 449, 463 (1988); Leonard A. Bennett, Comment, *The Impossibility of Impartiality: Interest in Judicial Reelection as a Denial of Due Process for a Criminal Defendant*, 4 GEO. MASON U. CIV. RTS. L.J. 275 (1994); Mark Andrew Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers*, 86 MICH. L. REV. 382 (1987); Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 189 (1996).

200. See ABA Ad Hoc Comm. on Judicial Campaign Finance, Am. Bar Ass'n, Report to the House of Delegates (May 5, 1999) (visited Feb. 12, 2001) <<http://www.abanet.org/cpr/adhoc599.html>>. These would require a judge to disqualify himself or herself in instances when a party or party's lawyer has contributed a threshold amount to the judge's campaign. See

has not weighed in. Various cases hold that a judge who has a financial interest in the outcome of the case, even an indirect interest, is not sufficiently impartial for constitutional purposes.<sup>201</sup> But, beyond expressing a certain distaste for judicial elections,<sup>202</sup> the U.S. Supreme Court has not held that elected judges must recuse themselves even if they have received campaign contributions from the parties or lawyers before them. It is of course possible that the Court might so hold but certainly not predictable. In *Aetna Life Ins. Co. v. Lavoie*, the Court stated that most matters relating to judicial disqualification do not rise to a constitutional level and that disqualification because of bias would only be required in extreme cases.<sup>203</sup> And, indeed, the Texas Supreme Court cited *Lavoie* in declining to hold that a judge should be disqualified under the Due Process Clause of the U.S. Constitution because opposing counsel made a \$10,000 contribution to the judge's campaign.<sup>204</sup>

Third, on the question whether the Mississippi appeal bond requirement is constitutional, it seems likely the Supreme Court would not find a violation. The Court has repeatedly stated that appeals are not required under the U.S. Constitution at all, for either criminal or civil cases.<sup>205</sup> However, if an appeal is provided by a state, the avenues of appellate review "must be kept free of unreasoned distinctions"<sup>206</sup> under the Due Process and Equal Protection Clauses. In

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*id.* Proposed Canon 3(E)(1).

201. See *Tumey v. Ohio*, 273 U.S. 510, 522–23 (1927) (holding unconstitutional system in which adjudicator, the town's mayor, received compensation each time he convicted a defendant but nothing if he acquitted); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (holding unconstitutional system in which adjudicator, the town's mayor, received no compensation from convictions, but the town received the proceeds of fines resulting from convictions). Other cases involving the concern that adjudicators be reasonably free from bias or risk of bias are collected in Wiener, *supra* note 199, at 191 n.25.

202. See *Chisom v. Roemer*, 501 U.S. 380, 400–01 (1991) (addressing voting rights question in the context of a judicial election, stating: "The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office.").

203. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986). *Aetna* held that a justice of the Alabama Supreme Court was not disqualified under the Due Process Clause for harboring dislike of insurance companies but was disqualified because he should not decide a legal issue that would stand as precedent in another pending case in which the same justice was a litigant. *Id.* at 824–25.

204. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 844–45 (Tex. 1987).

205. See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 110 (1996).

206. *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).

civil cases, this has come to mean two things. First, financial barriers must not be imposed on an indigent appellant in cases involving a fundamental right, such as divorce or termination of parental rights.<sup>207</sup> Second, much higher barriers may not be imposed on certain specific classes of litigants, such as tenants appealing eviction decisions.<sup>208</sup> The *Loewen* case would appear to fall into neither of these categories. In general, the Court has held that financial restrictions on appeal in civil cases are not unconstitutional.<sup>209</sup>

There is thus not a substantial likelihood of success on the merits for a litigant such as *Loewen* before the U.S. Supreme Court. But before the merits are even reached in the Court, there are a number of procedural hurdles to overcome in a case like *Loewen*'s. The Supreme Court has its own exhaustion of local remedies rule in the form of 28 U.S.C. § 1257. This statute governs petitions for writ of certiorari to the U.S. Supreme Court from decisions of state courts. Two prerequisites must be met before review is possible. First, a substantial federal question must be properly raised in the state court proceedings for the U.S. Supreme Court to have jurisdiction.<sup>210</sup> The Court has enforced this requirement tenaciously. *Loewen* did make federal constitutional arguments to the Mississippi courts in its motions to reduce the appeal bond<sup>211</sup> and so overcame this first hurdle. Second, § 1257 only provides for petitions from “[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had.” The Court has been more flexible about this finality requirement than the federal question requirement. It has given the finality requirement a “practical rather than a technical construction.”<sup>212</sup> For its jurisdictional purposes, “final” means a state court judgment that conclusively disposes of a matter that is distinct

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207. See *M.L.B.*, 519 U.S. at 113. See also *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291, 299–305 (5th Cir. 1979) (upholding district court decision granting relief from requirement of filing bond pending appeal of Mississippi state court judgment because case involved First and Fourteenth Amendments and Civil Rights Act of 1871).

208. *Lindsey v. Normet*, 405 U.S. 56, 79 (1972).

209. *United States v. Kras*, 409 U.S. 434, 445 (1973); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973); *M.L.B.*, 519 U.S. at 114–16.

210. See, e.g., *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This requirement goes back to interpretations given to section 25 of the Judiciary Act of 1789. See cases cited in *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 391–98 (1836).

211. See Motion for Stay of Enforcement of Final Judgment Pending Appeal, in *Loewen*'s Notice of Claim, *supra* note 34, at Appendix A838.

212. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

from the general subject of the litigation and affects only the parties to the particular controversy.<sup>213</sup> (This is similar to the collateral order doctrine that applies to petitions for review of lower federal court decisions.)

A litigant such as Loewen could argue that an order of the highest state court denying reduction of the appeal bond is a collateral decision reviewable under § 1257. Some members of the U.S. Supreme Court, however, have been strict about the finality requirement in the context of an appeal bond. According to them in *Pennzoil Co. v. Texaco, Inc.*, the loser's right not to be arbitrarily denied an appeal could be "adequately vindicated even if Texaco were forced to file for bankruptcy" when judgment was executed because the loser failed to file the (\$13 billion) appeal bond.<sup>214</sup>

By contrast, an international tribunal, under the "open and practical" standard, would not likely view bankruptcy as necessary to exhaust local remedies. In order to petition the Supreme Court for a writ of certiorari before execution of the judgment, a defendant would have to apply to the Court for an emergency stay of enforcement proceedings. International law may well view this as an extraordinary remedy and therefore unnecessary to exhaust local remedies.

The bottom line is that in ordinary cases a foreign litigant probably must petition for certiorari in the U.S. Supreme Court to satisfy the exhaustion of local remedies rule under international law. But in the case of a high state appeal bond, this may not be necessary. To be on the safe side, alien litigants should take care to raise all conceivable federal issues at the state level, including NAFTA issues, where there is a question of an appeal bond.

#### *F. Federal Responsibility for State Denials of Justice*

There is little doubt that the United States could be held responsible for denials of justice on the part of a state. Article 105 of NAFTA provides: "The Parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this Agree-

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213. See *Clark v. Williard*, 292 U.S. 112, 117-19 (1934); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 557-58 (1963) (invoking jurisdiction over Texas Supreme Court order that had improperly interpreted a federal statute dealing with the venue of suits against national banks).

214. 481 U.S. 1, 18 (1987) (Brennan, J., with Marshall, J., concurring); see *id.* at 28 (Blackmun, J., concurring).

ment, including their observance, except as otherwise provided in this Agreement, by state and provincial governments.” The U.S. Statement of Administrative Action on NAFTA declares that “no country can avoid its commitments under the Agreement by claiming that the measure in question is a matter of state or provincial jurisdiction.”<sup>215</sup> This was also the understanding of the U.S. Trade Representative at the time NAFTA was approved.<sup>216</sup> In this respect, NAFTA codifies basic principles of international law: federal responsibility for a political subdivision’s acts is well established.<sup>217</sup> The U.S. State Department recognized this principle when it refused to argue that the United States was not liable for the misconduct of Texas officials; when the United States had similar claims, “we have invariably insisted on the liability of the Federal Government although the failure . . . was chargeable to the officials of one of the constituent states or provinces.”<sup>218</sup>

#### V. PROBLEMS WITH HOLDING THE U.S. RESPONSIBLE FOR DENIALS OF JUSTICE

The U.S. legal system indeed suffers from problems that have so far proved resistant to internal efforts at reform. But the NAFTA cure may be worse than the disease. It could seriously undermine the sovereign ability of the United States to distribute power within a federal system and to organize its civil justice system. The success of Loewen-type claims threatens sovereignty with two categories of problems: first, problems when international bodies of any sort make awards compensating for U.S. judgments and, second, problems specific to arbitration under NAFTA Chapter 11.

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215. H.R. DOC. NO. 103-159, 103d Cong., 1st Sess., v. 2, at 5 (1993).

216. See Letter from Michael Kantor, *supra* note 52.

217. See 2 ROBERTO AGO, *Third Report on State Responsibility*, Y.B. INT’L L. COMM’N 199, 257 (1971) (“The attribution to a federal State of the acts of organs of its component states, in cases where such acts enter into consideration at the international level as a source of responsibility, is also a firmly established principle.”); see also International Law Commission, Draft Articles on State Responsibility, art. 4, (visited Feb. 21, 2001) <<http://www.un.org/ilc/index.htm>>.

218. Political Subdivisions, 5 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW §§ 527, 594 (1943); see also DeGalvan Claim (Mexico v. United States), OPINIONS OF THE COMMISSIONERS 408 (1927).

*A. Traditional Concerns About Interfering With Judgments*

Since the 1930s at least, the traditional concerns about an international tribunal holding a country liable for decisions of its courts have been downplayed. These concerns are likely to resurface in the wake of international agreements such as NAFTA. They may not be powerful enough to justify eliminating denial-of-justice claims from international grounds of action, but they do counsel caution in the way these claims are handled.

International tribunals have traditionally been reluctant to review judgments for three main reasons. First, local law was assumed to ensure the “separation and independence” of the judiciary from the government.<sup>219</sup> The government was therefore thought to have no control over actions of the judiciary, so holding the government liable was pointless. Also, because this separation supposedly freed the judiciary from political concerns, its judgments were less suspect than other governmental actions. Second, “respect for the finality of judicial decisions” counseled against upsetting these decisions.<sup>220</sup> Third, second-guessing judicial decisions would interfere with the internal organization of a country’s government, and in particular with principles of federalism.<sup>221</sup> Are these reasons still valid?

*1. The separation and independence of the judiciary*

The first principle, the separation and independence of the judiciary from the government, depends on a notion that the government is distinct from the state. For Europeans, “the government” suggests political involvement and direct responsibility to the electorate, whereas “the state” suggests officials who are more apolitical and permanent.<sup>222</sup> But in the United States, “state” and “government” are largely viewed as interchangeable terms, and, in international law, the distinction between government and state is likewise ceasing to matter. The former president of the International Court of Justice has pointed out that “[a]lthough independent of the Government, the judiciary is not independent of the State: the judgment

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219. Eduardo Jiménez de Aréchaga, *International Law in the Past Third of a Century* 278 RECUEIL DES COURS (1978).

220. *Id.*

221. See FREEMAN, *supra* note 104, at 36.

222. European judges, for example, often insist that they are not part of the government, although they serve the state.



given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive.”<sup>223</sup>

One might still say that a rationale behind this distinction between government and state remains valid: that judges are in fact relatively free from political pressure and impartial compared to other branches and so can be better trusted not to discriminate against outsiders. So, it could be argued, the distinction should be resurrected and judgments should be treated differently from other acts. In this view,

It is true that courts are organs of the nation; but they are not its organs in the sense in which the executive and the legislature are. The executive and the legislature represent the expression of its will. The courts of justice represent the colorless and impartial expression of justice in the interpretation of its will.<sup>224</sup>

However, this approach poses several difficulties. It is hard to argue that the judiciary is “colorless and impartial” in places—like Mississippi—where judges are elected. Elected judges begin to look more like political officials, responsible to the electorate (and to their campaign contributors).<sup>225</sup> Furthermore, the American use of juries as fact-finders in civil cases means that judges are not the only group to be considered. Through juries, in theory, the electorate speaks directly. Tocqueville said that the American jury was “as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage.”<sup>226</sup> Juries are supposed to inject into decisions of courts an element of popular common sense, to temper the aloofness of the judiciary. American fact-finders are thus closer to popular opinion and the European idea of “the government.” American ju-

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223. Jiménez de Aréchaga, *supra* note 219, at 278.

224. THOMAS BATY, THE CANONS OF INTERNATIONAL LAW 127–28 (1930). International tribunals have sometimes adopted this view. In one example, the *Yuille, Shortridge & Co.* case, the British government brought a claim on behalf of a company for losses in a judgment of a Portuguese court. The Senate of Hamburg, chosen to adjudicate the claim, declared it to be “altogether unjust to require the Royal Government of Portugal to answer for the misconduct of its court,” since these courts were “completely independent of the Government and the latter was consequently unable to exert any influence over their decisions.” 2 ALBERT DE LAPRADELLE & NICHOLAS POLITIS, RECUEIL DES ARBITRAGES INTERNATIONAUX 78, 103 (1923).

225. *See supra* text accompanying notes 122–35. Even appointed judges in the United States are relatively political, in part because of the way in which they are appointed.

226. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 273 (J.P. Mayer ed., 1969).

ries are, however, independent of “the government” in the American sense because they are not regular officials. Those who highly prize this independence greatly resent attempts to interfere with it through international arbitration.

Even in situations where the judiciary is formally separate and independent, judges are connected to political processes. Though separate from the legislature and executive, judges are still bound to apply local statutes and carry out the legislature’s will. Therefore, the ultimate source of a judgment that violates international law may well be an act of the legislature. This suggests that national responsibility for the acts of the judiciary should not be entirely excused. Perhaps instead that responsibility should be reduced by placing a greater burden on the claimant to show that a decision is unjust.

## 2. *Respect for the finality of judicial decisions: Res judicata*

Arguably, respect for the finality of judicial decisions should bar international litigation of the basis for a judgment. A judgment is an especially potent expression of sovereignty. It is usually clothed in great dignity, and it often represents considerable investment of state resources into a decision of particular questions between specific parties. At some point, litigants are entitled to certainty. These traditional concerns of *res judicata* doctrine similarly pertain if several sovereigns are involved. The U.S. constitutional doctrine of Full Faith and Credit,<sup>227</sup> for example, preserves judgments from collateral attack in a multi-state system. While Full Faith and Credit jurisprudence gives states wide latitude in deciding whether or not to apply other states’ laws,<sup>228</sup> it strictly requires recognition of other states’ judgments. Under the Full Faith and Credit doctrine, states must recognize another state’s judgment even if that judgment was based on a clear legal mistake (involving a different state’s law, no less).<sup>229</sup> Expense is spared and interstate friction is reduced by the impossibility of second-guessing another state’s judgment.

There are several responses to this argument (that a doctrine resembling *res judicata* should apply in international cases involving prior national court decisions).<sup>230</sup> First, the parties to an international

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227. See U.S. CONST. art. IV, § 1, cl. 1.

228. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

229. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908).

230. A doctrine of *res judicata* does exist regarding earlier *international* cases.

arbitration are different from the parties to the original action. In the case of traditional arbitration between states, the parties would be entirely different, although one state would be bringing claims on behalf of the injured national. Second, international arbitration in general is powerless to affect the original judgment. The judgment stands, so the relationship between the original parties is not affected. Third, the legal issues are usually different. The courts in the original action are ordinarily concerned with questions of purely internal law, whereas the only question an international arbitral panel asks is whether an international obligation was violated.

But these responses are less than satisfying. Regarding the parties, under the doctrine of collateral estoppel as opposed to *res judicata* (or issue preclusion as opposed to claim preclusion), the parties need not be the same.<sup>231</sup> Regarding the legal issues, the court hearing the original dispute *may* decide questions of international law, incorporated into national law. It could be argued that those issues should have been raised, because federal law includes treaties and the law of nations and state courts may decide most federal law issues.

The better argument against applying preclusion principles to a national judgment is that there currently is no international forum available to monitor local courts' compliance with international law. There is no court able to play a supervisory role in the international system, like the U.S. Supreme Court's role in the U.S. system, able to ensure that the states comply with federal law. The Full Faith and Credit doctrine is applied as strictly as it is to require states to enforce each other's judgments in part because there is available this avenue of direct review in the U.S. Supreme Court. American states are all bound by the Due Process Clause of the Fourteenth Amendment and by U.S. Supreme Court interpretations of that clause, so that a minimum baseline of due process is assured. (The states also have relatively similar legal standards.) The standards from nation to nation are different, so judgments (as to international law claims) at the national level should not be given preclusive effect at the international level. However, considerations of finality counsel caution when international tribunals consider whether a national decision violates international law.

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231. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979).

*3. Interference with traditional aspects of U.S. political organization:  
The civil justice system and federalism*

Perhaps the greatest problem with international denial-of-justice claims is that they could interfere with deep-rooted national political arrangements. In the case of the United States, these arrangements include specific aspects of the civil justice system and broader principles of federalism. International arbitration awards against the federal government based on state court denials of justice could provoke a backlash in the United States against international agreements like NAFTA and the budding Free Trade Agreement of the Americas.<sup>232</sup>

The previous discussion of denial-of-justice claims listed four key features of American civil justice as possible violations: elected judges, jury awards, aggressive advocacy, and punitive damages. Each of these is supported by powerful interest groups and by many voters.<sup>233</sup> They have tremendous symbolic significance and some practical impact on redistribution of wealth. A decision against the United States in a case like *Loewen* could raise the cry of interference with U.S. sovereignty and a democratically-chosen legal system.

The federal government's liability for state denials of justice under international law may also cause strain in federal-state relations. States traditionally have been given considerable freedom in designing their civil justice systems; dual sovereignty is very much alive in this area. But to prevent liability under NAFTA or other treaties, the federal government might well take steps that would affect state civil cases.

*a. Federal government suing states for indemnity under common law principles.* One possible step is indemnity. The United States government might try to sue a state government for violating NAFTA obligations. It could seek indemnity under common law principles in the absence of a relevant federal statute. But recent Supreme Court precedent has been hostile toward creation of federal common law. Cases in which such creation is proper are “few and restricted” and “extraordinary,”<sup>234</sup> where a “significant conflict be-

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232. The famous demonstrations and riots that derailed WTO meetings in Seattle in December 1999 show the hostility that exists toward trade agreements and globalization in some quarters. See, e.g., John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST, Dec. 1, 1999, at A1; Steven Pearlstein, *Trade Theory Collides With Angry Reality*, WASH. POST, Dec. 3, 1999, at A1.

233. See the discussions of the reactions of ATLA and Public Citizen, *supra* notes 64–66.

234. *O'Melveny & Meyers v. FDIC*, 512 U.S. 79, 87, 89 (1994) (quoting *Wheeldin v.*

tween some federal policy or interest and the use of state law.”<sup>235</sup> This limitation contemplates creation of federal common law only to preempt state law, not to create a cause of action to indemnify the United States for a state’s wrongdoing.

Indeed, the Supreme Court has declined to use common law principles to provide indemnity for the United States. The United States has brought suit for indemnity under common law principles against private parties, and these suits have failed. In *United States v. Standard Oil Co.*,<sup>236</sup> for example, a Standard Oil truck hit a U.S. soldier, who was hospitalized and disabled for a period. The United States brought suit against Standard Oil, seeking compensation for medical services and wages the soldier received while incapacitated. The Supreme Court held that federal (and not state) law applied, but it would not create federal common law to provide indemnity. Whether to provide indemnity was a question only Congress could resolve, not the courts or the executive. Congress “is the custodian of the national purse” and “most often the exclusive arbiter of federal fiscal affairs. And these comprehend . . . securing the treasury or the government against financial losses however inflicted.”<sup>237</sup> “Until it acts to establish the liability, this Court and others should withhold creative touch.”<sup>238</sup> On separation of powers principles, therefore, the Court would not step in. It seems even less likely the Court would create federal common law to provide indemnity against a state, which would add complicated questions of federalism to the separation-of-powers concerns.

*b. Possible reactions by Congress.* Congress might have the power to create such liability, however. It could conceivably do so under its powers to pay the debts of the United States and to regulate com-

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Wheeler, 373 U.S. 647, 651 (1963)). See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1250 (1996) (describing the Supreme Court’s approach “limit[ing] the scope of federal common law to several well-recognized enclaves”).

235. *O’Melveny*, 512 U.S. at 87 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

236. 332 U.S. 301 (1947).

237. *Id.* at 314–15.

238. *Id.* at 317. The Court cited *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (holding that federal courts may not punish common law crimes); see also *United States v. Gilman*, 347 U.S. 507 (1954) (holding that United States may not recover indemnity from one of its employees after it had been held liable under the Federal Tort Claims Act for the negligence of the employee). See Clark, *supra* note 234, at 1361–68 (discussing separation-of-powers limitations on creation of federal common law causes of action).

merce with foreign nations.<sup>239</sup> Even if Congress did not authorize a direct suit against states whose court systems violated NAFTA, it could exert pressure on such states through the Spending Clause not to commit further violations. For example, Congress could deduct the amount of any damages awarded against the United States from block grants to the offending state.<sup>240</sup> Regardless of whether direct indemnity or indirect pressure was used, action by the U.S. government against the states would create tension in the federal system.

### *B. Problems with the NAFTA Mechanism: Procedures*

Besides the general problems with subjecting American judgments to denial-of-justice claims, NAFTA's specific mechanism for doing so is flawed.<sup>241</sup> There are problems with subjecting govern-

239. See U.S. CONST. art. I, § 8.

240. This would seem to be permissible based on the holding of *South Dakota v. Dole*, 483 U.S. 203 (1987).

241. A threshold issue, though beyond the scope of this article, should at least be mentioned: the possibility that NAFTA itself is unconstitutional under the Treaty Clause. See U.S. CONST. art. II, § 2. NAFTA was approved using "fast-track" procedures involving majority votes of both the House and Senate, rather than a two-thirds vote of the Senate as the Treaty Clause specifies.

An original purpose of requiring a super-majority of the Senate to ratify treaties was to make it easier to block treaties that might affect state sovereignty and federalism. See Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 809-10 (1995). There has been a lively academic skirmish on this topic in the Harvard Law Review. Professors Ackerman and Golove argued that a "constitutional moment" occurred in the 1940s when the American people agreed to bypass the traditional treaty procedures in favor of giving President Roosevelt greater power to deal with the aftermath of World War II. This "constitutional moment," the authors argue, was driven in part by American embarrassment at the Senate's failure to ratify Woodrow Wilson's League of Nations treaty after World War I and by expanding federal power during the New Deal. *Id.* at 861-66. Professor Tribe heartily opposed this view of the Treaty Clause and, indeed, the method of constitutional interpretation in general. Tribe criticized the "prevailing view," as characterized by the Third Restatement, that a congressional-executive agreement "can be used as an alternative to the treaty method in every instance." Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1250 (1995) (commenting on and quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 303 cmt. e (1987)); cf. Michael Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133 (1998). The most recent version of Professor Tribe's treatise, however, grudgingly acknowledges that "the congressional-executive agreement appears for now to have found a settled place in United States foreign relations practice." 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-4, at 656 (3d ed. 2000). The issue of NAFTA's constitutionality is now being litigated in the Eleventh Circuit. Unions, including the United Steelworkers of America, brought an action against the United States challenging the constitutionality of NAFTA. In July 1999, the district court decided that the President and Congress had power to make and approve the agreement using "fast-track" pro-

ments to potentially large judgments based on international investor-state arbitration under Chapter 11. The very features of the ICSID that make the forum so effective for basic commercial arbitration are ill-suited to address politically explosive issues central to sovereignty. These features include the composition of the arbitral panels, the secrecy of arbitration, and the lack of effective appellate review.

*1. The problem of arbitrator bias*

Arbitral panels under NAFTA normally follow the standard tripartite model of international arbitration.<sup>242</sup> Unless the parties agree otherwise, the arbitral tribunal consists of three arbitrators. Each of the parties appoints one, and the third—who is the presiding arbitrator—is appointed by agreement of the parties.<sup>243</sup> If parties fail to agree or appoint an arbitrator, the Secretary General of ICSID appoints him or her. The Secretary General makes appointments from a roster of 45 arbitrators established by consensus of the NAFTA Parties. A presiding arbitrator appointed by the Secretary General may not be a national of either of the parties.<sup>244</sup> Decisions are reached by a majority of the panel.<sup>245</sup>

One view is that arbitration is best thought of as an outgrowth of contract law, rather than as a form of adjudication.<sup>246</sup> An inquiry into arbitration ought to determine what were the understandings and assumptions of the contracting parties, not whether it is “fair” or whether due process is provided. This conflicts with the notion in international arbitration that the arbitrators, even those chosen by the parties, will be independent and impartial.<sup>247</sup> This aspiration may be

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cedures. *See* *Made in the USA Found. v. United States*, 56 F. Supp. 2d 1226 (N.D. Ala. 1999). Plaintiffs have appealed to the Eleventh Circuit. *Union Announces Appeal in Case Challenging NAFTA*, 16 INT’L TRADE REP. (BNA) 1445 (1999).

242. *See* Gantz, *supra* note 78, at 43–45.

243. *See* NAFTA, *supra* note 40, art. 1123.

244. *See id.* art. 1124.

245. *See* The World Bank Group International Centre for Settlement of Investment Disputes, *Schedule C, Arbitration (Additional Facility) Rules*, art. 25 (visited Oct. 26, 2000) <<http://www.worldbank.org/icsid/facility/33.htm>> [hereinafter ICSID AF Rules].

246. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 487 (1997).

247. *See* INTERNATIONAL BAR ASSOCIATION, ETHICS FOR INTERNATIONAL ARBITRATORS arts. 3 (requirement of “impartiality and independence”), 5 (arbitrator should avoid ex parte communications with any party regarding the arbitration); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 63–71 (1994); W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION

unrealistic in practice. Even if an arbitrator chosen by one of the parties has no professional or financial relationship with the party, she may still favor that party because of shared nationality or legal, political, or economic outlook.<sup>248</sup> This is viewed as an advantage because party-appointed arbitrators can ensure that the presiding arbitrator (or “president”) fully understands the issues at stake, the background of the case, and the implications of an award.<sup>249</sup> But because these party-appointed arbitrators are a blend of judge and advocate, American arbitration rules do not hold them to the same standard of impartiality as arbitrators appointed in other ways.<sup>250</sup> Moreover, many party-selected arbitrators seem to overplay their roles as advocates. In choosing the party-appointed arbitrator, parties prefer a candidate who “‘knows just how far he can go in advocacy’ without losing all credibility with his colleagues.”<sup>251</sup>

American courts have said that this tripartite model creates a neutral tribunal because biases in either direction are offset.<sup>252</sup> Though the president is supposed to have the controlling voice, she must obtain a majority to decide the case. Often tribunal presidents must bargain with one arbitrator or the other to arrive at a decision (or try to play the two party-appointed arbitrators off each other). The decision thus often differs from what the president would have decided alone.<sup>253</sup> This process of negotiation and compromise may

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§§ 12.04, 13.03, 13.05 (3d ed. 2000); ALAN REDFERN & MARTIN HUNTER, *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 201, 218–26 (2d ed. 1991).

248. See CRAIG ET AL., *supra* note 247, at 212, 233; Andreas F. Lowenfeld, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, 30 *TEX. INT’L L.J.* 59, 60, 69 (1995); William W. Park, *Neutrality, Predictability and Economic Co-operation*, 12 *J. INT’L ARB.* 99, 105 (1995).

249. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 *HARV. L. REV.* 353, 396 (1978); Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 *WIS. L. REV.* 3, 36–37; Arnold M. Zack, *Tripartite Panels: Asset or Hindrance in Dispute Settlement?*, PROCEEDINGS, 34TH ANNUAL MEETING, NAT’L ACADEMY OF ARBITRATORS 273, 279 (1982).

250. AMERICAN ARBITRATION ASSOCIATION, *COMMERCIAL ARBITRATION RULES*, Rules 12, 19.

251. Rau, *supra* note 246, at 508.

252. See, e.g., *Tate v. Saratoga Sav. & Loan Ass’n*, 265 *Cal. Rptr.* 440, 445 (Ct. App. 1989).

253. See Martin Hunter, *Ethics of the International Arbitrator*, *ARB.*, Nov. 1987, at 219, 222 (neutral president often must “take a deep breath and select one of the party-nominated arbitrators to negotiate with” to arrive at a majority award); Rau, *supra* note 246, at 501–02; Murray L. Smith, *Impartiality of the Party-Appointed Arbitrator*, 6 *ARB. INT’L* 320, 333 (1990) (requiring a majority “could lead to a negotiated majority award that is not based solely



well be effective in ordinary commercial arbitration, but it seems a problematic method for resolving difficult questions of international law affecting national sovereignty. The persuasive skills of the party-appointed arbitrators and the bargaining skills of the president could predominate over the merits of the case.

## 2. Confidentiality

Another feature of the arbitration regimes specified by NAFTA is confidentiality. Again, while perhaps desirable in the resolution of a commercial dispute between private parties, confidentiality is troubling in the context of weighty issues of sovereignty<sup>254</sup> and the functioning of court systems. Arbitrations in the ICSID Additional Facility occur in two phases: a written phase and an oral hearing. Both the filings submitted in the written phase and the oral hearings are confidential if a party desires it. Minutes are made of the oral hearings, but these minutes may not be published without the consent of the parties.<sup>255</sup> Under UNCITRAL rules, hearings are held *in camera* unless the parties agree otherwise.<sup>256</sup> (In the ICSID proper, even the award may not be published without the consent of the parties.)<sup>257</sup> ICSID's Additional Facility at least publishes basic docket information on its new website regarding cases pending before that tribunal.<sup>258</sup> ICSID and UNCITRAL do not even do that, so the public might never find out about an arbitration in those fora. Governments have no obligations under these arbitration rules to disclose cases pending against them. The press learned of Loewen's notice of claim against the U.S. government from a brief mention in its SEC 10-Q report.

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on the merits of the case").

254. See Gantz, *supra* note 78.

255. See ICSID AF Rules, *supra* note 245, art. 44(2). The Additional Facility rules also specify that, as early as possible after the tribunal is constituted, the president must try "to ascertain the views of the parties regarding on questions of procedure." *Id.* art. 29(1). These would include questions of confidentiality.

256. United Nations Commission on International Trade Law, *Arbitration Rules (1976)*, art. 25 (visited Nov. 30, 2000) <<http://www.jus.uio.no/lm/un.arbitration.rules.1976/toc.html>> [hereinafter UNCITRAL Arbitration Rules].

257. See The World Bank Group International Centre for Settlement of Investment Disputes, *Rules of Procedure for Arbitration Proceedings*, Part D, Rule 48 (visited Nov. 30, 2000) <<http://www.worldbank.org/icsid/basicdoc/63.htm>> [hereinafter ICSID Rules].

258. See *List of Pending Cases*, *supra* note 43.

This lack of disclosure is common in arbitrations. It may well aid in the speedy and effective resolution of most commercial disputes by minimizing the collateral consequences of litigation, such as unpleasant publicity. However, the arguments in favor of disclosure are much stronger when the issue in question is the fairness of a judicial decision and the government is a party. If courts in America are reaching decisions that are denials of justice, courts' reasoning should be aired publicly. Furthermore, the subject matter of the dispute is not simply a matter of public concern; it is itself public. Trials, judicial decisions, and jury verdicts are public in the United States, and so little additional harm could be done by opening the hearings that deal with these questions.

The confidentiality of proceedings is linked with a lack of input from others outside the process. There is no provision for amicus briefs under the NAFTA investor-state arbitration system. NAFTA's investor-dispute mechanism does allow NAFTA Parties to make submissions resembling amicus briefs to an arbitration panel on questions involving the interpretation of NAFTA.<sup>259</sup> For example, in the *Loewen* case, Canada could make a submission to the panel. Also, the arbitration panel could appoint experts to report in writing on factual issues concerning environmental, health, safety, or other scientific matters raised by a disputing party. But these issues are limited in scope. They do not include expert consideration of a country's or state's legal system.<sup>260</sup> The NAFTA provisions about arbitration—as well as rules of ICSID, ICSID-AF, and UNCITRAL—do not allow nonparties to submit amicus briefs. The state of Mississippi, for instance, in theory, cannot be heard directly in the *Loewen* case. Thus, on important questions concerning a country's legal system, a very limited number of voices will be heard. Recent developments indicate that occasionally Chapter 11 panels may accept amicus briefs from nongovernmental organizations, but it remains to be seen how wide spread this practice becomes.<sup>261</sup>

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259. See NAFTA, *supra* note 40, art. 1124.

260. See *id.* art. 1133.

261. In one Chapter 11 dispute, the arbitration panel allowed a nongovernmental organization to file an amicus curiae brief. See Peter Menyas, *NAFTA Panel Says NGOs Can Intervene in Cases Brought for Arbitration Purposes*, 18 INT'L TRADE REP. (BNA) 211 (Feb. 1, 2001). This occurred in the Methanex case, brought by the Canadian Methanex Corporation against the United States because of California's 1999 decision to ban the gasoline additive MTBE. Methanex is claiming \$970 million in damages. Peter Menyas, *Canadian, U.S. Governments Support IISD on Access to Chapter 11 Tribunal Process*, 17 INT'L TRADE REP. (BNA)

If a dispute settles, the results of that settlement are not made public. NAFTA is designed to strongly encourage settlement before arbitration.<sup>262</sup> To submit a claim to arbitration, the claimant must wait six months after the events giving rise to that claim.<sup>263</sup> At least ninety days before the claim is submitted, the claimant must give written notice to the other party of its “intention to submit a claim.” It must specify “the provisions of [NAFTA] alleged to have been breached,” “the issues and factual basis for the claim,” and “the relief sought and the approximate amount of damages claimed.”<sup>264</sup> These six-month and ninety-day periods are intended to give the parties time for settlement negotiations. If a government and private party settle the claim before arbitration, such a settlement might not be made public. The public might not discover that the government was paying out substantial sums because of failures of justice in state or federal courts.

### 3. *Lack of appeal*

Appeals from arbitral decisions under NAFTA are strictly limited. The limited appeal makes the arbitration process efficient, which is highly desirable in private commercial arbitration. Under ICSID Additional Facility rules, within forty-five days after the award a party may request an interpretation of the award<sup>265</sup> or a correction for “any clerical, arithmetical or similar errors.”<sup>266</sup> Also within that time period, either party may request that the tribunal decide any question that it failed to decide in the award.<sup>267</sup> That is the extent of review. There can be no reconsideration of issues already decided. UNCITRAL rules provide for almost identical procedures.<sup>268</sup>

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1901 (Dec. 14, 2000). Both the U.S. and Canadian governments supported the participation of the NGO, the International Institute for Sustainable Development. *Id.* Although this ruling is not binding on other NAFTA panels, it may prove influential.

262. *See* NAFTA, *supra* note 40, art. 1118.

263. *See id.* art. 1120(1).

264. *Id.* art. 1119.

265. *See* ICSID AF Rules, *supra* note 245, art. 56.

266. *Id.* art. 57.

267. *See id.* art. 58.

268. *See* UNCITRAL Arbitration Rules, *supra* note 256, arts. 35–37. Parties must request an interpretation, correction, or supplementary award within 30 after the award is made. There are somewhat different procedures in the ICSID itself, which provide for more thorough review. But these procedures do not apply to arbitrations under NAFTA, since neither Mexico nor Canada is a member of ICSID. Besides allowing supplementary decision, correction, and

These awards are binding on the parties. NAFTA declares that each NAFTA Party “shall provide for the enforcement of an award in its territory.”<sup>269</sup> If a NAFTA Party fails to comply with a final award, the investor’s home country may begin proceedings against the losing Party under Chapter 20. A panel established under that chapter may determine that the losing Party has violated its NAFTA obligations and recommend that the Party comply with the terms of the award. Failure to do so may trigger the right of the investor’s country to suspend benefits it provides under NAFTA.<sup>270</sup> Other international agreements can be brought into play to enforce an award. An investor can seek enforcement of an award under the ICSID Convention, the New York Convention, or the Inter-American Convention.<sup>271</sup> All of these provide tough enforcement mechanisms.<sup>272</sup>

The requirement of reasoned decision making partially compensates for the lack of an appeal. Each of the arbitration regimes specified under NAFTA requires that the award be in writing and the reasons stated.<sup>273</sup> A requirement of reasoned decision making is

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interpretation of the award, there are procedures for revision and annulment. *See* ICSID Rules, *supra* note 257, Rule 50. Revision is meant to deal with evidence that the tribunal was not able to consider previously, and may be done by the panel itself. Annulment is a more elaborate procedure. Grounds for annulment include the tribunal being improperly constituted, exceeding its powers, being corrupt, seriously departing from a fundamental rule of procedure, or failing to state the reasons on which the award is based. *See id.* The Chairman of the Administrative Council of ICSID has appointed committees to review claims of annulment, *see id.* Rule 52, and these committees have proved controversial. The procedure for annulment is so slow that it casts doubt on the ICSID’s efficiency. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 46–106 (1992). It should be noted that the grounds for annulment are still limited and do not include review of the substance of the tribunal’s decision.

269. NAFTA, *supra* note 40, art. 1136(4).

270. *See id.* art. 1136.

271. *See id.* art. 1136(6).

272. The ICSID Convention, to which the United States is a signatory, provides that each contracting state is obligated to enforce an award “within its territories as if it were a final judgment of a court in that State.” The World Bank Group, International Centre for Settlement of Investment Disputes, *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, pt. A, ch. IV, art. 54(1) (visited Oct. 26, 2000) <<http://www.worldbank.org/icsid/basicdoc/9.htm>>. This is even more potent than the New York Convention. *See* United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; Inter-American Convention on International Commercial Arbitration.

273. *See* ICSID Rules, *supra* note 257, Rule 47; ICSID AF Rules, *supra* note 245, art. 53(1) (panel must also address every question submitted to it); UNCITRAL Arbitration Rules, *supra* note 256, art. 32 (reasons must be given unless parties have agreed that no reasons are to be given).

conceptually linked with judicial appeal to enable review of the decision below. But it may constrain decision making even in the absence of review. It may force arbitrators to think systematically about claims and take into account various interests, legal authorities, and factual complexity.<sup>274</sup> However, as legal realists have long pointed out, this requirement may instead simply spur the decision-maker's ingenuity.<sup>275</sup> Where the law is vague and unsettled—as it is in the area of state liability for denials of justice—little ingenuity is needed to justify any particular result. Customary international law allows a decision-maker to draw upon (or ignore) many sources in crafting reasons. In dealing with these claims, arbitrators are even less constrained than they normally are in the absence of effective review.

#### VI. POSSIBLE SOLUTIONS TO THE PROBLEMS

There are several alternative ways to reduce problems posed by arbitrating denial-of-justice claims under the current NAFTA investor-state procedures. One is simply to amend the treaty to bar denial-of-justice claims to say that the actions of a country's judicial system may never constitute violations of NAFTA.<sup>276</sup> This approach seems extreme, however, in light of well-established principles of international law and NAFTA's goals to reduce discrimination against foreign goods and investors. U.S. investors may suffer. Eliminating denial-of-justice claims would create a loophole that national or local governments might exploit.

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274. See ROBERT E. KEETON, *JUDGING* 137 (1990); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 652 (1995); Lord Justice Bingham, *Reasons and Reasons for Reasons: Differences Between a Court Judgment and an Arbitration Award*, 4 ARB. INT'L 141, 143 (1988); Kathleen Waits, *Values, Intuitions, and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 931.

275. See Rau, *supra* note 246, at 531 & n.164. There are other benefits to giving reasons besides constraining arbitrators' discretion. For example, reasons may reassure the parties that their arguments have been heard and considered. And they may serve as effective advertising for the arbitrators, who hope to be employed in future cases. See *id.* at 532, 535.

276. It may also be possible to interpret NAFTA as it currently exists to preclude denial-of-justice claims, but this would be a stretch. Some might argue that NAFTA Article 1101 supports such an interpretation. Article 1101, which is titled "Scope and Coverage," states: "This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party . . ." It could be argued that the phrase "measures adopted or maintained" means only legislative or executive acts, not judicial ones. But in light of the well-established doctrine in international law that a state is responsible for the actions of its judiciary as well as its other branches, see *supra* Part V.A.1, this seems implausible.

*A. An International Alternative: State-to-State Resolution of Denials of Justice*

A traditional alternative to eliminating denial-of-justice claims altogether would be a return to requiring a state to bring a claim on behalf of its injured national. This traditional approach is used in the WTO.<sup>277</sup> The procedures of NAFTA Chapter 20 (governing resolution of state-to-state disputes) could be used instead. Chapter 20 governs all disputes between states except those involving subsidy and dumping issues, which are governed by chapter 19 and a few other narrow areas.<sup>278</sup> A change to Chapter 20 procedures in denial-of-justice cases would provide a better dispute mechanism and allow the state to filter the serious claims that touch on sovereignty.

Chapter 20 creates a Free Trade Commission and a Secretariat to give administrative support for resolving state-to-state disputes.<sup>279</sup> The chapter provides a three-step process for resolving these disputes: consultation, conciliation, and arbitration. The first two steps are required before reaching the arbitration phase.<sup>280</sup> Consultation is simply an exchange of information between parties and an effort to resolve the dispute by negotiation between them.<sup>281</sup> In the concilia-

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277. For example, the European Community brought a complaint on behalf of the Dutch company Akzo Chemie concerning U.S. export restrictions that were said to favor Dupont. This claim led to a panel decision. Chile has pursued the interests of its fruit export sector by bringing a number of disputes to GATT settlement. AMELIA PORGES, PROCEEDINGS OF THE 85TH MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 13–14 (1993). Proposals to grant private parties access to the GATT dispute settlement system, in order to avoid them having to rely on their governments to take up the complaint, have not succeeded. Proposals to modify GATT in this way have come from several sources. *See, e.g.*, JOHN H. JACKSON ET AL., IMPLEMENTING THE TOKYO ROUND: NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES 207–09 (1984); Miquel Montanà i Mora, *A GATT with Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes*, 31 COLUM. J. TRANSNAT'L L. 103, 161–62 (1993); Rudolf Ostrihansky, *The Future of Dispute Settlement Within GATT: Conciliation v. Adjudication?*, in THE UNITED NATIONS DECADE OF INTERNATIONAL LAW: REFLECTIONS ON INTERNATIONAL DISPUTE SETTLEMENT 125 (Marcel Brus et al., eds., 1991). An investor-state dispute mechanism was not included in the WTO arrangements. *See* MARCEL M.T.A. BRUS, THIRD PARTY DISPUTE SETTLEMENT IN AN INTERDEPENDENT WORLD 28–37, 207–08 (1995). Proposals for an investor-state provision would add an adversarial element to the procedures that is said to be not in harmony with the conciliatory approach to bringing governments into line with GATT rules. *See* PORGES, *supra*, at 14.

278. The other areas include emergency actions under Chapter 8 and financial services disputes under Chapter 14.

279. *See* NAFTA, *supra* note 40, art. 2001–02.

280. *See id.* art. 2008(1).

281. *See id.* art. 2006.

tion phase, the Commission assists the parties in reaching a resolution but does not itself act as a decision-maker.<sup>282</sup>

Arbitration proceedings under Chapter 20 are notably different from those under Chapter 11. Arbitrators are chosen from a roster of up to 30 people who are put on the roster by agreement of the NAFTA Parties for terms of three years. They are to have expertise in law, international trade, or other matters covered by the agreement; be independent of the parties; and comply with a code of conduct established by the Commission.<sup>283</sup> The panel consists of five arbitrators. The chair is chosen by agreement of the parties; if there is no agreement, then the party chosen by lot picks a chair who is not a citizen of that party. Each of the parties then chooses two panelists who are citizens of the other party.<sup>284</sup> The panel is to prepare a final report, with any separate opinions, which the parties then transmit to the Commission. Unless it decides otherwise, the Commission is to publish the report fifteen days after it receives it.<sup>285</sup>

State-to-state dispute resolution would resolve some of the problems caused by the current investor-state procedures. The Chapter 20 dispute mechanism is better designed to cope with difficult questions touching sovereignty than arbitrations under Chapter 11, since the Chapter 20 arbitrators are chosen from a roster of carefully-selected experts, the arbitrators must abide by a strict ethics code, and their final report is made public. States filter out less serious claims. States can take into account comity interests in reciprocal respect of legal decisions. Canada, like the United States, would not want to see its legal system lightly treated, as might occur if denial-of-justice claims became common under Chapter 11.

But Chapter 20 proceedings are far from perfect. First, panel decisions are unappealable, and proceedings are confidential.<sup>286</sup> Second, the implementation of the report is left rather vague. When the parties receive the report, they are to “agree on the resolution of the

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282. *See id.* art. 2007.

283. *See id.* art. 2009; *see also* Code of Conduct for Proceedings Under NAFTA Chapters Nineteen and Twenty, 59 Fed. Reg. 8720 (Feb. 23, 1994).

284. *See* NAFTA, *supra* note 40, art. 2011.

285. *See id.* art. 2017.

286. *See* Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement, Rule 35 (“The Parties shall maintain the confidentiality of the panel’s hearings, deliberations and initial report, and all written submissions to and communications with the panel, in accordance with such procedures as may be agreed from time to time between representatives of the Parties.”).

dispute, which normally shall conform with the determinations and recommendations of the panel.”<sup>287</sup> If the panel has determined that there has been a breach of NAFTA and the parties cannot agree on a resolution, the winning party is entitled to suspend the benefits it provides under NAFTA.<sup>288</sup> This suspension should be, if possible, in the same sector as that in which the breach occurred. The Commission may establish a separate panel to determine whether the level of benefits suspended is “manifestly excessive.”<sup>289</sup>

Decisions of the panel, therefore, are not binding. The winner of such an arbitration is given the right to retaliate by not having to abide by its normal obligations under the agreement. This has potential to lead to mini trade wars, such as those going on now concerning the WTO’s decision on U.S.-produced hormone-fed beef and other matters.<sup>290</sup> There has been some speculation that this form of retaliation could seriously weaken the WTO system, and the same might occur with NAFTA.<sup>291</sup> However, bounded retaliation seems preferable to unbounded retaliation.<sup>292</sup> Since states have proved extremely reluctant to accept binding dispute settlement, this sort of mechanism may be the most effective possible. The system of retaliation interferes less with sovereignty and is less inflammatory than a monetary award.

Perhaps the most serious disadvantage of barring investor-state claims is that states may be reluctant to bring claims on behalf of their nationals. States worry about straining relations with another country and complicating other areas of interaction. They also may decide that bringing such claims is not worth the time and effort. Countries may be inclined to bring claims on behalf of politically powerful constituents and ignore the claims of others. This latter

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287. NAFTA, *supra* note 40, art. 2018(1).

288. *See id.* art. 2019(1).

289. *Id.* art. 2019(3).

290. *See* Thomas J. Dillon, Jr., *The World Trade Organization: A New Legal Order for World Trade?*, 16 MICH. J. INT’L L. 349 (1995); Kishore Gawande & Wendy L. Hansen, *Retaliation, Bargaining, and the Pursuit of “Free and Fair” Trade*, 53 INT’L ORG. 117 (1999); Kim Van der Borgh, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT’L L. REV. 1223 (1999).

291. *See, e.g.*, Van der Borgh, *supra* note 290, at 1232; Matthew Schaefer, *National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?*, 11 ST. JOHN’S J. LEGAL COMMENT. 307, 335 (1996).

292. *See, e.g.*, Andrea Kupfer Schneider, *Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations*, 20 MICH. J. INT’L L. 697, 712 (1999).



possibility is especially troubling because NAFTA was designed to encourage transnational interaction by smaller (and less influential) businesses in particular.<sup>293</sup>

*B. A National Alternative: Changes in Federal Diversity Requirements and Removal Statutes*

Scholars of international law are naturally apt to search for international solutions to international problems. But sometimes solutions lie at the national level. One alternative for resolving the denial-of-justice difficulty is an old idea: allow removal of cases involving aliens to federal court. The U.S. Constitution provides that the judicial power of the federal courts “shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”<sup>294</sup> The Judiciary Act of 1789 gave the federal circuit courts “original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where . . . an alien is a party.”<sup>295</sup> This was the Founders’ solution to the problems of bias in state courts, but the subsequent complete diversity rule has undermined that solution. This section will explore the Founders’ view, examine the complete diversity rule, and suggest how the complete diversity rule might be modified to protect aliens from denials of justice in state courts.

*1. The Founders’ vision*

The Founders explicitly contemplated removal to federal court as a remedy for state-court bias against aliens. State-court bias against aliens caused the Founders great concern because, in the post-revolutionary period, state courts were making it difficult or impossible for British creditors to collect debts owed by U.S. citizens.<sup>296</sup>

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293. This concern with medium-sized and smaller businesses is evident in the inclusion of NAFTA Article 2022, which requires an Advisory Committee on Private Commercial Disputes to report to the NAFTA Commission on the availability, use, and effectiveness of arbitration and other dispute resolution procedures in the free trade area. See *Terms of Reference for NAFTA Advisory Committee on Private Commercial Disputes*, (visited Feb. 16, 2001) <[http://www.ita.doc.gov/legal/adr\\_term.htm](http://www.ita.doc.gov/legal/adr_term.htm)>.

294. U.S. CONST. art. III, § 2. The Eleventh Amendment modified this provision to exclude from federal judicial power suits brought by citizens or subjects of foreign countries against one of the states. U.S. CONST. amend. XI.

295. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

296. See Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV.

This obstruction was a violation of the United States' obligations under the 1783 Treaty of Paris and threatened the flow of much-needed capital into the new country.<sup>297</sup>

Alexander Hamilton was the most outspoken supporter of alienage jurisdiction in the constitutional debates. Hamilton, writing in Federalist 80, made very clear that such diversity jurisdiction for aliens was necessary in order to fulfill the United States' obligations under international law and to preserve good relations with other nations.<sup>298</sup> The federal judicial power, he said, should extend to all cases involving "the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations or to that between the States themselves."<sup>299</sup> Federal courts should handle such matters because "the peace of the WHOLE ought not to be left at the disposal of a PART."<sup>300</sup> He anticipated that the United States would be held responsible for state violations of international law: "The Union will undoubtedly be answerable to foreign powers for the conduct of its members."<sup>301</sup> Therefore, the federal government should have the means of preventing such violations: "the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."<sup>302</sup> The consequences of injustice to foreigners in state courts could be grave, and the best means of avoiding it

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547, 553–62 (1989) (describing post-revolutionary debt crisis and anti-British creditor actions of state courts and legislatures); Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1430–53 (describing post-revolutionary debt crisis and anti-British creditor actions of state courts and legislatures); John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 24 (1948).

297. Article IV of the Treaty of Paris provided that foreign creditors would "meet with no lawful Impediment to the Recovery of the full Value . . . of all bona fide Debts heretofore contracted." Treaty of Paris, Sept. 3, 1783, U.S.-Gr. Brit., art. 4, 8 Stat. 80, 82. Secretary for Foreign Affairs John Jay wrote a lengthy memorandum to the Continental Congress in 1786 detailing massive American violations of Article IV and arguing that these violations might provoke war and damage the commercial prospects of the new nation. 31 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 781–884 (John C. Fitzpatrick ed., 1934). James Wilson of Pennsylvania also expressed concern about the United States' ability to attract capital if state courts could continue to discriminate against foreign creditors. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 491–93 (Jonathan Elliot ed. 1987) [hereinafter Elliot].

298. See THE FEDERALIST NO. 80, *supra* note 1, at 475.

299. *Id.*

300. *Id.* at 476.

301. *Id.*

302. *Id.*

would be to hear such cases in federal court. “As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.”<sup>303</sup>

Hamilton acknowledged that some might argue that the federal courts should hear only cases arising under treaties and the law of nations and not those that concerned only local law. He argued that both types of cases should be heard in the federal courts. Denial of justice in cases concerning local law might itself violate international law. “[I]t is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign, as well as one which violated the stipulations in a treaty or the general law of nations.”<sup>304</sup> In addition, it could be very difficult to distinguish between cases involving local law and those involving national questions when a foreigner was a party.<sup>305</sup>

Implicit in Hamilton’s discussion of federal court jurisdiction over aliens was the problem of bias in state courts. He warned against the “prevalency of a local spirit” in state courts and worried that the judges of certain states, “holding their offices during pleasure [of the legislature or executive], or from year to year, will be too little independent to be relied upon” for impartial application of the laws.<sup>306</sup> John Jay also expressed concern about state courts and “the different local laws and interests which may affect and influence them.”<sup>307</sup> His concern was supported by his report on state courts’ failure to comply with the Treaty of Paris.<sup>308</sup> At the Philadelphia Constitutional Convention of 1787 and elsewhere, James Madison several times referred to the need for protection against state court bias. At one point he bluntly said, “Confidence cannot be put in the State Tribunals as guardians of the National authority and inter-

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303. *Id.*; see also THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (“It is of high importance to the peace of America that she observe the laws of nations toward all these powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be . . . by thirteen separate States . . .”).

304. THE FEDERALIST NO. 80, *supra* note 1, 476–77.

305. *See id.*

306. THE FEDERALIST NO. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

307. THE FEDERALIST No. 3, *supra* note 303, at 43.

308. *See supra* note 297.

ests.”<sup>309</sup> Referring to alienage jurisdiction, he asked, “Could there be a more favorable or eligible provision to avoid controversies with foreign powers? Ought it to be put in the power of a member of the Union to drag the whole community?”<sup>310</sup> James Wilson of Pennsylvania and William Davie of North Carolina made similar arguments.<sup>311</sup> And Chief Justice Marshall, in the 1809 case *Bank of the United States v. Deveaux*,<sup>312</sup> also stated that fear of state court bias was the motivation behind diversity jurisdiction:

However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not the less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.<sup>313</sup>

It has been the fashion for some time to question whether local bias is still a problem in the state courts, if indeed it ever was a problem. Some academics and federal judges have argued that the supposed advantages to removal are chimerical and that diversity jurisdiction only congests federal courts. In their view, diversity jurisdiction should be severely curtailed or even abolished altogether.<sup>314</sup>

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309. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 27 (Max Farrand ed., rev. ed., 1927). In the debate over whether to have lower federal courts, Madison referred to British debt cases and asked, “What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand ed., rev. ed., 1927).

310. 3 Elliot, *supra* note 297, at 533–34 (Madison’s Report on the Virginia Resolutions).

311. 2 Elliot, *supra* note 297, at 491–93 (Wilson); 4 Elliot, *supra* note 297, at 158–59 (Davie) (“[T]he denial of justice is one of the just causes of war. If these controversies were left to the decision of particular states, it would be in their power, at any time, to involve the continent in a war . . . . It is clear that where the peace of the Union is affected, the general judiciary ought to decide.”).

312. 9 U.S. (5 Cranch) 61 (1809).

313. *Id.* at 87.

314. The literature on diversity jurisdiction is huge. See RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 210–221 (1996) (discussing literature); CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS § 23 (5th ed. 1994) (summarizing literature). One of the most formidable foes of diversity jurisdiction was Judge Henry Friendly. See HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 139–52 (1973); see also Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13

Today, because of *Erie Railroad Co. v. Tompkins*,<sup>315</sup> federal diversity jurisdiction cannot solve problems of bias in state substantive law (or at least not to any great extent). Federal courts sitting in diversity jurisdiction must apply the state law, biased or not. Judge Henry Friendly suggested that, in part, federal diversity jurisdiction was meant to correct for biased state substantive law.<sup>316</sup> Indeed, former West Virginia Chief Justice Richard Neely has argued that elected judges' incentives have affected the substantive tort law of many states.<sup>317</sup> Long before *Erie*, Justice Story said general common law should apply in alienage cases.<sup>318</sup> In light of *Erie*, there seems little prospect of returning to *Swift v. Tyson*-style<sup>319</sup> general common law in cases involving aliens.

Still, the Founders' remarks suggest that diversity jurisdiction was designed to address bias in the *application* of the law. The denial-of-justice claims focus on the same problem, and diversity jurisdiction could help.<sup>320</sup> Out-of-state corporate defendants and aliens generally believe that federal courts provide them with a more impartial forum.<sup>321</sup> Federal judges are not elected and receive no campaign contributions. To ensure their independence and insulation from interest group pressure, they hold tenure during good behavior and their salaries cannot be diminished.<sup>322</sup> Federal judges may have political

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CORNELL L.Q. 499, 520–23 (1928); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); Larry Kramer, *Diversity Jurisdiction*, 1990 BYU L. REV. 97, 121–22. The arguments over parity between federal and state courts concerning diversity jurisdiction overlap with arguments about federal question jurisdiction.

315. 304 U.S. 64 (1938). See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1474–93 (1997) (explaining the constitutional basis of the Court's decision in *Erie*).

316. Henry J. Friendly, *Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495 (1928).

317. NEELY, *supra* note 121, at 4, 53.

318. See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1691–94, at 568–71 (1833). Story stated that the “law to be administered in cases of foreigners is often very distinct from the mere municipal code of a state, and dependent upon the law merchant, or the more enlarged consideration of international rights and duties, in the case of conflict of the foreign and domestic laws.” *Id.* at 570.

319. 41 U.S. (16 Pet.) 1 (1842).

320. *Erie* itself suggested the goal of federal diversity jurisdiction was to provide a neutral forum. See 304 U.S. at 74.

321. See *infra* Part V.B.1.

322. See THE FEDERALIST NOS. 78, 79, at 464–75 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

and other biases, but at least they are not directly beholden to certain interests for their continuance on the bench.

### 2. *The complete diversity requirement*

A major stumbling block to removal to federal court has been the requirement of complete diversity. Where the interests are joint, each party on one side must be diverse from each party on the other side.<sup>323</sup> This complete diversity is required to remove a case from state to federal court, and an action is removable only if none of the defendants with joint interests are citizens of the state in which the action is brought.<sup>324</sup> These rules regarding complete diversity and removal allow plaintiffs to control removal to some extent. In order to defeat complete diversity, plaintiffs often join a local defendant, who often contributes little to a final resolution.<sup>325</sup> For example, in a products liability case, plaintiffs might name a local dealer as well as an out-of-state manufacturer as defendants. The true target is obviously the out-of-state manufacturer's deep pockets. The *Loewen* case provides a classic example of a similar maneuver: the Canadian and Delaware corporations were the actual targets, but O'Keefe also joined much smaller Mississippi corporations owned by Loewen, such as the Wright & Ferguson Funeral Home, to defeat diversity. Loewen mentions in its notice of claim that O'Keefe thereby "made it impossible for Loewen to remove the case to federal court, where all judges are appointed and have life tenure, and are thus not beholden to any particular local constituency."<sup>326</sup>

### 3. *Abandoning the complete diversity requirement as to aliens*

Abandoning the complete diversity requirement—at least as to aliens—and allowing parties such as Loewen to remove cases to federal court would help considerably to prevent state court denials of justice for which the United States is liable under international law.<sup>327</sup> The current complete diversity requirement allows parties to

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323. See *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

324. See 28 U.S.C. § 1441(a)-(b) (1994).

325. See *Bill Aims to Get More Class Actions Under Jurisdiction of Federal Courts*, 67 U.S.L.W. 2707 (June 1, 1999) [hereinafter *Bill Aims*].

326. Loewen's Notice of Claim, *supra* note 34, at 14–15.

327. Even those who have opposed diversity jurisdiction generally have advocated retaining it in alienage cases and even applying a minimal diversity test to such cases. See, e.g., Rowe,

defeat removal to federal court on technicalities irrelevant to the actual dispute. Hamilton's goal of preventing international strife is thus frustrated. Abandoning the complete diversity requirement as to aliens may be the solution that is least damaging to federalism concerns. How might this be done?

The complete diversity requirement is not to be found in the words of the Constitution nor on the face of the diversity statute, 28 U.S.C. § 1332. It is a long-standing judicial construction of the statute, which dates back to Chief Justice Marshall's 1806 opinion in *Strawbridge v. Curtis*,<sup>328</sup> construing the Judiciary Act of 1789 (which contained no specific language on the question). The opinion in *Strawbridge* is only a few sentences long and gives no reasoning for the decision, but federal courts have followed *Strawbridge* ever since. One could argue that, since *Strawbridge*, joinder rules have become much less restrictive, so a change in the complete diversity rule is now justified.<sup>329</sup>

The Supreme Court, in *State Farm Fire & Casualty Co. v. Tashire*,<sup>330</sup> held that the complete diversity rule is a statutory construction, not a constitutional requirement. Also in that case, the Court construed the federal interpleader statute, 28 U.S.C. § 1335, to require only "minimal diversity"—diversity of citizenship simply between two or more claimants—rather than complete diversity. Like the other jurisdictional statutes, § 1335 did not specify exactly what type of diversity was required; in requiring only minimal diversity, the Court said it considered "[t]he language of the statute, the legislative purpose . . . , and the consistent judicial interpretation tacitly accepted by Congress" not to require complete diversity in inter-

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*supra* note 314, at 967 (briefly discussing alienage jurisdiction and favoring minimal diversity in such cases largely because of "possible effects on the foreign relations of the United States"); Kramer, *supra* note 314, at 122 (same). See also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 39–40 (1990) (recommending abolition of diversity jurisdiction except for suits involving aliens and interpleader); H.R. 6691, 97th Cong., 2d Sess. (1982) (bill that would have abolished diversity jurisdiction but retained alienage jurisdiction); Johnson, *supra* note 143, at 58 ("The complete alienage requirement . . . fails to appreciate fully the foreign relations implications raised if an alien is a party to a lawsuit.").

328. 7 U.S. (3 Cranch) 267 (1806).

329. In addressing diversity and removal, however, Congress and the courts have tried to compensate for more permissive modern joinder rules with doctrines concerning "separate and independent . . . cause[s] of action," 28 U.S.C. § 1441(c) (1994), and "additional parties," *id.* § 1332(a)(3).

330. 386 U.S. 523, 530–31 (1967).

pleader cases.<sup>331</sup> The Supreme Court has proved willing to modify the complete diversity requirement in certain contexts.

The U.S. Supreme Court has not decided whether complete diversity is required in a case involving an alien. The lower courts have assumed that complete diversity *is* required, often citing the Fifth Circuit's decision in *Ed and Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*<sup>332</sup>

Judicial decision could possibly abolish the complete diversity requirement for cases involving aliens. But this is unlikely for several reasons. The complete diversity requirement has acquired the authoritative patina of time, and judges are loathe to disturb long-standing statutory constructions.<sup>333</sup> Judges tend to be opposed to expansion of federal jurisdiction, particularly diversity jurisdiction, arguing that it overloads federal courts.<sup>334</sup> Finally, the removal statute, § 1441, requires that none of the defendants be a citizen of the state where the action was brought.<sup>335</sup>

The better course for abolishing the complete diversity requirement as to aliens would be congressional action. Congress need only amend the removal statute to provide that an alien can always remove a case to federal court, regardless of other parties' diversity, in the same manner that a foreign state can.<sup>336</sup> Additionally, it would be possible to give federal courts exclusive jurisdiction over alienage cases.<sup>337</sup> But this seems unnecessary because, in practice, foreign de-

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331. *Id.* at 530.

332. 506 F.2d 757, 758 (1975).

333. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).

334. For example, the Judicial Conference of the United States voted in March 1999 to oppose bills that would permit minimal diversity and eliminate the amount in controversy requirement for suits concerning Year 2000 computer failures. The Conference's statement said that the bills could potentially cause a massive overload of the federal court system, "resulting in substantial costs and delays." *Judicial Council Headed by Chief Justice Registers Opposition to Year 2000 Bills*, 67 U.S.L.W. 2555 (Mar. 23, 1999).

335. *See* 28 U.S.C. § 1441(b) (1994).

336. 28 U.S.C. § 1441(d) provides that "[a]ny civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending." The section further provides that the case shall be tried in federal court without a jury, which may well be important given the extra care necessary in dealing with sovereign states, but perhaps would not be so significant in a case involving private parties. In addition, the section provides that the time limitations for removal in 28 U.S.C. § 1446(b) may be enlarged "at time for any cause shown," which would make sense in the alienage context as well.

337. *See* *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("Congressional power to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either lim-



defendants would probably remove and might as well be given the choice. If they could remove, but chose not to, and a denial of justice resulted in state court, they arguably failed to take advantage of a remedy provided and so cannot claim damages against the United States under agreements such as NAFTA.<sup>338</sup>

After the case is filed, changing circumstances may affect diversity jurisdiction. For example, a foreign defendant might be joined in a case after the initial filing. The longstanding rule is that a case cannot be removed on the basis of diversity unless the required diversity existed both at the commencement of the suit and at the time of filing the petition for removal.<sup>339</sup> An exception exists if the plaintiffs' voluntary action (including dismissal or settlement) causes a change in circumstances.<sup>340</sup> To prevent discrimination against aliens, an alien ought to be able to remove whether joined by a plaintiff or defendant.<sup>341</sup> If this rule should prove too burdensome to the federal system, then removal could be allowed at least where the alien was joined by a *plaintiff*. As is the case with cases involving foreign states, the strict time limits for removal in § 1446(b) ought not to apply in alienage cases.<sup>342</sup>

Shifting these cases from state to federal court is of course not without cost to the federal judicial system. The Association of Trial Lawyers of America ("ATLA"), a pro-plaintiff's lawyer group, claims that the proposed class action reform allowing greater removal to federal court "would cause an even greater backlog of the civil dockets [in federal court], eventually discouraging consumers from ever bringing their cases."<sup>343</sup> However, backlogs in state courts are often greater than those in federal courts; measures transferring cases to federal court might actually improve the situation by relieving the harder-pressed state courts.<sup>344</sup>

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ited, concurrent, or exclusive . . . ." (quoting *Cary v. Curtis*, 44 U.S. (How.) 236, 245 (1845)).

338. See *infra* discussion of exhaustion of local remedies rule.

339. See *Gibson v. Bruce*, 108 U.S. 561, 563 (1883).

340. See numerous cases cited at 28 U.S.C.A. § 1446, ann. 484-90 (West 1999).

341. This is the case with the removal rules governing foreign states. See 28 U.S.C. § 1441(d) (1994).

342. See *id.*

343. *Congress, Judicial Conference Mull Changes to Class Action, Mass Tort Rules*, *supra* note 129, at 2724 (quotation of Carlton Carl of ATLA).

344. See POSNER, *supra* note 314, at 219.

In any case, alienage cases form a relatively small proportion of the docket. According to the most recent data available from the Administrative Office of the U.S. Courts (for the year ending June 30, 2000), the total number of diversity cases filed in federal court, including cases removed, was 49,603.<sup>345</sup> Of these, foreigners were listed as defendants in 1,136 cases, or 2.3% of the total diversity cases. (Foreigners were listed as plaintiffs in 1,353 cases, or 2.7% of the total.)

Allowing aliens more power to remove to federal court may be politically feasible. Congress recently has attempted to modify diversity requirements in other contexts, notably class actions.<sup>346</sup> During the last Congress, both the House and the Senate were working on legislation that would permit removal of many more class actions to federal court by abolishing the traditional requirement that every defendant be diverse from every named plaintiff.<sup>347</sup> The House approved its version, while the Senate Judiciary Committee reported its version to the floor last June.<sup>348</sup> According to its supporters, the measure was necessary in part to prevent plaintiff's attorneys from capitalizing on political goodwill with their local elected judges.<sup>349</sup> The bills had enthusiastic business support. It seems that business groups have shifted their tactics somewhat from focus on changes in substantive law, through tort and punitive damages reform, to focus on changes in procedure.<sup>350</sup>

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345. This statistic and the ones that follow were provided by the Administrative Office of the United States Courts, Analysis and Reports Branch, Statistics Division. The information is derived from the civil cover sheets of cases filed.

346. Congress has also tinkered with diversity jurisdiction for aliens by amending the diversity statute in 1988 to provide that "an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled." 28 U.S.C. § 1332(a) (1994).

347. See S. 353, 106th Cong. (1999); H.R. 1875, 106th Cong. (1999); see also *House Judiciary Committee Approves Bill Vastly Expanding Federal Class Action Power*, 68 U.S.L.W. 2068 (Aug. 10, 1999); *Bill Aims*, *supra* note 325, at 2707. The requirement for diversity in class actions that every named plaintiff be diverse to every defendant was established in *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921).

348. *Senate Judiciary OKs Class Action Bill, Rejects Attempts to Carve Out Exemptions*, 69 U.S.L.W. 2006, 2006-07 (July 4, 2000). A filibuster was threatened. *Id.*

349. See *Congress, Judicial Conference Mull Changes to Class Action, Mass Tort Rules*, *supra* note 129, at 2723.

350. See *id.* at 2724 (remarks attributed to Sherman Joyce, president of the American Tort Reform Association).

Procedural changes such as allowing removal in more cases may prove to be much more politically palatable than broad-based federal tort reform. And they may even work to solve the problem better, since more of the biggest verdicts are being awarded in contract disputes, for example.<sup>351</sup> If the federal government altered the law of torts, or even contracts, ingenious plaintiffs' lawyers and judges could likely find new ways of transferring money from out-of-state defendants to in-state plaintiffs. It would be far better to remove these cases altogether from the state systems.

Foreign interests often do not have the same domestic clout as U.S. commercial interests, but they do have NAFTA and a certain degree of international pressure on their side. If the *Loewen* arbitration produces an award against the United States, and, even if it does not but there is still danger of such awards, this could provide a spur against Congress's normal inertia. The prospect of paying out hundreds of millions of dollars to compensate foreigners for denials of justice in state courts—with the accompanying loss to U.S. prestige around the world—might galvanize Congress' will to act.

#### 4. *The difference a federal forum makes for aliens*

Litigating a case in federal rather than state court would make a difference to aliens in several ways. The most important difference, which the analysis in Part III.B has already suggested, is the nature of the judges. Federal judges are not elected and have life tenure. As other commentators have noted, they are therefore likely to be less sensitive to popular xenophobia<sup>352</sup> and not apt to favor lawyers (especially those of in-state plaintiffs) who contribute to judicial campaigns. This relative lack of bias and favoritism may be manifested in various ways. For one thing, federal judges would probably be more likely to restrain lawyers' rhetorical excesses in playing to jurors' prejudices and generally to keep a firmer control of their courtroom, not ceding it entirely to the plaintiff's lawyers.

In addition, federal judges would be more likely to apply the substantive law fairly. Of course, because of *Erie R. Company v.*

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351. See Galanter, *supra* note 5, at 1133; Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 8; MARK PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS 23–24 (1987).

352. See Johnson, *supra* note 143. The empirical study of Clermont and Eisenberg suggests that bias against foreigners is not common in federal court. See Clermont and Eisenberg, *supra* note 143.

*Thompkins*,<sup>353</sup> federal courts sitting in diversity jurisdiction must apply state substantive law. But many state laws allow considerable discretion in the laws' application. For example, although state standards for review of punitive damages must be followed,<sup>354</sup> federal courts may be more likely to exercise powers of remittitur. Empirical studies have suggested that these differences between federal and state judges are significant in cases involving in-state plaintiffs and out-of-state defendants.<sup>355</sup>

Besides differences in judges, there may be significant differences in law. Federal procedural law may be more favorable to aliens in Loewen's position than state procedures. State appeal bond requirements, for instance, most likely do not apply to cases removed to federal court.<sup>356</sup> Of lesser importance, but perhaps still significant, is the fact that federal juries tend to be drawn from a broader geographic area than state juries,<sup>357</sup> reducing the chance that juries will be exclusively drawn from one very populist and xenophobic area. In short, abandoning the complete diversity rule in alienage cases is not a panacea that will solve all problems facing aliens in American courts, but it should improve the situation considerably.

## VII. CONCLUSION

The denial-of-justice doctrine poses a challenge to our legal system. As global trade grows, this challenge cannot be ignored if the United States is to retain its credibility as it urges other countries to adopt the rule of law and accountable legal systems. Even a few extreme verdicts against foreign corporations or individuals damages

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353. 304 U.S. 64 (1938).

354. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

355. See *Helland & Tabarrok*, *Electoral Institutions*, *supra* note 131.

356. See *Burlington Northern R.R. v. Woods*, 480 U.S. 1 (1987) (holding that Alabama rule requiring unsuccessful appellant to pay 10% of judgment as an affirmance penalty does not apply to federal court sitting in diversity jurisdiction). *But see* *Cohen v. Beneficial Ind. Loan Corp.*, 337 U.S. 541 (1949) (upholding application of a state bond requirement for shareholder derivative actions even though Rule 23.1 is silent about such a requirement; the case predates *Hanna v. Plumer*, 380 U.S. 460 (1965) but is still good law).

357. See *Johnson*, *supra* note 143, at 54–55. Johnson focuses on the fact that drawing jurors from a narrow pool may sometimes help aliens, since the pool in a certain small area such as San Francisco may be more cosmopolitan and less biased against aliens than the broader pool in the Northern District of California. However, the dangers of a local pool would seem to be greater than the possible benefits for aliens. Plaintiffs often take care to lay venue in more biased areas, which is easier to do in state court.

the foreign perception of the United States' commitment to justice.

International solutions to the problem could be adopted, but they are likely to generate great friction within the United States. Decisions of international tribunals provide a ready focus for discontent. As far as possible, it makes sense to find national solutions to international problems, to adjust our national law to avoid international conflict. This was precisely the type of solution the Founders had in mind when they advocated alienage jurisdiction in the federal courts. The United States was preoccupied with building good foreign relations then, as a new nation struggling to keep the peace and to develop economically. Now again we find ourselves in a world in which international trade is vitally important. By eliminating the complete diversity requirement for aliens, we may manage to kill two birds with one stone: alleviate some of the most serious problems with our civil justice system and fulfill our international obligations.