The Loewen Claim: A Creative Use of NAFTA's Chapter 11

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I. INTRODUCTION

In ratifying NAFTA, the governments of Canada, Mexico and the United States resolved to "[establish] clear and mutually advantageous rules governing their trade; [ensure] a predictable commercial framework for business planning and investment,"¹ "eliminate barriers to trade[,]" and "create effective procedures... for the resolution of disputes."² Chapter 11 implements these objectives by providing standards for the treatment of foreign

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². Id. art. 102(1)(a)&(e).
investors and establishing procedures for arbitration of investor-state disputes. Chapter 11 is an increasingly important aspect of NAFTA, as evidenced by the growing number of claims under the agreement, which permits individual investors to sue signatory nations directly to enforce rights guaranteed therein.

In November of 1998, The Loewen Group, Inc. ("TLGI"), a Canadian corporation involved in the death-care industry, filed a claim pursuant to NAFTA under the International Centre for the Settlement of Investment Disputes (ICSID) Additional Facility Rules against the United States government. The claim sought damages in excess of $600 million for alleged injuries that Loewen suffered as a party to litigation in Mississippi state courts. Loewen argues, inter alia, that an award of punitive damages in a civil suit is tantamount to an indirect expropriation under NAFTA Article 1110. Chapter 11 of NAFTA on investment establishes protections for investors and procedures for arbitration of investor-state disputes. Article 1110 of NAFTA prohibits the uncompensated expropriation of investments made by foreign investors.

The United States moved to dismiss Loewen's claims, inter alia, objecting to the jurisdiction of the Loewen Tribunal. In its January 2001 decision, the Tribunal rejected the U.S.'s jurisdictional objection and dismissed the motion on all other grounds as more appropriately addressed on the merits. The Tribunal concluded that the judgment of a state court in litigation between pri-

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4. See U.S. Department of State, NAFTA Investor-State Arbitrations, available at http://www.state.gov/s/1/c3439.htm (last visited Mar. 28, 2003). Six cases have been filed against the United States of America; four cases have been filed against the Government of Canada; eight cases have been filed against The United Mexican States.
8. NAFTA, supra note 1, ch. 11.
9. Id. art. 1110.
vate parties constituted a "measure" under NAFTA within the definition of Article 201. Article 201 defines "measure" as including "any law, regulation, procedure, requirement or practice." The Tribunal deemed Article 201's inclusive definition inconsistent with the notion that state judicial action is not such a "measure." This aspect of the Loewen Tribunal's preliminary decision indicates that NAFTA Tribunals deem most forms of state action or inaction, irrespective of the branch of state involved, to constitute a measure for purposes of Chapter 11 claims.

Thus far, only one claimant under Chapter 11, Metalclad Corp. v. The United Mexican States, has been successful. It arose from conduct of a Mexican State that "resulted in the complete loss of the claimant's investment." Although NAFTA arbitration decisions do not have precedential value, they do indicate approaches future panels are likely to take. This comment will analyze the Loewen claim in light of the relevant NAFTA provisions and the Metalclad Arbitration, including the subsequent Arbitral Appeal in the British Columbia Supreme Court. This comment will also provide an overview of the arbitral process as laid out in NAFTA. The comment concludes by suggesting that the Loewen claim, though superficially tenable, will likely fail because it side-steps crucial procedural obstacles in its expropriation argument.

II. BACKGROUND: JEREMIAH J. O'KEEFE, ET AL. V. THE LOEWEN GROUP, INC., ET AL.

In 1995, Jeremiah O'Keefe, a Biloxi businessman, brought suit in a Mississippi state court against The Loewen Group, Inc. ("TLGI"), a Canadian corporation, and its founder, Raymond L. Loewen, a Canadian citizen. The litigation arose out of a com-

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13. NAFTA, supra note 1, at art. 201.
15. Weiler, supra note 10, at 367.
18. Lerner, supra note 5, at 263.
mmercial dispute between O'Keefe and Loewen, who were competitors in the funeral home and funeral insurance industries in Mississippi.²⁰ O'Keefe alleged that Loewen committed predatory and anti-competitive acts in a scheme to dominate the local market and drive local funeral and insurance companies out of business.²¹

Specifically, the dispute involved three contracts between O'Keefe and Loewen valued by O'Keefe at $980,000, and one alleged contract involving a proposed exchange of a Loewen funeral home insurance company and O'Keefe funeral homes worth approximately $4 million and $2.5 million, respectively.²² O'Keefe's amended complaint, alleging breach of contract, common-law fraud, and violations of state antitrust laws, sought actual damages of $5 million.²³ In a successful strategy to bar Loewen's removal to federal court, O'Keefe named local Mississippi corporations owned by Loewen as additional defendants.²⁴

O'Keefe's lead trial counsel was Willie Gary,²⁵ a flamboyant plaintiffs' lawyer known for his success in winning substantial awards.²⁶ During the trial, despite court instructions to the attorneys not to make public statements about the case, Gary told the congregation of a local black church that a large verdict in the case would answer his prayers.²⁷ Gary also spoke on a radio talk program popular among the local black community.²⁸ Moreover, the jury was not sequestered.²⁹

Michael Krauss, in his article on the subject, described O'Keefe v. Loewen as "[t]he [t]rial [d]ebacle," stating that Gary's trial presentation was "essentially devoid of legal arguments

²⁰ The Loewen Group, Inc., case no. ARB(AF)/98/3, para. 2.
²¹ Id. para. 33.
²² Id. para. 2.
²³ Id. para. 33.
²⁴ Id. para. 37.
²⁵ Id. para. 38; see Michael I. Krauss, NAFTA Meets the American Torts Process: O'Keefe v. Loewen, 9 GEO. MASON L. REV. 69, 76-77 (2000) (detailing the background of the prominent plaintiffs' lawyer from Florida. Gary clearly influenced the litigation. Six months prior to his participation, the Loewen legal team rebuffed a $4 million demand from O'Keefe's attorneys. Three months before trial, Gary sent Loewen a new settlement demand of $125 million).
²⁶ Krauss, supra note 25, at 76 (noting that Gary has won twenty-five suits of $1 million or more during his career).
²⁷ The Loewen Group, Inc., case no. ARB(AF)/98/3, para. 39.
²⁸ Id.
²⁹ Id.
Regarding contract law."³⁰ Throughout the trial, O'Keefe's attorneys, over the objections of defense counsel, made highly prejudicial comments. Gary contrasted Loewen's "foreign" Canadian nationality to "O'Keefe's Mississippi roots" and World War II military service record.³¹ The plaintiff presented testimony that O'Keefe, a white man, was not racist. The plaintiff also introduced testimony suggesting that Loewen was racist.³² O'Keefe's attorneys also made "class-based distinctions" between their client, portrayed "as running a family-owned business," and Loewen, "portrayed as a large, wealthy corporation."³³ All of Loewen's objections to this evidence on relevance grounds were overruled.³⁴ Gary's closing argument ignored details of contract and tort law, and instead focused on themes of nationality, race, and wealth.³⁵

The Mississippi jury awarded O'Keefe $100 million in compensatory damages, including $74 million for emotional distress, and $400 million in punitive damages, for a total award of $500 million.³⁶ The New York Times reported that the jury foreman made a public statement after the verdict 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."³⁷ The verdict, which represented 78% of Loewen's total net worth, was the largest award in Mississippi history "and was over 100 times greater than the entire net worth of the companies to be exchanged in the principal underlying transaction."³⁸

Mississippi law requires a losing defendant who wishes to appeal prior to paying damages to post an appeal bond for 125% of the judgment in order to protect the interests of the judgment creditor during the appeals process.³⁹ In this case, 125% of the judgment is $625 million.⁴⁰ The surety bond companies contacted by Loewen required a $625 million letter of credit as collateral.⁴¹

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³⁰ Krauss, supra note 25, at 77 (asking the question "What's Law Got To Do With It?").
³¹ The Loewen Group, Inc., case no. ARB(AF)/98/3, para. 4.
³² Id.
³³ Id.
³⁴ Krauss, supra note 25, at 78.
³⁵ The Loewen Group, Inc. case no. ARB(AF)/98/3, para. 96.
³⁶ Id. para. 3.
³⁷ Id. para. 118 (quoting N. Bernstein, Brash Funeral Chain Meets Its Match in Old South, N.Y. TIMES, Jan. 27, 1996, at A1, A6).
³⁸ Id. para. 3.
³⁹ Canadian Corp. Found Liable, supra note 19.
⁴⁰ The Loewen Group, Inc. case no. ARB(AF)/98/3, para. 121.
⁴¹ Id.
In its Notice of Claim, Loewen states that it would have incurred "well over $200 million in costs in 1996 and 1997 alone to pursue the appeal bond," which Loewen would not recover even if it prevailed on appeal. The bond, however, may be reduced or eliminated for "good cause." Loewen offered to post a bond for $125 million, which constituted 125% of the compensatory award. The Mississippi Supreme Court refused any reduction of the bond, requiring Loewen to post a $625 million bond within a week. Loewen claims that this decision "effectively foreclosed [its] appeal rights" and forced it to settle for $175 million.

In November 1988, Loewen filed a claim for arbitration against the United States. It contended that the trial court proceedings and the Mississippi Supreme Court's refusal to reduce the bond requirement constituted violations of NAFTA's Chapter 11. Specifically, Loewen alleged in its notice of claim that "the introduction of extensive anti-Canadian and pro-American testimony and counsel comments during the O'Keefe litigation violated" the anti-discrimination principles set forth in Article 1102 and the minimum standard of treatment guaranteed in Article 1105 of NAFTA. Loewen also claims that "the discriminatory conduct, excessive verdict, the denial of right to appeal, and the coerced settlement violated Article 1110 of NAFTA, which bars the uncompensated expropriation of investments of foreign investors."

III. **Metalclad Corp. v. The United Mexican States**

A. Arbitral Awards

*Metalclad Corp. v. United Mexican States* is the only decision to date to find a violation of Article 1110's prohibition against

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42. *Id.* para. 123, 127 (the $200 million figure stated by Loewen includes the "bonding cost itself ... the cost of selling equity at a distressed price to finance the bond, and the added cost of continuing to finance TLGI's operations.").
43. *Id.* para. 5.
44. *Id.*
45. *Id.*
46. *Id.* para. 6.
47. *Id.*
48. Christopher Dugan of Jones, Day, Reavis & Pogue's Washington, D.C., office filed the arbitration claim on behalf of Loewen.
49. The Loewen Group, Inc. case no. ARB(AF)/98/3.
50. *Id.* para. 139.
51. *Id.* para. 7.
uncompensated expropriation. The dispute arose from the activities of Metalclad, a U.S. corporation, in the Mexican Municipality of Guadalcazar ("Guadalcazar"), in the Mexican State of San Luis Potosi, ("SLP"). Metalclad alleged that the United Mexican States ("Mexico"), through its local governments of SLP and Guadalcazar, interfered with the development and operation of a hazardous waste landfill. The Government of Mexico and SLP issued operating permits for the landfill, and federal authorities assured Metalclad that it had all that was necessary to undertake the landfill project. Relying on the representations of the federal government, Metalclad began construction on the landfill until Guadalcazar issued a "Stop Work Order." Guadalcazar refused to issue the required permits for the landfill, citing local opposition and environmental concerns. Negotiation attempts failed, and Metalclad filed a claim under NAFTA alleging violations of Article 1105 and Article 1110. While the arbitration proceeding was underway, the governor of SLP, three days before his term expired, issued an ecological decree declaring the landfill a nature reserve for the protection of rare cactus. The effect of the decree "permanently precluded the operation of the landfill." Ultimately, the arbitral tribunal awarded Metalclad compensation in the amount of U.S. $16.685 million.

B. Arbitral Award Appeal

Mexico challenged the arbitration award in the Supreme Court of British Columbia, the location of the arbitral tribunal. That court found the Metalclad Tribunal misconstrued applicable law to include transparency obligations in Article 1105's guaranteed minimum standard of treatment. The principle of transparency, which is mentioned in Article 102(1), is implemented

53. Vicki Been, NAFTA's Investment Protections and the Division of Authority for Land Use and Environmental Controls, 32 ENVTL. L. REP. 11001 (2002).
54. Metalclad Corp., 40 I.L.M. para. 1 at 37.
55. Id.
56. Id. paras. 78, 79 at 48.
57. Id. para. 87, at 48, 49.
58. Id. para. 92.
59. Been, supra note 53, at 11008.
60. Metalclad Corp., 40 I.L.M. para. 59 at 44.
61. Id.
62. Id. para. 131 at 54.
64. Id. para. 40.
through the provisions of Chapter 18, not Chapter 11.\textsuperscript{65} Since the Tribunal made its decision on the basis of transparency, the matter was beyond the scope of the submission to arbitration because Chapter 11 contains no transparency obligations.\textsuperscript{66}

The court temporally bifurcated its analysis of the alleged Article 1110 violation into pre-ecological decree analysis and post-ecological decree analysis.\textsuperscript{67} The court held “that the Tribunal’s analysis of Article 1105 infected its analysis of Article 1110.”\textsuperscript{68} In finding a breach of Article 1105 on the basis of a lack of transparency and concluding that there had been expropriation within the meaning of Article 1110, the Tribunal also decided a matter beyond the scope of the submission to arbitration.\textsuperscript{69}

The court went on to hold, however, that the Tribunal’s finding that the Governor’s ecological decree amounted to expropriation was not based on a lack of transparency or on the Tribunal’s finding of a breach of Article 1105; therefore, it “stands on its own.”\textsuperscript{70} The Tribunal’s decision with respect to the ecological decree was not found to be patently unreasonable.\textsuperscript{71} Although the court found the Tribunal’s definition of expropriation for purposes of Article 1110 to be “extremely broad,” that definition is a question of law and therefore was not subject to review.\textsuperscript{72} Accordingly, the court upheld the award to the extent that it was based on the Tribunal’s conclusion that the ecological decree amounted to an expropriation without compensation.\textsuperscript{73}

IV. CHAPTER 11

A. Background

Provisions such as Chapter 11 are known as investor-state provisions.\textsuperscript{74} They are a departure from traditional international law under which only states could bring actions against other states.\textsuperscript{75} In general, countries that export capital favor investor-state provisions as a means to protect their citizens’ assets from

\begin{itemize}
\item \textsuperscript{65} Id. para. 71.
\item \textsuperscript{66} Id. para. 72.
\item \textsuperscript{67} Id. paras. 77-101.
\item \textsuperscript{68} Id. para. 78.
\item \textsuperscript{69} Id. para. 79.
\item \textsuperscript{70} Id. para. 94.
\item \textsuperscript{71} Id. para. 97.
\item \textsuperscript{72} Id. para. 99.
\item \textsuperscript{73} Id. para. 105.
\item \textsuperscript{74} Lerner, \textit{supra} note 5, at 233.
\item \textsuperscript{75} Id.
\end{itemize}
expropriation in less-developed countries. In particular, the United States has been enthusiastic about investor-state provisions, which, "in theory aid the development of an open trading system."

The United States has advocated these provisions in large part because of fear of "foreign expropriation of U.S. investor assets abroad." Consequently, Chapter 11's underlying impetus was a means of protecting U.S. and Canadian investments from takings by the Mexican government. Without being able to resort to international arbitration against this type of action, prospective U.S. and Canadian investors would be hesitant to invest in Mexico because of fears that the Mexican courts offered insufficient protection against direct or creeping expropriation. As a result, a major theme behind Article 1101 is to provide a level playing field in an investment dispute with the Mexican government and to allow for arbitration outside of Mexico by an independent body. Given this background, it is ironic that Loewen, a Canadian corporation, is employing Chapter 11's provisions, which were originally incorporated into NAFTA to protect American investments from expropriation, to assail a decision of an American court as an indirect expropriation.

On the other hand, one might ask of Chapter 11, "[i]f it's applicable to Mexico, why not to the U.S.?

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76. Id.
78. Lerner, supra note 5, at 245 (noting that U.S. investments have long been beset with expropriations abroad, especially in Latin America. Examples include the uncompensated expropriations in Cuba and the Mexican nationalization of the oil industry in 1938).
79. Id.; see also Gregory M. Sterner, Note, Taking a Constitutional Look: NAFTA Chapter 11 as an Extension of Member States' Constitutional Protection of Property, 33 LAW & POL'Y INT'L BUS. 405, 419 (2002) (explaining that the fear of expropriation of foreign investments by Mexico, and in particular U.S. investments, was a key issue raised during NAFTA negotiations. One of the primary motivations behind Article 1110 of Chapter 11 was to protect foreign investment by guarding against "arbitrary and discriminatory government actions against foreign investors.").
81. Sterner, supra note 79, at 419. Even with the presence of investor state provisions like Chapter 11 any government is still free to expropriate so long as it pays just compensation. Under this principle, Chapter 11 targets the perception that Mexican Courts are not reliably independent or fair.
82. Lerner, supra note 5, at 245.
Canada were concerned about the absence of the rule of law in Mexico when drafting Chapter 11. This history, however, does not exempt either country from application of the provision against their respective governments. A rule of law problem may well exist in Mississippi State courts. In other words, just because the shoe is on the other foot does not mean that the shoe does not fit.

B. Mechanics

Chapter 11 is divided into two sections. Section A, entitled "Investment," establishes protective measures for foreign investments, and Section B, entitled "Settlement of Disputes between a Party and an Investor of an Another Party," governs the arbitration process. Loewen's Articles 1102, 1105, and 1110 claims fall within Section A of Chapter 11.

1. Article 1102

Article 1102 establishes "National Treatment." It provides that parties to the agreement "shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors" and "treatment no less favorable than the most favorable treatment accorded, in like circumstances, to investments of its own investors." Put simply, Article 1102 requires NAFTA Parties to "treat the investors of another NAFTA Party and their investments no worse than it treats its own investors and their investments." Given the provision's limited scope, even if Loewen's allegations that prejudicial testimony and comments based on nationality were introduced into the Mississippi State court trial proceedings are true, an Article 1102 argument is misplaced. By analogy, if Loewen were, for example, a New York corporation doing business in Mississippi, introduction of that fact at trial would certainly not be considered prejudicial. The United States, in its Counter-Memorial, points
out that claimant fails to assert a "prima facie claim under . . . Article 1102" because Loewen does not identify any United States investor or what constitutes "like circumstances" for the purposes of comparison. Loewen's Article 1102 claim therefore fails to distinguish between fact and law in that during the trial the treatment Loewen received was no less favorable than the treatment accorded to similarly situated United States investors. Stated differently, American corporations often feel the sting of enormous punitive damages awards entered against them in jury trials.

2. Article 1105

Article 1105 establishes a minimum standard of treatment that foreign investments must be accorded. Unlike Article 1102 and Article 1103 which are "framed in relative terms by way of comparison to the way in which the NAFTA Party treats other investors . . . Article 1105 is framed in absolute terms." Article 1105 establishes a "minimum standard" below which Parties are prohibited from treating investments of an investor of another Party "irrespective of the manner in which the Party treats other investors and their investments."

To qualify as a breach of Article 1105, the treatment involved "must fail to accord to international law." Loewen's most plausible claim rests in its allegations of Article 1105 violations. But here again, Loewen begins its argument by assuming that the introduction of testimony and comments about its wealth and Canadian citizenship during the state court proceedings infringes upon its right to an "impartial trial untainted by invidious discrimination." The United States points out, however, that the

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90. Counter-Memorial, supra note 7, at 4.
91. NAFTA, supra note 1, art. 1103 (establishing "Most-Favored-Nation Treatment"). This article ensures that no member of the agreement may accord less favorable treatment to an investor of a Party than it accords to an investor of a non-Party. Id. art. 1103(1). In other words, NAFTA Parties "must treat the investors of another Party and their investments no worse than it treats the investors of any other Party or non-party and their investments." The United Mexican States, [2001] B.C.S.C. 664, para. 59. Loewen's NAFTA claim does not, nor did Metalclad in its claim allege a violation of Article 1103.
92. NAFTA, supra note 1, art. 1105.
94. Id.
95. Id. para. 62.
96. Loewen also contends that other violations of Article 1105 include the "grossly excessive verdict" and the Mississippi Supreme Court's application of the bonding requirement. Loewen's denial of justice claim is discussed infra Part V.
97. The Loewen Group, Inc. case. No. ARB(AF)/98/3, para. 141.
trial proceedings were "conducted in a manner consonant with the dictates of adversarial justice" and, moreover, the difficulties encountered by Loewen were the result of its "strategic choices or miscalculations." This observation further obscures Loewen's claim. Loewen predicates its claim on the assumption that a violation of Article 1105 has indeed occurred, thereby circumventing pertinent issues to the penultimate question of whether civil trial proceedings subject to appellate review could ever constitute a violation of international law.99

V. DENIAL OF JUSTICE

The United States has long supported the principle that nations are liable for injustices committed in their courts.100 Claims based on denial of substantive justice, however, are extremely difficult to make.101 International law sources are in agreement 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."102 Nevertheless, the United States has often "endorsed the view that denials of justice include manifestly unjust decisions."103 For example, in the Denham Claim against Panama, the United States argued "'a nation is responsible for the manifestly unjust decisions of its courts.'"104 The Loewen claim subjects U.S. courts to the same doctrine.105

98. Counter-Memorial, supra note 7, at 132. But see The Loewen Group, Inc., case No. ARB(AF)/98/3, Jennings Op. (Professor Sir Robert Jennings, former President of the International Court of Justice, opining that the Mississippi verdict was a denial of justice); see also id. Neely Aff. at 3 (Richard Neely, former Chief Justice of West Virginia Court of Appeals, opining that the O'Keefe v. Loewen litigation was a "mockery of justice").

99. "International law" as used in Article 1105 refers to customary international law, which is to be distinguished from conventional international law. The United Mexican States, [2001] B.C.S.C. 664, para. 62. Customary international law is developed by common practices of countries whereas treaties entered into by countries comprise conventional international law. Id. The Metalclad appeal resolved this distinction and thereby set aside a portion of the Tribunal's ruling, prompting one commentator to note that judicial review may be an available avenue to circumvent NAFTA's binding arbitration. Brower, supra note 3, at 47. Should the Loewen Tribunal find in favor of the claimant, the United States may likewise seek judicial review anticipating a more favorable decision.

100. Lerner, supra note 5, at 247.
101. Id. at 261.
102. Id.
103. Id. at 262.
104. Id. (quoting Denham Claim (United States v. Panama 1933), Hunt's Report 491, 506 (1934)).
105. Id. at 247.
Researhing Loewen's claim that a jury award rendering money damages against a foreign investor could constitute a prohibited expropriation, one is astounded at the absence of authority available on the subject. Weston notes that "it is very hard to get agreement on whether one or a combination of governmental acts" constitutes an expropriation "giving rise to State responsibility." The problem arises from the complexity of the facts involved, attendant burdens of proof, and subjective responses to the facts at issue. More importantly, international law scholars and practitioners have simply failed to provide a systematic appraisal of ways foreign investors may be deprived of wealth through the exercise of a State's police powers. Consequently, Loewen's claim is based on tenuous arguments which lack any relevant authority. Furthermore, since it bears the burden of proof, Loewen's NAFTA and hypothetical juxtapositions to denial of justice claims do not pass scrutiny.

Loewen asserts as settled principle that "egregiously wrong judicial judgment[s]" violate an international law principle referred to as "denial of justice." A violation of the minimum standard treatment for aliens can be analogized to a denial of justice. The term denial of justice, however, is difficult to define. In the most extreme application, 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." Under that definition, denial of justice encompasses judicial conduct as well as executive and legislative conduct. The Loewen Tribunal's conception of the term "measure," which includes the judgment of a state court, embraces this position. Given the attendant burden of proof that a denial of justice allegation requires, however, a NAFTA Tribunal will not likely conclude that an unenforced jury award of punitive damages benefiting a private individual in a suit between private litigants is in fact a denial of justice.

107. Id. at 106.
108. Id.
109. The Loewen Group, Inc. case no. ARB(AF)/98/3, para. 145 (citing Rihani claim, Decision 27-C, American Mexican Claims Report, 254, 257 (1948)).
110. Lerner, supra note 5, at 248.
111. Id.
112. Id. at 250.
113. Id.
In its most limited construction, denial of justice is restricted to State refusal to "grant an alien access to its courts or a failure of a court to pronounce a judgment." An intermediate construction of the phrase refers to "improper administration of civil and criminal justice as regards an alien, including denial of access to courts, inadequate procedures, and unjust decisions." This intermediate construction includes "both procedural and substantive wrongdoing by the court—both improper procedures and unjust decisions." The facts underlying the Loewen claim meet this test. Loewen seems to incorporate this conception of the term in its claim by characterizing the introduction of prejudicial testimony concerning its alienage at trial and the subsequent denial of its motion to reduce the appeal bond as procedural wrongdoing and by claiming that the size of the award epitomizes an unjust decision.

Loewen's argument, though attractive at first glance, unravels when the procedural hurdles it faces are duly considered. The United States interprets the denial of justice standard to require a decision of a court of last resort as a necessary predicate to a denial of justice claim. International law acknowledges that errors occur in all systems of justice. When a tribunal evaluates whether a state has performed its obligation to provide an adequate system of justice to aliens, it must therefore consider the appellate mechanisms available in that state's system of justice. The United States judicial system does provide a means for correcting lower-court error, including the type of error alleged by Loewen. According to this standard of denial of justice, Loewen must demonstrate that it had no recourse to appellate review in order to establish a denial of justice claim.

Mississippi is not peculiar in that a stay of execution of a judgment pending appeal is not automatic. The bond requirement at issue in Loewen's claim is a feature common to legal systems around the world. Both common law and civil law jurisdictions provide procedures pending an appeal to protect the interests of a

114. Id.
115. Id.
116. Id. at 250-51.
117. 96 AM. J. INT'L L. 707, 709. The United States first advanced this interpretation of the denial of justice standard in its Counter-Memorial to the Loewen Tribunal.
118. Id. at 708.
119. Counter-Memorial, supra note 7, at 144-50. The United States lists examples of appellate procedures in several jurisdictions.
litigant who has won a judgment. The Mississippi courts' decision denying a reduction in the amount of the bond requirement simply does not translate into a denial of justice. Indeed, as the United States articulates in its Counter-Memorial, Loewen cites no case that stands for the proposition that the existence or application of a bond requirement amounts to a denial of justice.

Loewen attempts to demonstrate that its access to appellate review was denied when the Mississippi Supreme Court refused to reduce the amount of the supersedeas bond required to stay execution of the judgment pending appeal. The fact remains, however, that had Loewen posted the $625 million dollar bond it would have had access to the appeals process. Loewen simply argues that the cost of pursuing the supersedeas bond was too high and that the Mississippi Supreme Court's decision effectively foreclosed its right to appeal the trial court judgment entered against it. Unable to exercise its right to appeal, Loewen argues it was forced to settle the underlying litigation.

VI. THE PENNZOIL PROBLEM

Loewen seeks recourse on the supersedeas bond issue through NAFTA on a denial of justice claim under similar circumstances in which Texaco made an unsuccessful attempt on the same issue through the federal courts on due process grounds. In *Pennzoil v. Texaco*, a jury returned a verdict against Texaco for tortiously inducing breach of contract. Texaco would have been required to post a bond of more than $13 billion in order to pursue an appeal pursuant to Texas law. Before the Texas court entered judgment, Texaco filed an action in federal district court that alleged the application of the bond provisions would effectively deny it a right to an appeal. Though *Pennzoil v. Texaco* turned on the abstention doctrine rather than resolving the constitutional issue involved, the concurring opinion of two U.S. Supreme Court Justices noted, in relevant part,

Textaco clearly could exercise its right to appeal . . . even if it were forced to file for bankruptcy under Chapter 11. Texaco . . .

121. Counter-Memorial, *supra* note 7, at 143.
123. *Id.*
124. *Id.* at 1523.
125. *Id.* at 1524.
could go forward with the appeal, and if it did prevail on its appeal in Texas courts, the bankruptcy proceedings could be terminated. Texaco simply fails to show how the initiation of corporate reorganization activities would prevent it from obtaining meaningful appellate review.  

Similarly, Loewen's constitutional right to appeal could have been vindicated if it had sought appellate review even if doing so meant facing the prospect of bankruptcy. Loewen's end run attempt around state law supersedeas bond requirements by resorting to NAFTA should fail as did Texaco's attempt to avoid the bond requirement by resorting to the federal courts.

VII. PUNITIVE DAMAGES

A. American Jurisprudence

In recent years, the concept of awarding punitive damages has been attacked in the United States. In BMW of North America v. Gore, the Supreme Court invalidated a state court punitive damage award solely because of its excessive amount. The Court announced a three-prong test. In determining excessiveness of punitive damage awards, the reviewing court should consider: (1) the "degree of reprehensibility" of the defendant's actions; (2) the "disparity between the harm or potential harm" suffered by the plaintiff and the punitive damages award; and (3) the difference between imposed penalties in similar cases. The Court, however, by refusing "to draw a bright line marking the limits of a constitutionally acceptable punitive damages award," provided little guidance to courts for future cases.  

126. Id. at 1531-32 (Brennan and Marshall, J. J., concurring).
127. The juxtaposed cases are distinguishable in that Texaco sought to circumvent a state law supersedeas bond requirement on constitutional grounds by filing in federal court before attempting any recourse at the state level. Loewen sought the same by filing a NAFTA claim after appealing the issue at the state level. Irrespective of these differences, analysis of the procedural steps taken by Loewen results in an analogous conclusion, namely, that like Texaco, Loewen did not exhaust its right to appeal at the state level and therefore recourse outside of state court proceedings is unavailable.
130. Id. at 575.
131. Id. at 582-583.
O'Keefe v. Loewen dispute settled, the judgment was never enforced. Consequently, the question of whether the punitive damages award entered against Loewen fails the Gore test was not reached.

Punitive damages are not traditionally available for breach of contract. 132 Most jurisdictions do, however, allow punitive damages in breach of contract cases if the breach constitutes an “independent tort.” 133 O'Keefe's complaint against Loewen alleged, in addition to breach of contract, common-law fraud and violations of state antitrust laws. Thus, O'Keefe's additional allegations triggered the “independent tort” exception to the general bar against punitive damages in disputes founded on breach of contract.

B. International Jurisprudence

A majority of nations find American punitive damages awards particularly suspect. Because their domestic laws do not recognize civil punitive damages at all, these countries often refuse to enforce punitive damage awards rendered in American courts. Thus, as Loewen contends, an excessive punitive damages award could constitute a denial of substantive justice under international law. Claims contesting American judgments rendering punitive damages awards have particular significance with regard to internationally recognized procedural rights: “the right to an impartial tribunal and to freedom from unfair discrimination against the alien because of alienage.” 134 The argument is made by analogy to the international law approach to criminal cases wherein “courts are said to violate international law when they impose unreasonably harsh sentences on aliens.” 135 Following this reasoning, an essential criterion in which to judge measures alleged to be expropriations is to determine to what extent they violate human rights principles. 136 Where measures are deemed abusive of this minimum standard, then, according to Weston, a demand for compensation is justified. Nevertheless, Loewen has

133. Dodge, supra note 132, at 637.
134. Lerner, supra note 5, at 252.
135. Id. at 264.
failed to meet the burden of proof required by this extreme allegation. The judgment against it was never enforced,\textsuperscript{137} therefore, Loewen asserts nothing more than an argument about what constitutes an unreasonable jury award.

**VIII. DEFERENCE TO THE JUDICIARY**

In its notice of claim, Loewen contends that “[t]he conduct of the *O'Keefe* litigation violated” Article 1102’s prohibition on discrimination against foreign investors and their investments, Article 1105’s guaranteed minimum standard of treatment for investments of foreign investors, and Article 1110’s prohibition on uncompensated or discriminatory expropriation of investments of foreign investors.\textsuperscript{138} In its answer to Loewen’s claim that the Mississippi judgment was “tantamount to” an expropriation and also amounted to an indirect expropriation under NAFTA Article 1110, the United States argues that there is “no support in international case law for the proposition that a civil judgment entering money damages against a foreign investor in a private dispute can constitute an expropriation.”\textsuperscript{139} It is well established that judicial acts violate international obligations only in extreme circumstances and that acts of the judiciary are accorded greater deference under customary international law than are legislative or administrative actions.\textsuperscript{140} The United States correctly points out that the international minimum standard found in Article 1105 “requires the Tribunal to consider the United States’ system of justice as a whole . . . in assessing whether there was a denial of justice in this case.”\textsuperscript{141}

The United States’ reasoning, while correct in regard to applicable case law, fails to acknowledge arguments pointing to the opposite conclusion. “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 by their courts.”\textsuperscript{142} This position recognizes that the jury “is but a particular kind of accessory in a chosen mechanism of judicial administration, a link in the chain of

\begin{itemize}
  \item \textsuperscript{137} Loewen argues that the judgment was never enforced because it was forced to settle. Procedural aspects of the case, however, make this reasoning problematic. Namely, Loewen could have appealed by allowing execution of the judgment or by resorting to bankruptcy.
  \item \textsuperscript{138} The Loewen Group, Inc., case no. ARB(AF)/98/3, para. 138.
  \item \textsuperscript{139} Counter-Memorial, \textit{supra} note 7, at 181.
  \item \textsuperscript{140} \textit{Id.} at 117.
  \item \textsuperscript{141} \textit{Id.} at 124.
  \item \textsuperscript{142} Lerner, \textit{supra} note 5, at 266.
\end{itemize}
justice which is ultimately open to inspection in all its constitu-
ents by the processes of international law."\textsuperscript{143} Judges and juries are, after all, "inseparable parts of the judicial organ," and it follows, therefore, that where the actions of either constitute a denial of justice, the state is equally accountable.\textsuperscript{144} This proposition is supported by the statements of the former president of the International Court of Justice who points out that "[a]lthough independent of the Government, the judiciary is not independent of the State: the judgment given by 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."\textsuperscript{145} While, hypothetically speaking, the argument seems logical enough, it simply does not comport with the facts underlying Loewen's claim. In order to reach this stage of the denial of justice claim, Loewen must first prove that during the state court proceedings a NAFTA violation occurred and culminated into a denial of justice.

According to the Restatement (Third) of Foreign Relations Law, "[a] state is not responsible for loss of property or for other economic disadvantage resulting from . . . action of the kind that is commonly accepted as within the police power of states, if it is not discriminatory."\textsuperscript{146} Loewen's argument seems to understand this principle to mean that if the trial were discriminatory then the state would be responsible. In order for the state to be responsible for the litigation and the subsequent money damages against Loewen, however, the American jury system itself would have to amount to action that is not commonly accepted within the police powers of states. In other words, Loewen approaches the argument from the wrong starting point. Additionally, its claim is not clearly tendered and its analysis is circular, thus avoiding critical issues that pertain to the expropriation question.

IX. ARTICLE 1110

Loewen also claims that the U.S. has violated Article 1110 on "Expropriation and Compensation," arguably the most important article within Section A. Article 1110 provides:

\begin{quote}
[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization
\end{quote}

\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 275-276.
\textsuperscript{146} \textsc{Restatement (Third) of Foreign Relations Law} § 712 cmt. g. (1986).
or expropriation of such an investment ("expropriation"), except:
(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6.147

"Investment," as defined in Article 1139, is an expansive term extending to any ‘enterprise,’ equity and debt securities, loans, real estate, or other property, tangible or intangible.148 Article 201 defines "measure" to include "any law, regulation, procedure, requirement or practice."149 Pursuant to Article 1110, "[c]ompensation shall be paid without delay," "be equivalent to the fair market value of the expropriated investment," and "include interest . . . from the date of expropriation" until payment.150

Article 1110’s prohibition on expropriation "covers direct, indirect and so-called ‘creeping’ expropriation."151 This inference is drawn from Restatement (Third) of the Foreign Relations Laws of the United States § 712(g), entitled Expropriation or regulation, which states that it "applies not only to avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of ‘taking’ property, in whole or in large part, outright or in stages (‘creeping expropriation’)."152 Some commentators contend that the term "creeping expropriation" is "too polemic."153 In addition, they argue that the term suggests a host State’s attempt to do in a "round-about way" what it could not do directly: nationalize the foreign investment concerned.154 While this distinction is relevant in analysis of the Metalclad outcome, a case where several regulatory measures, including the infamous cacti reserve, were ultimately deemed to have effectuated an expropriation, it bears no

147. NAFTA, supra note 1, art. 1110.
148. Beauvais, supra note 17, at 249.
149. NAFTA, supra note 1, art. 201.
150. Id. art. 1110.
152. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 712 cmt. g. (1986).
154. Id.
relationship to Loewen’s claim. Unlike the investment at issue in the Metalclad case, the government did not abrogate Loewen’s investment.\textsuperscript{155} The money damages entered against Loewen were not instigated by the United States. Rather, the judgment against Loewen was the product of a lawsuit between private litigants founded, inter alia, on breach of contract.\textsuperscript{156} Furthermore, the damages entered against Loewen, which were never paid, benefited a private citizen, whereas in the Metalclad case, the Mexican government received the environmental benefit of the cacti reserve. The damages award rendered against Loewen represents the cost of violating domestic law, not an expropriation. Loewen’s claim at best demonstrates the absurd outcomes that fickle juries occasionally render. Furthermore, because Loewen settled the litigation rather than seeking an appeal from the trial court judgment, it is a stretch to argue that an expropriation occurred. In any case, as the United States insists, “NAFTA is not a no-fault insurance policy,” available to provide Loewen a means to recoup its losses.\textsuperscript{157}

The effectuation of an expropriation, however, does not necessarily require nationalization of the investment or property at issue. “Constructive takings” is the concept that governments, in the absence of “physical occupation or transfer of title,” may effectively deprive foreign investors of the use and enjoyment of their investments.\textsuperscript{158} As discussed in the preceding paragraph, “creeping expropriation” is a category of constructive takings where a government “deprives a foreign investor of property by means of cumulative imposition of regulatory measures, any one of which might be permissible, but whose success leads to compensable expropriation.”\textsuperscript{159} Applicable international law rules in the area of expropriation are ambiguous at best.\textsuperscript{160} Writers on the subject are often struck at how little authority exists on “the making of the distinction between compensable takings and regulatory non-compensable takings.”\textsuperscript{161} It has been postulated that, “certain acts of wealth deprivation by definition exclude the payment of any com-

\textsuperscript{155} Metalclad’s investment was not technically nationalized because it retained title to the land.
\textsuperscript{156} The Loewen Group, Inc., case no. ARB(AF)/98/3, para. 33.
\textsuperscript{157} Counter-Memorial, \textit{supra} note 7, at 3.
\textsuperscript{158} Beauvais, \textit{supra} note 17, at 259.
\textsuperscript{159} \textit{Id.}
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.} at 259- 260 (quoting M. Sornarajah, \textit{The International Law on Foreign Investments} 300-01 (1994)).
pensation."\textsuperscript{162} Under this analysis, where the authorities intend to impose a financial loss on an individual as a punishment no compensation would be due.\textsuperscript{163} This type of wealth deprivation has been referred to not as "expropriation" but rather as "condemnation" in an effort to show its penal character.\textsuperscript{164} A jury award of punitive damages in a civil suit comports with this proposition.

In \textit{Metalclad}, the decision of the tribunal and subsequent appeal focused on the fact that the claimant had been completely deprived of any meaningful return on its investment by what was deemed to be egregious state action.\textsuperscript{165} NAFTA tribunals consistently interpret the customary international law definition of expropriation to require, at a minimum, substantial deprivation of the economic use of the investment at issue.\textsuperscript{166} The \textit{Metalclad} outcome, however, turned essentially on the fact that reprehensible government conduct resulted in the complete loss of the foreign investor's investment.\textsuperscript{167} Accordingly, it appears that both the predicate of egregious state conduct and the resulting foreclosure of a return on the investor's investment are necessary elements of a successful Chapter 11 claim.

In contrast to the \textit{Metalclad} case where an expropriation occurred at the hands of a government actor's ecological decree, the damages awarded against Loewen arose from litigation between private individuals.\textsuperscript{168} Loewen's claim, founded on a state court's punitive damages award, lacks the egregious government conduct prong of the equation. Moreover, it fails to satisfy the deprivation of investment prong since the punitive damages award was never enforced. The \textit{Loewen} case merely illustrates capricious state action, not a violation of Chapter 11 under any analysis.

Thus far only a small number of Article 1110 claims have been decided through the arbitral process.\textsuperscript{169} As such, "[s]ignificant questions remain regarding the provision's potential

\textsuperscript{162} Dicke, \textit{supra} note 153, at 251.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Beauvais, \textit{supra} note 17, at 281.
\textsuperscript{166} Id. at 285 (noting that "[r]egulations that merely affect some property interest or decrease the profitability of business simply do not fall within Article 1110's purview.").
\textsuperscript{167} Id. at 285.
\textsuperscript{168} It may be argued, however, that "[a]n expropriation may occur where the state simply acts as an instrument of redistribution." Lutz & Trice, \textit{supra} note 77, at 3.
\textsuperscript{169} Beauvais, \textit{supra} note 17, at 287.
Some argue that the resulting uncertainty is problematic, reasoning that where "governments are unsure of the governing standard, regulatory measures within the 'penumbra' of Article 1110 may be chilled, and firms may continue to use the threat of indirect expropriation claims as a 'sword' in policy debates and legislative lobbying." Support exists for this contention as Chapter 11 tribunals have rejected member State arguments that environmental or social regulations fall outside the scope of Article 1110 because they embody legitimate exercises of state regulatory "police power." An overview of the decisions handed down by the NAFTA Tribunals indicates that they "represent fact-based equitable judgments in which the legal standard is, to some extent, both malleable and peripheral." The Loewen claim will likely prove unsuccessful as the underlying dispute does not derive from inequitable action instigated by the state but rather from an unexpected outcome, of which the State was not the beneficiary.

X. Arbitration Process

Section B of Chapter 11 establishes the arbitration procedure. Article 1119 provides that a "disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted." Investors may submit claims to the International Centre for the Settlement of Investment Disputes ("ICSID") if the investor and the host country are parties to the ICSID Convention. Commentators note "the ICSID is a product of the World Bank." The driving force behind the World Bank's creation of ICSID was a belief that an institution specifically designed to facilitate settlements of investment disputes between governments and foreign investors would promote increased flows of international investment. If only the investor or the government is a party to the Convention but not both, the claim may be

170. Id.
171. Id.
172. Id. at 290.
173. Id. at 292.
174. NAFTA, supra note 1, ch. 11.
175. Id. art. 1119.
176. Cantey, supra note 151, at 292.
177. Id. at 297.
brought under the Additional Facility Rules of the ICSID or the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules. Currently, the United States is the only party to the ICSID Convention and consequently, only U.S. investors, or claims against the United States, may be heard under the Additional Facility Rules. Both the Metalclad claim, which involved American investors, and the Loewen claim to which the United States is a party, fall under the ICSID Convention.

NAFTA arbitration tribunals are comprised of three arbitrators. Each party to the dispute appoints one arbitrator and the third arbitrator, "the presiding arbitrator," is agreed on by the parties. If the parties are unable to agree on the presiding arbitrator within 90 days, the ICSID Secretary General appoints one.

Though the arbitration process does not provide for appeals, arbitral judgments may be challenged in the national court of the country where the tribunal sits. Article 1136 recognizes by implication the right of losing parties to seek revision or annulment of Chapter 11 awards by municipal courts at the seat of arbitration. Prevailing parties may not seek enforcement of awards rendered under the Additional Facility or UNCITRAL Rules until either: (1) three months have passed without the losing party having initiated a proceeding to revise, set aside, or annul the award; or, (2) a court has dismissed or allowed such a proceeding and there is no further appeal. The Government of Mexico appealed the Metalclad Tribunal’s decision through this process. If Loewen's claim proves successful, the United States will likely seek an appeal of the decision through the same process.

XI. CHAPTER 11 OPPONENTS

The Loewen case demonstrates a creative use of Chapter 11 by attempting to recover losses incurred in litigation between private parties. The case is unusual because, while most complaints are founded on regulatory takings, it assails a judicial

179. Cantey, supra note 151, at 292.
180. Id. at 292-293.
181. NAFTA, supra note 1, art. 1123.
182. Id.
183. Id. art. 1124.
184. Harbine, supra note 80, at 378.
185. Brower, supra note 3, at 52.
186. Lerner, supra note 5, at 245.
decision of a member Party.\textsuperscript{187} Though \textit{Metalclad} is the only case judged to have effectuated an expropriation, regulatory takings claims filed under NAFTA Chapter 11 have led to at least one significant settlement.\textsuperscript{188}

NAFTA opponents equate successful Chapter 11 investor claims to affronts on the sovereignty of NAFTA Parties and argue that member States did not contemplate the liabilities incurred when they are found liable for investors' losses arising from state and municipal regulation.\textsuperscript{189} The opposition contends that Chapter 11 claims and resultant member State liability is particularly dangerous given the zeal with which businesses have employed Chapter 11's binding arbitration.\textsuperscript{190} Environmentalists have even reached the conclusion "that the private rights of foreign investors are being used not as defensive protection against government abuse because an investor is a foreign-owned company, but as a strategic offensive threat to be wielded against government decision-makers rendering or considering decisions adverse to the interests of the company involved."\textsuperscript{191} They reason that Chapter 11 brought into being a path through which foreign investors are able to sue NAFTA Parties, who were formerly impervious to private investor lawsuits, over any regulation that impairs an investor's property interests.\textsuperscript{192} Advocacy groups such as Public Citizen and Friends of the Earth are lobbying for renegotiation of Chapter 11 to prevent future arbitrations.\textsuperscript{193} Despite such protests, regulatory expropriation claims simply have not borne out to be as subversive of environmental and social regulation as such groups fear.\textsuperscript{194}

Advocacy groups have taken notice of the \textit{Loewen} filing under NAFTA and attacked it as evidence of NAFTA's infringement on U.S. sovereignty.\textsuperscript{195} Public Citizen has devoted a substantial portion of its web page to NAFTA claims and, in particular, to the

\textsuperscript{187} Id.
\textsuperscript{188} Id.; see also Ethyl Corp. v. Government of Canada. (NAFTA Chapter 11 suit brought by an American corporation against the Government of Canada, which settled for $13 million).
\textsuperscript{189} Harbine, \textit{supra} note 80, at 376.
\textsuperscript{190} Id.
\textsuperscript{192} Cantey, \textit{supra} note 151, at 289.
\textsuperscript{193} Lerner, \textit{supra} note 5, at 243.
\textsuperscript{194} Beauvais, \textit{supra} note 17, at 295.
\textsuperscript{195} Lerner, \textit{supra} note 5, at 243.
In a statement released by Public Citizen, the Loewen arbitration was called "an all-out attack on democracy," which, if successful, "would undermine the jury system, which is fundamental to our system of justice." Such a contentious view, however, does not survive scrutiny. Indeed, most nations that utilize the jury system only do so in criminal prosecutions. Moreover, legal scholars often postulate that that use of the jury in civil suits acts as an impediment, particularly in commercial disputes, to expedient and fair adjudication of cases.

XII. CONCLUSION

Loewen has premised its case on the existence of NAFTA violations in the state court proceedings that, in turn, culminate into a denial of justice claim. Its claim, however, is not clearly tendered. Loewen’s evidence of the NAFTA violations is based solely on the surrounding circumstances of the case and fails to show that the Mississippi state court procedures did indeed violate NAFTA provisions. Furthermore, since Loewen never paid the jury’s verdict, arguments about excessive awards in violation of an international minimum standard are inappropriate. The facts underlying Loewen’s claim, no matter how distasteful they may be to the claimant, simply do not establish a violation of NAFTA. Because Loewen must prove that the Mississippi State court procedures violated Chapter 11 of NAFTA and because a denial of justice allegation is extremely serious and difficult to make, Loewen’s claim will likely be unsuccessful.

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