International Arbitration Case Law

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L.FAY H. NEER AND PAULINE NEER (USA) V. UNITED MEXICAN STATES

Case Report by Maria Kostytska**
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In a decision rendered on October 15, 1926, under the Convention between the United States of America and the United Mexican States of 1923, the Claims Commission formulated a standard for denial of justice.

Mexico-United States Claims Commission:
Cornelis van Vollenhoven, Genaro Fernández Mac Gregor, and Fred Kenelm Nielsen (replaced Edwin B. Parker)

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Digest

1. Introduction

Neer v. United Mexican States, a three-page decision rendered in 1926, is one of the most cited precedents on denial of justice, fair and equitable treatment, and minimum standard of treatment in international law. *Neer* has been cited in a number of investor-State cases, including *Pope & Talbot v. Canada*, *LG&E v. Argentina*, *Thunderbird v. Mexico*, *Waste Management II v. Mexico*, *GAMI v. Mexico*, *Mondev v. United States*, *ADF v. United States*, *Glamis Gold v. United States*, and *Merrill & Ring Forestry v. Canada*. The continued vitality and evolution of the *Neer* standard of treatment has been debated by numerous arbitrators, counsel, and commentators.

2. Facts and Allegations

In the evening of November 16, 1924, Paul Neer, an American superintendent of a mine in Guanaceví, Mexico, was horseback riding to his home with his wife. They were stopped by a group of armed men, who shot and killed Paul Neer. His wife escaped.

The United States espoused a claim against the United Mexican States on behalf of American citizens, L. Fay H. Neer, widow, and Pauline E. Neer, daughter, who claimed that they sustained damages in the amount of $100,000.00. The United States alleged that the Mexican authorities were liable as they "showed an unwarrantable lack of diligence or an unwarrantable lack of intelligent investigation in prosecuting the culprits."[1]

3. Denial of Justice Standard

The Commission, "[w]ithout attempting to announce a precise formula" for denial of justice, nonetheless went further than various commentators and formulated an oft-quoted standard: "**the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency**."[2] According to the Commission, denial of justice could result either from "deficient execution" of a law that complies with international standards, or from enacting a law that falls short of international standards.[3] The Commission adopted a broad notion of denial of justice, in stating that such offense could arise out of the acts of the executive and legislature, and not only the acts of the judiciary.[4]

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[1] *L. Fay H. Neer (USA) v. United Mexican States*, Opinion of Commissioners of October 15, 1926, IV R. INT'L ARB. AWARDS 60, ¶ 1.

[2] *Id.*, ¶ 4 (emphasis added).

[3] *Id.*

[4] *Id.*

In addition to setting a rigorous substantive standard, the Commission imposed a heavy evidentiary burden: "**convincing evidence**."[5] The Commission's task was to inquire "whether there is convincing evidence either (1) that the authorities administering the Mexican law acted in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action, or (2) that Mexican law rendered it impossible for them properly to fulfil their task."[6]

4.   *Analysis*

The Commission decided that the first prong — outrageous conduct, bad faith, wilful neglect of duties, or a pronounced degree of improper action — was negated by the record. The record showed that on the night of the shooting, the local authorities went to the crime scene and examined the corpse. The next day, the judge proceeded to the examination of witnesses, including Mrs. Neer. The only eyewitness of the crime, Mrs. Neer, was unable to provide any helpful information. The investigation continued for several days. Some suspects were arrested, but were later released for want of evidence.[7] In light of the record, the Commission was "not prepared to hold that the Mexican authorities have shown such lack of diligence or such lack of intelligent investigation in apprehending and punishing the culprits as would render Mexico liable."[8]

The Commission also noted that no attempt was made to establish the second prong — Mexican law preventing the Mexican authorities from living up to international standards.[9]

Thus, the Commission dismissed the claim against the United Mexican States.[10]

5.   *Concurring Opinion*

The American Commissioner, Fred K. Nielsen, concurred with the decision rejecting the claim, but found himself "unable to concur fully in the statement of reasons upon which the other two members of the Commission think the award should be grounded."[11]

The four-page concurring opinion contains a more detailed recitation of the facts and analysis of the evidence, and a more elaborate discussion of case-law and commentary. The denial justice standard proffered by the American Commissioner, however, is not qualitatively different from that of the majority: a denial of justice claim is "justified

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[5] *Id.*, ¶ 5 (emphasis added).

[6] *Id.*

[7] *See id.*, ¶¶ 5, 3.

[8] *Id.*, ¶ 5.

[9] *Id.*

[10] *Id.*, ¶ 6.

[11] Concurring opinion, at 62.

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when **the treatment of an alien reveals an obvious error in the administration of justice, or fraud, or a clear outrage**."[12] The American Commissioner quoted the *Medina* case between Costa Rica and the United States, in which Commissioner Bertinatti indicated that denial of justice by the judiciary can be found only in limited circumstances involving denial of "free access to the local tribunals," denial of "equality of treatment with the natives," "dishonesty . . . of a judge," "denial of the means of defense at the trial," or "gross injustice."[13]

The American Commissioner likewise adopted the same evidentiary standard as the majority: "**convincing evidence**."[14] In denial of justice cases, damages can be awarded "only on the basis of convincing evidence of a pronounced degree of improper governmental administration."[15]

With respect to the claim for the alleged "neglect of the authorities to take proper measures to apprehend and punish the persons who killed Neer,"[16] Mr. Nielsen opined "that better methods might have been used by the Mexican authorities, and that the action taken by them may well be adversely criticized."[17] In light of the record, however, Mr. Nielsen was "not prepared to decide that a charge of a denial of justice can be maintained against the Government of Mexico."[18]

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[12] *Id.*, at 65 (emphasis added).

[13] *Id.*

[14] *Id.* (emphasis added).

[15] *Id.*

[16] *Id.*

[17] *Id.* at 65.

[18] *Id.*