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2010-32

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Neer-ly Misled?

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ONE OF THE MOST HEATED DEBATES CONCERNING the standards of protection for foreign investment seems to have taken the wrong track and never looked back. The lapse relates to the question whether the concepts of "fair [or 'just'] and equitable" treatment and "full protection and security" are synonymous with, or part of, the customary-law "minimum standard for the treatment of aliens."[1] This issue has given rise to now-familiar sub-questions: (i) whether treatment compliant with the customary-law minimum standard is by definition fair and equitable (and consistent with the duty to ensure protection and security); and (ii) whether the customary-law standard of treatment is frozen in time. But a more basic matter seems to have been eluded by a hasty assumption, namely that the minimum standard of treatment looks to a single, generally applicable standard of review with respect to all types of state conduct, and that the test was set forth in the 1926 *Neer* decision of the United States–Mexico General Claims Commission.[2]

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[1] *See* notably J.C. Thomas, "Reflections on Art. 1105 of NAFTA: History, State Practice and the Influence of Commentators," 17 ICSID Rev.—FILJ 21 (2002).

[2] *See*, *e.g.*, P. Foy & R. Deane, "Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement," 16 ICSID Rev.—FILJ 299, 315 (2001); G. Kaufmann-Kohler, "Arbitral Precedent: Dream, Necessity, or Excuse?", 23 Arb. Int'l 357, 370–371 (2007); and, in less clear terms, S. Vasciannie, "Fair and Equitable Treatment Standard in International Investment Law and Practice," 70 Brit. YB Int'l L. 99, 144 (1999).

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The record shows that this assumption is unsustainable. The *Neer* criterion of "outrage, … bad faith, … wilful neglect of duty" and glaring "insufficiency of governmental action" applied only to what the Commission regarded as denial of justice claims. In all other cases, and in particular with respect to "direct responsibility for acts of executive officials," the elements of the *Neer* formulation were "aggravating circumstances," and not necessary to constitute an international wrong.

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Paul Neer was the manager of a mine in the sparsely populated state of Durango in northwest Mexico. On a November evening in 1924, returning home from a nearby village on horseback, he was attacked and killed by a group of armed men. The only eyewitness was his wife, who managed to escape but was unable later to identify the culprits. A judicial investigation was opened the following day. It was later acknowledged by Mexico not to have been sufficiently "vigorous and effective." Nonetheless, the site of the killing was examined and, apparently after pressure was applied by higher authorities in the state, a few arrests were made. Ultimately, however, all of the suspects were released. Espousing the claim of Mr. Neer's family, the United States brought a claim against Mexico for an "unwarrantable lack of intelligent investigation in prosecuting the culprits"—in other words, a denial of justice.[3]

It was the first claim decided by the Commission on the merits. It was dismissed. The Commission thought that Mexico's justice system had not fallen foul of "the principles of international law, justice and equity"[4] (effectively shorthand for international law).[5] The presiding Commissioner, Cornelis van Vollenhoven of the Netherlands, wrote for a Commission whose members were unanimous in the result:[6]

> The Commission recognizes the difficulty of devising a general formula for determining the boundary between an international delinquency of this type and an unsatisfactory use of power included in national sovereignty. … Without attempting to announce a precise formula, it is in the opinion of the Commission possible to hold (first) that the propriety

[3] *See Neer*, 4 Rep. Int'l Arb. Awards 60 (1926) at 60, 64.

[4] Convention Establishing the General Claims Commission (Washington, D.C., September 8, 1923), UST No. 678, Art. 1, *reprinted in* Feller, *infra* note 11, at 321.

[5] *Cf. Gordon*, 4 Rep. Int'l Arb. Awards 586, 588 (1930).

[6] The American Commissioner, Fred Nielsen, filed a Separate Opinion: *Neer*, 4 Rep. Int'l Arb. Awards at 62.

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> of governmental acts should be put to the test of international standards, and (second) that 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. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.[7]

The claim was therefore determined on the basis of two legal propositions. The first was that, contrary to Mexico's assertion,[8] compliance by the investigating authorities with Mexican law was not the end of the matter. Their actions had to be put to the test of "international standards." That was doubtless a proposition of general import, applicable to all claims before the Commission, and it is of some interest to note that no direct authority was cited for it, though authority was available.[9] The second proposition was about the dividing line between an "unsatisfactory use of power included in national sovereignty" and an "international delinquency." How "far short" of international standards did Mexico's conduct need to be for the claim to succeed? The Commission noted that "better methods might have been used" in the investigation, but held that the Mexican authorities had not acted "in an outrageous way, in bad faith, in wilful neglect of their duties, or in a pronounced degree of improper action," nor had Mexican law "rendered it impossible for them properly to fulfil their task."[10]

Today, the question is whether the second proposition in *Neer* purported to set forth a standard of review for all types of state conduct. Feller's standard monograph on the jurisprudence of all Mexican Claims Commissions does not suggest so. Rather, it treats the case as laying down a rule for instances of "failure

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[7] *Neer*, 4 Rep. Int'l Arb. Awards at 61–62. Nielsen formulated the operative test as one of "pronounced degree of improper governmental administration." *Id.* at 65. Nielsen reiterated this formulation in his later Dissenting Opinion in the *Salem* case, 2 Rep. Int'l Arb. Awards 1163, 1223 (1932) (United States-Egypt Claims Commission). *See also* text to note 60, *infra*.

[8] On which, *see* Nielsen's Separate Opinion in *Neer*, 4 Rep. Int'l Arb. Awards at 64. For the United States position at the time, *see* J. B. Moore, A Digest of International Law, vol. iv (1906), at 9 *et seq*, and especially at 11. *See also* Moore's declaration on behalf of the United States at the Fourth International Conference of American Republics, reported at 4 Am. J. Int'l L. 777, 787 (1910) (also quoted in *Neer*, 4 Rep. Int'l Arb. Awards at 61).

[9] *See Norwegian Shipowners' Claims* (Norway *v.* United States; Valloton—Pres., Anderson, Vogt), 1 Rep. Int'l Arb. Awards 307 (1921) at 330 *et seq.*; and *Certain German Interests in Polish Upper Silesia* (Merits), PCIJ, Series A, No. 7 (1925) at 22 ("the rules generally applied in regard to the treatment of foreigners").

[10] *Neer*, 4 Rep. Int'l Arb. Awards at 62.

to apprehend," a species of "indirect responsibility"[11] (about which more below). Similar conclusions are to be drawn from the extensive pleadings in the *Barcelona Traction* case in the International Court of Justice,[12] where the Court did not have occasion to pronounce itself on the matter. More importantly, no other international court or tribunal (including the claims commissions established by Mexico and other countries in the 1920s,[13] and the Iran-United States Claims Tribunal[14]) has relied on *Neer* as enunciating a single standard of review.

On the whole, the position is the same in the literature. Roth's monograph-length work on the minimum standard presents its content in broad terms as the "common standard of conduct which civilized States have observed and still are willing to observe with regard to aliens."[15] Roth describes *Neer* as "set[ting] the rule which was to be the guiding principle of [the Commission's] jurisdiction,"[16] but it is clear from the context that the statement was directed not to the standard of review in *Neer* but, rather, to the holding that "the propriety of governmental acts should be put to the test of international standards." The writings of Borchard and Schwarzenberger are to the same effect.[17] No author

[11] *See* A. H. Feller, The Mexican Claims Commissions (1935) at 147 *et seq*, and especially at 150–51. The less well-known doctoral thesis by J. G. de Beus, The Jurisprudence of the General Claims Commission United States and Mexico, Chap. IX (1938), suggests (at p. 133) that *Neer* "laid down three rules … of general importance for all international delinquencies," but goes on to cite several decisions of the Commission which cast doubt on his assertion. *See infra* notes 61–75 with respect to these cases.

[12] *See* the Counter-Memorial of Spain (December 31, 1965), *Barcelona Traction (New Application, 1962)*, ICJ Pleadings, vol. IV, 5 at 508 (asserting that the *Neer* standard applies to acts of the judiciary, though not to acts of the executive branch). *See also* the Reply of Belgium (May 16, 1967), *id.*, vol. V, at 316 (citing *Neer* for the proposition that it does not matter, from the perspective of international law, whether the breach is due to legislative or administrative action); and the Memorial of the United States (May 15, 1987), *Elettronica Sicula*, *id.*, vol. I, 43 at 93, 98 (citing *Neer* as support for the proposition that an international minimum standard is applicable).

[13] The jurisprudence of the France-Mexico Claims Commission (1928–1931) may be found at 5 Rep. Int'l Arb. Awards 325 *et seq.* That of the Germany-Mexico Claims Commission (1926–1930) may be found at 5 Rep. Int'l Arb. Awards 579 *et seq.*, with a commentary by A. H. Feller, 27 Am. J. Int'l L. 62 (1933). That of the United Kingdom-Mexico Claims Commission (1928–1932) may be found at 5 Rep. Int'l Arb. Awards 17 *et seq*., and in two volumes published by the HMSO in 1931 and 1933.

[14] There is only one express reference to the minimum standard in the jurisprudence of the Iran-United States Claims Tribunal, in the Dissenting Opinion of Judge Kashani in *Starrett Housing Corp v. Iran* 4 Iran-United States CTR 122 (1983-I), which does not cite *Neer*. Though United States-Mexico Claims Commission rulings have been relied upon in seven other decisions of the Tribunal as authority for a number of legal propositions of substantive, procedural or jurisdictional law, *Neer* has been cited in none of them.

[15] A. Roth, The Minimum Standard of International Law Applied to Aliens 87, 113 (1949).

[16] *Id.* at 95.

[17] *See* E. Borchard, "The Minimum Standard of Treatment of Aliens," 38 Mich. L. Rev. 445, 454–455 (1940); G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, vol. 1, at 201 (3d ed., 1957); and G. Schwarzenberger, A Manual of International Law, vol. 1, at 99 (4th ed., 1960). Among the several publicists who cite *Neer* as a primary authority for this proposition, *see* F. V. García Amador, "First Report on International Responsibility," YB Int'l L. Comm. 173, 200, para. 140 (1956-II).

appears to have suggested in unqualified terms that *Neer* is to be regarded as laying down a universally applicable standard of review. For example, in its section on the international standard of treatment, the most recent edition of *Oppenheim* cites the *Roberts* decision of the United States-Mexico Commission (issued two weeks after *Neer*), which dealt with a claim for mistreatment in prison and which describes the standard of treatment due as one "in accordance with ordinary standards of civilization."[18] In other texts, where *Neer* is cited as indicating the content of the minimum standard, care is taken to add references to other decisions (notably *Roberts*).[19]

Indeed, *Neer* is principally cited as a decision indicating the extent of state responsibility in cases where the substantive injury has been caused by a private actor, and where the responsibility of the state lies in its failure to apprehend, prosecute and punish that actor.[20] In such cases, as in cases of failure to prevent the occurrence of injury caused by private actors, the applicable standard was one of reasonable care[21] or "vigilance," taking into account the resources reasonably available to the state.[22] On that analysis, *Neer* is an illustration of the rule of customary law that

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[18] *Roberts*, 4 Rep. Int'l Arb. Awards 77, 80 (1926). *See* R. Jennings & A. Watts, Oppenheim's International Law, vol. 1, at 931, fn. 2 (9th ed., 1992), and to same effect Borchard, *supra* note 17, at 454–455, and C.F. Amerasinghe, State Responsibility for Injuries to Aliens 44 (1967).

[19] *See* J. L. Brierly, The Law of Nations 280–281 (6th ed., by H. Waldock, 1963); American Law Institute, Restatement of the Law Second: Foreign Relations Law of the United States (1965), Reporters' Note 1 to § 165, at 504–505; J.H.W. Verzijl, International Law in Historical Perspectiv*e*, vol. V, at 438 (1972); Brownlie, *infra* note 24; D. Vagts, "Minimum Standard," in R. Bernhardt (ed.), Encyclopedia of Public International Law, vol. iii, at 408 (1997); M. Shaw, International Law 734–735 (5th ed., 2003); P. Malanczuk, Akehurst's Modern Introduction to International Law 261 (7th ed., 1997); J. Dugard, "First Report on Diplomatic Protection," U.N. Doc A/CN.4/506, para. 11 (2000); and D. Carreau & P. Julliard, Droit International Economique 438–439 (1st ed., 2003), and 464–465 (3d ed., 2007).

[20] *See* C. Eagleton, The Responsibility of States in Public International Law 93, 119 (1928); C. Eagleton, "Denial of Justice in International Law," 22 Am. J. Int'l L. 538 (1928) at 538 and 558–559; E. Borchard, "Theoretical Aspects of the International Responsibility of States, 1 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 223, 245 (1929); J. Ralston, Supplement to the Law and Procedure of International Tribunals 438 (1936); A. Freeman, Denial of Justice 380 (1938); F. V. García Amador, "Sixth Report on International Responsibility," YB Int'l L. Comm. 1, 35, para. 138 (1961-II); G. Schwarzenberger, International Law as Applied by International Courts and Tribunals, vol. I, at 201 (3d ed., 1957); E. Jiménez de Aréchaga, "International Responsibility," in M. Sørensen (ed.), Manual of Public International Law 531, 560 (1968); ILC Secretariat, "Study on State Practice Regarding 'Force Majeure' and 'Fortuitous Event' as Circumstances Precluding Wrongfulness," YB Int'l L. Comm. 61, 173–174 (1978-II(1)); J. Crawford, "Second Report on State Responsibility," U.N. Doc A/CN.4/498 (1999), at para. 145; C.F. Amerasinghe, Diplomatic Protection 39 (2008). *Cf.* M. Sornarajah, The International Law on Foreign Investment 331, 339 (2d ed., 2004) (describing *Neer* as a case about the "abuse of the physical security of the alien").

[21] *See* E. Borchard, The Diplomatic Protection of Citizens Abroad 213, 219 (1915).

[22] *See Spanish Zones in Morocco* (Spain *v.* United Kingdom; Huber, Sole Arbitrator), 2 Rep. Int'l Arb. Awards 615, 640–644 (1925).

> [a]s regards damage caused to foreigners or their property by private persons, the State is only responsible where the damage sustained by the foreigners results from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent, redress, or inflict punishment of the acts causing the damage.[23]

Nevertheless, *Neer* features prominently in Brownlie's works, which describe it as a "useful and classical" formulation of a minimum standard of treatment applicable to a broad range of claims.[24] It is true that Brownlie cites several other cases of the United States-Mexico Commission, including *Roberts* and Huber's earlier decision in the *Spanish Zones* case,[25] but only *Neer* is quoted. The textbooks by Shaw and Malanczuk also place emphasis on *Neer*.[26]

The conclusion from this survey is that none of the commentaries or relevant decisions may fairly be read as suggesting that *Neer* is controlling in all cases where state conduct is alleged to have fallen below the minimum standard. Indeed, the specialized works make it clear that *Neer* is relevant only in cases of failure to arrest and punish private actors of crimes against aliens.

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Yet in the sphere of investment-treaty claims, *Neer* has curiously occupied center stage in the discourse. After languishing three-quarters of a century in relative obscurity, *Neer* was, it seems, resuscitated in Canada's pleadings in the *SD Myers* and *Pope & Talbot* cases, both of which heavily relied on *Neer*.[27] Both cases

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[23] Article 10 of the Draft Convention on Responsibility of States for Damage Caused in their Territory to the Person or Property of Foreigners, adopted on first reading by the Third Committee of the League of Nations Conference for the Unification of International Law (1930), *reprinted in* YB Int'l L. Comm. 225 (1956-II). (Article 10 was adopted by a 21–17 vote. *See* G. Hackworth, "Responsibility of States for Damages Caused in their Territory to the Person or Property of Foreigners," 24 Am. J. Int'l L. 500, 512–514 (1930).) The Harvard Law School draft convention on the same topic cited *Neer* as support for its Article 9, which provided in material part that "[d]enial of justice exists when there is … gross deficiency in the administration of judicial or remedial process." *See* 23 Am. J. Int'l L. Spec. Supp. 132 (1929), at 173 *et seq.*, and in particular at 182.

[24] I. Brownlie, System of State Responsibility (Part I) 74 (1983); and *see id.*, Principles of Public International Law 510–511 (2d ed., 1973), and all five subsequent editions.

[25] *See supra*, notes 22, 24.

[26] *See supra*, note 19.

[27] *See* Canada's Counter-Memorial in *SD Myers* (October 5, 1999), http://www.naftaclaims.com, at paras. 289 *et seq.*; and Canada's Counter-Memorial in *Pope & Talbot* (October 10, 2000), http://www.naftaclaims.com, at paras. 258 *et seq.*, and especially at paras. 266, 309, 325. The latter submission states at para. 266 that "[o]ther international bodies have applied the *Neer* standard, referring to it as the 'standard habitually practised among civilised nations' or even 'general principles of law.' The formulation of the standard in *Neer* continues to be the seminal statement of the meaning of the international minimum

involved claims under NAFTA Article 1105(1).[28] Neither tribunal endorsed Canada's submissions to the effect that the threshold under Article 1105(1) is "egregiousness." The *SD Myers* tribunal read Article 1105(1) as giving rise to a claim when "an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective."[29] The *Pope & Talbot* tribunal dismissed Canada's submission on the ground that "the precedents relied on by Canada addressed the content of the requirements of international law, rather than the other factors referred to in Article 1105, namely, 'fair and equitable treatment and full protection and security,'"[30] which requirements the tribunal considered to be "additive" to customary international law.[31]

The *Pope & Talbot* tribunal had an opportunity to revisit its decision. Shortly after the tribunal's award on the merits, Canada, Mexico and the United States, acting as the NAFTA Free Trade Commission, issued a binding interpretation[32] to the following effect:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[33]

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standard." (Internal citations omitted.) Yet, neither of the two cases cited by Canada refers to *Neer*. Nor does either one of them contain a formulation approximating *Neer*'s language in any way. *See Chevreau* (France *v.* United Kingdom; Beichmann, Sole Arbitrator), 2 Rep. Int'l Arb. Awards 1113, 1123 (1931) (detention conditions must "correspond to the level habitually admitted among civilized nations"); and *Amco v. Indonesia I* (Merits) (Goldman—Pres., Foighel, Rubin), 1 ICSID Rep. 413 (1984), at para. 172 (stating that "[i]t is a generally accepted rule of international law … that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens") (internal citations omitted), *upheld in material part*, *Amco v. Indonesia I* (Annulment) (Seidl-Hohenveldern—Pres., Feliciano, Giardina), 1 ICSID Rep. 509 (1986), at paras. 59–60.

[28] NAFTA Article 1105(1) provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security."

[29] *SD Myers v. Canada* (Merits) (Hunter—Pres., Schwartz, Chiasson), 8 ICSID Rep. 18 (First Partial Award, 2000), at para. 263.

[30] *Pope & Talbot v. Canada* (Merits—Phase 2) (Dervaird—Pres., Greenberg, Belman), 7 ICSID Rep. 102 (April 10, 2001), at para. 109.

[31] *Id.* at paras. 110–117.

[32] *See* NAFTA Article 1131(2).

[33] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, 6 ICSID Rep. 567, sect. B (July 31, 2001).

The parties were asked to comment on the implications of that interpretation on the case, given that the tribunal had already issued its award on the merits. The tribunal held that the interpretation was binding upon it,[34] and went on to consider whether its award was consistent with the interpretation, a matter which turned on "whether the concept behind the fairness elements under customary international law is different from those elements under ordinary standards applied in NAFTA countries."[35] Canada argued that "the principles of customary international law were frozen in amber at the time of the *Neer* decision."[36] The tribunal did not question Canada's argument that the *Neer* "egregiousness" criterion "encapsulated" the standard of review under customary international law—at least in the 1920s.[37] Indeed, the tribunal dismissed Canada's submission as relying on a "static conception of customary international law" and placing too much emphasis on *Neer*, while international law had since come to encompass a broader "range of actions," and as improperly expunging the "fairness" elements from Article 1105(1).[38]

The first (and only) time a tribunal in an investment-treaty case has positively relied on the *Neer* formulation appears to be the *Genin* case in June 2001. The *Genin* tribunal considered the standard of conduct required under the "fair and equitable" treatment provision of the United States-Estonia bilateral investment treaty (BIT) and had this to say, paraphrasing *Neer*:[39]

> Under international law, this requirement [of fair and equitable treatment] is generally understood to "provide a basic and general standard which is detached from the host State's domestic law." While the exact content of that standard is not clear, the Tribunal understands it to require an "international minimum standard" that is separate from domestic law, but that is indeed a *minimum* standard. Acts that would violate this minimum standard would include acts showing a wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith.[40]

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[34] *See Pope & Talbot v. Canada* (Reparation), 7 ICSID Rep. 148 (2002), at para. 51.

[35] *Id.* at para. 56.

[36] *Id.* at para. 57.

[37] *Id*.

[38] *Id.* at paras. 58–66.

[39] *Genin v. Estonia* (Merits) (Fortier—Pres., Heth, van den Berg), 6 ICSID Rep. 241 (2001), at para. 367 (emphasis in the original, citations omitted). *See also Ronald S. Lauder v. Czech Republic* (Final Award) (Briner—Pres., Cutler, Klein), 4 World Trade & Arb. Mat'ls. 35 (2002), at para. 292.

[40] In respect of the holding on "wilful neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith," the *Genin* tribunal cited to the sub-sections in Brownlie's Principles dealing with the international minimum standard as compared with the national-treatment standard, where Brownlie quotes *Neer*. *See* Brownlie, *supra* note 24.

The language is guarded: "acts showing a wilful neglect of duty," etc., "include"—and so by definition would not exhaust—the kind of conduct that falls foul of the fair and equitable treatment standard.[41]

The cases that followed have on the whole distinguished the *Neer* formulation on the basis that it no longer reflects contemporary customary international law,[42] or is to be confined to the particular context of insufficiency of state action to apprehend and punish private criminals, or both.[43] Both of those points were made at some length in *Mondev v. United States*, a denial of justice claim under the NAFTA. The tribunal there observed first that

> the *Neer* case, and other similar cases which were cited [in argument], concerned not the treatment of foreign investment as such but the physical security of the alien. … There is insufficient cause for assuming that provisions of bilateral investment treaties, and of NAFTA, while incorporating the *Neer* principle in respect of the duty of protection against acts of private parties affecting the physical security of aliens … are confined to the *Neer* standard of outrageous treatment where the issue is the treatment of foreign investment by the State itself.[44]

The *Mondev* tribunal added, as a second reason for not regarding the *Neer* standard as controlling today, that "both the substantive and procedural rights of the individual in international law have undergone considerable development."[45] It went on to hold as follows:

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[41] *Cf.* the reading of the *Genin* award in *Saluka BV v. Czech Republic* (Merits) (Watts—Pres., Fortier, Behrens), 18:3 World Trade & Arb. Mat'ls 166 (2007), at para. 295. *See also Tecmed SA v. Mexico* (Grigera Naón—Pres., Fernandez Rozas, Bernal Verea), 10 ICSID Rep. 134 (2003), at para. 154, where a tribunal applying the fair and equitable treatment provision of the Spain-Mexico BIT quoted the holding in *Neer* regarding the applicability of an international standard as part of the tribunal's own proposition that arbitrary action includes one that "present[s] insufficiencies that would be recognized by 'any reasonable and impartial man.'"

[42] *See UPS v. Canada* (Jurisdiction) (Keith—Pres., Cass, Fortier), 7 ICSID Rep. 285 (2002), at paras. 78, 84; *International Thunderbird Gaming Corp. v. Mexico* (van den Berg—Pres., Portal Ariosa, Wälde), 18:2 WTAM 59 (2007), at para. 194 (stating that "[n]otwithstanding the evolution of customary international law since decisions such as the *Neer Claim* in 1926, the threshold for finding a violation of the minimum standard of treatment still remains high, as illustrated by recent international jurisprudence") (citations omitted), *cited with approval in BG Group Plc v. Argentina* (Merits) (Aguilar Alvarez—Pres., Garro, van den Berg), unpublished (2007), at para. 302; and *Cia de Aguas del Aconquija SA v. Argentina II* (Merits) (Kaufmann-Kohler—Pres., Bernal Verea, Rowley), unpublished (2007), at para. 7.4.7, fn. 325.

[43] *See Saluka*, *supra* note 41.

[44] *Mondev v. United States* (Stephen—Pres., Crawford, Schwebel), 6 ICSID Rep. 192 (2002), at para. 115.

[45] *Id.* at para. 116.

> In the light of these developments it is unconvincing to confine the meaning of "fair and equitable treatment" and "full protection and security" of foreign investments to what those terms—had they been current at the time—might have meant in the 1920s when applied to the physical security of an alien. To the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a State may treat foreign investment unfairly and inequitably without necessarily acting in bad faith.[46]

This is in effect the point that Jennings had made in rather more flowery language in 1967:

> It is small wonder that difficulties arise when 19th century precedents about outlandish behaviour towards aliens residing in outlandish parts are sought to be pressed into service to yield principles apposite to sophisticated programmes of international investment.[47]

Following on *Mondev*'s heels, the tribunal in *ADF v. United States* quoted with approval relevant passages in the earlier decision and went on to state:

> It may be added that the Claims Commission in the *Neer* case did not purport to pronounce a general standard applicable not only with respect to protection against acts of private parties directed against the physical safety of foreigners while in the territory of a host State, but also in any and all conceivable contexts. There is no logical necessity and no concordant state practice to support the view that the *Neer* formulation is automatically extendible to the contemporary context of treatment of foreign investors and their investments by a host or recipient State.[48]

Those views were cited with approval by the tribunals in the *Waste Management II*[49] and *Gami*[50] cases. Ultimately, NAFTA tribunals have come to adopt distinct

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[46] *Id*.

[47] R. Jennings, "General Course on Principles of Public International Law," 121 Recueil des Cours 323, 473 (1967-II).

[48] *ADF Group v. United States* (Feliciano—Pres., Lamm, de Mestral), 6 ICSID Rep. 470 (2003), at para. 181.

[49] *See Waste Management, Inc v. United States II* (Merits) (Crawford—Pres., Civiletti, Magallón Gómez), 11 ICSID Rep. 361 (2004), at para. 93.

[50] *See Gami Investments, Inc. v. Mexico* (Paulsson—Pres., Lacarte Muró, Reisman), 44 ILM 545 (2005), at para. 95.

standards of review under Article 1105, both for conduct attributable to the state generally,[51] and for denial of justice claims in particular.[52]

Nevertheless, *pace Mondev* and *ADF*, it has not been doubted that *Neer* did reflect the standard of review under the international minimum standard, at least in the 1920s. The *Saluka* tribunal had no difficulty stating that "the traditional *Neer* formula … reflects the traditional, and not necessarily the contemporary, definition of the customary minimum standard, at least in certain non-investment fields."[53] Other tribunals have been even more reverential. In the *LG&E* case, it was said that "the [minimum] standard existed pursuant to the interpretation provided in the 1920s in the emblematic *Neer* case,"[54] and two other tribunals have gone so far as to describe *Neer* as the "expression of customary international law" on the standard of *fair and equitable treatment*.[55]

A similar tendency can also be found in the specialized literature,[56] though it is fair to say that the most recent works approach *Neer* with circumspection, especially in the light of the case law discussed above.[57] Nonetheless, in modern

[51] *See Waste Management II*, *supra* note 49, at para. 98:

> Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.

This passage was cited with approval in *Gami*, *supra* note 50, at para. 95; and in *Methanex Corp. v. United States* (Merits) (Veeder—Pres., Rowley, Reisman), 44 ILM 1345 (2005), at Part IV, chap. C, para. 11.

[52] *See Mondev*, *supra* note 44, at para. 127; and *Loewen v. United States* (Merits) (Mustill—Pres., Mason, Mikva), 7 ICSID Rep. 442 (2003), at paras. 132–137. In *Loewen*, the United States relied on *Neer* (*see* Counter-Memorial of United States (March 30, 2001), http://www.naftaclaims.com, at 142), and as *Loewen* was a denial of justice claim, such reliance was legitimate. *Cf.* text for notes 65 and 70, *infra*.

[53] *Saluka*, *supra* note 41, at para. 295.

[54] *LG&E Energy Corp. v. Argentina* (Liability) (de Maekelt—Pres., Rezek, van den Berg), 46 ILM 40 (2007), at para. 123, fn. 29.

[55] *See Azurix Corp. v. Argentina* (Merits) (Rigo Sureda—Pres., Lalonde, Hugo Martins), 10 ICSID Rep. 412 (2006), at para. 366; and *Siemens AG v. Argentina* (Merits) (Rigo Sureda—Pres., Brower, Bello Janeiro), unpublished (2007), at paras. 293 *et seq.*

[56] *See*, *e.g.*, K. Yannaca-Small, "Fair and Equitable Treatment Standard in International Investment Law," OECD Working Paper on International Investment, No. 2004/3 (September 2004), at 9, fn. 37 (stating that "[t]he 1926 decision on the *Neer Claim* became the landmark case for the international minimum standard"); UNCTAD, Fair and Equitable Treatment 39–40 (1999).

[57] *See* Ch. Schreuer, "Fair and Equitable Treatment in Arbitral Practice," 6:3 J. World Invest. & Trade 357, 368 *et seq.* (2005); R. Dolzer and Ch. Schreuer, Principles of International Investment Law 14, 129 (2008); and C. McLachlan *et al.*, International Investment Arbitration 215 (2007).

investment-law literature *Neer* remains a prime citation for the standard of review under the minimum standard of treatment in traditional customary law.[58] Closer examination of the jurisprudence of the United States-Mexico General Claims Commission, however, reveals that the *Neer* formula was from the outset one of quite narrow application.

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As noted, *Neer* was the United States-Mexico General Claims Commission's first decision on the merits. It is clear, not only from the text of *Neer* itself but also in the light of subsequent decisions, that the primary concern of the Commissioners was to establish once and for all the rule that an international minimum standard obtained, and that acts of domestic authorities had to measure up to that standard, not to their national law. Furthermore, there is reason to believe that in the circumstances of the case the United States had contended for a standard of review which was very similar to the one ultimately adopted by the Commission. In the *Cayuga Indians* case,[59] which had been decided earlier in 1926, the United States had proposed a definition of denial of justice as "an obvious outrage—a wrong of such a character that reasonable men cannot differ concerning it"[60] (the United States agent was Fred Nielsen, who was the American Commissioner in *Neer*). The similarity with the *Neer* formulation is striking.

In the *Faulkner* decision, handed down two weeks after *Neer*, the Commission accepted that there had been "detention under intolerable circumstances of indignity and inconvenience."[61] That would certainly have amounted to an "outrage … far short of international standards" in a *Neer* sense, but the Commission cited *Neer* only for the proposition that "the test [for an international delinquency] lies in the application of international standards."[62] In another detention and ill-treatment case decided the same day, *Roberts*, the Commission formulated the operative standard under international law as follows:

> Facts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment

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[58] *See* R. D. Bishop *et al.*, Foreign Investment Disputes: Cases, Materials and Commentary 1063 (2005).

[59] *Cayuga Indians* (United Kingdom *v.* United States) (Nerincx—Pres., Fitzpatrick, Pound), 5 Rep. Int'l Arb. Awards 173 (1926).

[60] *See* F. Nielsen, American and British Claims Arbitration: *Cayuga Indians*—Oral Argument by Fred K. Nielsen 250 (1926), quoted by Eagleton, *supra* note 20, at 539, and by Borchard, *supra* note 20, at 244.

[61] *Faulkner*, 4 Rep. Int'l Arb. Awards 67, 71 (1926).

[62] *Id*.

> of an alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. The test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.[63]

That the *Neer* standard was relevant only in discrete circumstances was made plain in subsequent decisions. In the *Venable* case, decided in July of 1927, one of the claims was that Mexico's National Railways had arbitrarily prevented an American company from repatriating to the United States railway stock that was under lease to it from another American company. A number of possible explanations were advanced for National Railways' action, but none of them was factually persuasive or reasonable. The claim was accepted as an unlawful interference with contract rights. It was immaterial whether the official who had prevented the release of the locomotives was or was not aware that in so doing he was causing the lessee to breach its contract with a third party, the lessor. In so holding, the Commission stated:

> Direct responsibility for acts of executive officials does not depend on the existence on their part of aggravating circumstances such as an outrage, wilful neglect of duty, etc.[64]

Nevertheless, the Commission dismissed a separate claim which concerned the subsequent court-ordered attachment of the locomotives. It had been claimed that the attachment was unlawful, given that the locomotives did not belong to the creditor whose property was being attached. In that respect, the Commission considered that it was for the creditor to object to the attachment (which it had not), and therefore that

> [n]o fault can be imputed to the [Mexican] Court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action (see paragraph 4 of the Commission's opinion in the *Neer* case … rendered October 15, 1926).[65]

In the *Chattin* case, where a decision was handed down two weeks after *Neer*, the Commission had an opportunity to clarify matters further. Chattin had been convicted of embezzlement and had served part of a two-year sentence. It was

[63] *Roberts*, 4 Rep. Int'l Arb. Awards 77, 80 (1926).
[64] *Venable*, 4 Rep. Int'l Arb. Awards 219, 224 (1927).
[65] *Id.* at 226.

claimed that his arrest, trial and conviction were "illegal" and that his treatment in jail was "inhuman." The claim succeeded only in respect of irregularities in the trial. The Commission started its analysis by drawing at length a distinction between cases of "indirect liability" (or "remote or secondary" liability) and "direct liability." Indirect-liability cases were those where

> a citizen of either country having been wrongfully damaged either by a private individual or by an executive official, the judicial authorities had failed to take proper steps against the person or persons who caused the loss or damage.[66]

Direct liability, by contrast, was "incurred on account of acts of the government itself, or its officials, unconnected with any previous wrongful act of a citizen."[67] This category included not only acts of the legislative and executive branches, but also acts of the judiciary insofar as the courts had "mistreat[ed]" aliens and the "damage sustained is caused by the *judiciary* itself."[68]

The Commission considered that the concept of denial of justice encompassed only cases of indirect responsibility, on the theory that there can be no denial of justice unless there has been a prior ("antecedent") injustice that the state has failed to redress.[69] The Commission went on to state:

> The practical importance of a consistent cleavage between these two categories of governmental acts lies in the following. In cases of direct responsibility, insufficiency of governmental action entailing liability is not limited to flagrant cases such as cases of bad faith or wilful neglect of duty. So, at least, it is for the non-judicial branches of government. Acts of the *judiciary*, either entailing direct responsibility or indirect liability (the latter called denial of justice, proper), are not considered insufficient unless the wrong committed amounts to an outrage, bad faith, wilful neglect of duty, or insufficiency of action apparent to any unbiased man. Acts of the executive and legislative branches, on the contrary, share this lot only then, when they engender a so-called *indirect* liability in connection with acts of others; and the very reason why this type of acts is covered by the same term "denial of justice" in its broader sense may be party in this, that to such acts or inactivities [*sic*] of the executive and legislative branches engendering *indirect* liability, the rule

[66] *Chattin*, 4 Rep. Int'l Arb. Awards 282, 285 (1927).
[67] *Id.* at 286.
[68] *Id.* (emphasis in the original).
[69] *Id*.

> applies that a government cannot be held responsible for them unless the wrong done amounts 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. …
>
> [A]s far as acts of the judiciary are involved, … the rule applies that state responsibility is limited to judicial acts showing outrage, bad faith, wilful neglect of duty, or manifestly insufficient governmental action. But the distinction [between direct and indirect responsibility] becomes of importance whenever acts of the *other* branches of government are concerned; then the limitation of liability (as it exists for *all* judicial acts) does not apply to the category of direct responsibility, but only to the category of so-called indirect or derivative responsibility for acts of the executive and legislative branches, for instance on the ground of lack of protection against acts of individuals.[70]

Chattin merits extensive quotation because it puts the *Neer* formula in context and shows its proper historical confines. Whether the distinction between direct and indirect responsibility has any relevance today is of no moment here; nor is it important for present purposes to question the Commission's conception of the notion of denial of justice.[71] Rather, the point to make is that the *Neer* standard had its place within a system of state responsibility predicated on a distinction between direct and indirect responsibility. The Commission intended the standard to apply only in "denial of justice" cases, by which it meant, first, claims regarding acts of the judiciary and, secondly, cases of failure by the judicial or other authorities to redress an injury that had been caused by private actors. Neither of those propositions was controversial.

To illustrate, the *Neer* standard was applied in: (1) a case where an off-duty officer killed an American citizen, and was given the "wholly inadequate sentence of four years";[72] (2) a case of apparent murder by persons who remained unidentified notwithstanding investigations and arrests of suspects;[73] and (3) a complaint about alleged leniency in the arrest, detention and sentencing of

[70] *Id.* at 286–288 (emphasis in the original).

[71] For such a critique, *see* J. Paulsson, Denial of Justice in International Law 46–47 (2005).

[72] *See Morton*, 4 Rep. Int'l Arb. Awards 428, 429 (1929).

[73] *See Eitelman*, 4 Rep. Int'l Arb. Awards 336, 337 (1928). *See also Mecham*, 4 Rep. Int'l Arb. Awards 440, 443 (1929) (finding a failure to take steps to apprehend criminals to be culpable only if "what was done shows such a degree of negligence, defective administration of justice, or bad faith, that the procedure falls below the standards of international law"); and *Janes*, 4 Rep. Int'l Arb. Awards 82, 87 (1926) (holding that a failure for eight years to arrest and prosecute a murderer whose identity was known constituted a "nonrepresssion" in breach of international law).

two Mexican nationals who had accidentally wounded an American citizen while engaging in target practice.[74] In the case of *García & Garza*, the claim by Mexico concerned the shooting of a child by an American officer who was trying to stop a group from crossing over to the United States on a raft. The officer was dismissed from service by a court-martial in the United States, but then freed and restored to duty by order of the President of the United States. In respect of the child's killing, the Commission accepted that there had been a "reckless use of firearms" in the circumstances, given that the "international standard concerning the taking of human life" prohibited killing "unless in cases of extreme necessity."[75] But in respect of the claim that the reversal of the sentence by the United States President constituted a denial of justice, the Commission applied the *Neer* standard, and dismissed the claim.

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It is curious that a fresh review of *Neer* and the related jurisprudence of the United States-Mexico General Claims Commission should be required after 80 years. In addition to two monographs on the jurisprudence of the Commission, a concise study by the International Law Commission Secretariat in 1964 made it clear that *Neer* did not lay down a general rule.[76] Yet some work never stays done; and so it is with new canards that need to be put to rest. There should be no doubt that, to the extent the customary-law minimum standard has any role to play in the interpretation of investment treaties, the *Neer* formula is of limited import. The majority of modern claims concern administrative or legislative acts, which in the United States-Mexico General Claims Commission's classification are to be regarded as cases of direct responsibility where the alleged injury flows directly from such acts. *Neer* was on its own terms inapplicable in such cases—in 1926 and *a fortiori* today. In customary law, those acts would properly fall to be measured by the *Roberts* formula of treatment "in accordance with ordinary standards of civilization." That, not *Neer*'s, is therefore the formulation which needs to be understood, developed, or indeed reconsidered in the context of investment protection.

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[74] *See Gordon*, 4 Rep. Int'l Arb. Awards 586, 589–590 (1930).

[75] *See García & Garza*, 4 Rep. Int'l Arb. Awards 119, 121 (1926).

[76] *See* ILC Secretariat, Digest of the Decisions of International Tribunals relating to International Responsibility, YB Int'l L. Comm. 132, 143–144, 150–152 (1964-II).