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State Responsibility for Contract Breaches: Possible Insights from the U.S- Mexican General Claims Commission

Jennifer Thornton (US Department of State) · Saturday, April 10th, 2010 · American Society of International Law (ASIL)

The United States and Mexico signed the General Claims Convention of September 8, 1923 and thereby constituted the U.S.-Mexico General Claims Commission.* The Commission was asked to resolve all claims by U.S. and Mexican citizens against the other government for loss or damage to their person or property interests arising out of the period of political upheaval that followed a series of Mexican revolutions in the late 19th and early 20th Centuries. Perhaps the most cited opinion of the General Claims Commission is the one it issued in Neer v. United Mexican States, a denial of justice case brought by an American widow who alleged that the Mexican government violated international law when failing to dutifully prosecute her husband's murderers. Neer v. United Mexican States, Doc. No. 136, Opinion (Oct. 15, 1926), reprinted in OPINIONS OF THE COMMISSIONERS UNDER THE CONVENTION CONCLUDED SEPTEMBER 8, 1923 BETWEEN THE UNITED STATES AND MEXICO 71-80 (1927) (hereinafter "OPINIONS").

In Neer, the General Claims Commission was concerned with determining when a State can be held liable under international law for failing to provide adequate judicial remedies to protect the personal security of a foreigner. In numerous other opinions, however, the General Claims Commission commented specifically on when States can be liable under international law for impairing the contract and property interests of foreigners and thus, resolved claims more factually analogous to those arising under modern international investment agreements. Some of the most interesting of these opinions are those in which the Commission examined State responsibility for breach of contract under international law. Although these opinions are few among hundreds generated by the mixed claims commissions of the era, they provide guidance to modern practitioners attempting to distinguish between breach of contract claims that give rise to treaty violations and those that do not.

In Illinois Central Railroad Co. v. United Mexican States, the Commission considered Mexico's motion to dismiss a claim for non-payment of monies owed on a contract for train engines on the grounds that claims for non-performance of contract obligations were not within its jurisdiction. See Illinois Central Railroad Co. v. United Mexican States, Doc. No. 432, Opinion ¶ 1 (Mar. 31, 1926), reprinted in OPINIONS 15 (1927).

The Commission expressly disavowed a general rule that "mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the non-performance is accompanied by some feature of the public capacity of the government as an authority." Id. ¶ 4; (OPINIONS at 16). Instead, it interpreted Article I of the General Claims Convention as containing a broad grant of jurisdiction over "all claims" of an international character, including contract claims by a citizen of one country against the government of another country that are governed purely by municipal law. Id. ¶ 6; 17-18. Therefore, notwithstanding its decision to exercise jurisdiction over contract claims, the Commission expressly rejected the notion that international liability will necessarily follow from a government's decision to exercise some sovereign prerogative when breaching a contract.

Against this backdrop, the Commission considered a claim for loss and damage flowing from Mexico's alleged non-performance of a contract for dredging the port of Salina Cruz in North American Dredging Company of Texas v. United Mexican States. See North American Dredging Co. of Texas v. United Mexican States, Doc. No. 1223, Opinion (Mar. 31, 1926), reprinted in OPINIONS 21 (1927). The Commission found that it had jurisdiction to consider breach of contract claims based on its holding in Illinois Central Railroad, but dismissed the claim without prejudice because of the existence of a Calvo clause in the contract. The Calvo clause expressly deprived the contractor and its agents "of any rights as aliens" and prevented requests for diplomatic protection in relation to the contract. Id. at 22. Most international authority rejects the Commission's conclusions regarding the validity of the Calvo clause, but the Commission's insistence that the clause did not deprive the claimant of all international law remedies is instructive. See 1 ROBERT JENNINGS & ARTHUR WATTS, OPPENHEIM'S INTERNATIONAL LAW 931 (9th ed. 1992). The Commission reasoned that such clauses could not eliminate a national's right "to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law." North American Dredging, ¶ 14; 27. With this, the Commission recognized that if a State fails to provide foreign nationals with minimum procedural guarantees for resolving breach of contract claims against it in its courts, international liability might lie.

The Commission reexamined the validity of the Calvo clause several years later, and in so doing, commented more directly on when a State can be liable at international law for contract claims. In International Fisheries Co. v. Mexico, the Commission considered a large claim arising out of Mexico's cancellation of a concession contract for canning factories and fish markets. See International Fisheries Co. v. United Mexican States, Doc. No. 625, Opinion (July 1931), reprinted in OPINIONS 217-18 (1931) (upholding the validity of the Calvo clause notwithstanding a vehement and wide-ranging dissent by the U.S. Commissioner, Fred K. Nielsen). Mexico cancelled the concession by administrative decree after concluding that International Fisheries had failed to establish these factories and markets within the contractually agreed time-frame. The U.S. Agent urged the Commission to hear International Fisheries' claim on the grounds that the decree constituted an arbitrary repudiation of contract and maintained that the only lawful way for Mexico to have terminated the contract was through its courts. Relying on a 19th Century note from the U.S. Secretary of

State to one of his "Ministers," the majority of the Commission held that the administrative decree could not be construed as arbitrarily repudiating or nullifying the contract, because the cancellation was pronounced in conformity with the contract's terms. Id. at 218-19. In the Commission's view, an "international delinquency" could not arise from a plain and simple notice by a government to its concessionary that the contract had been breached, even if that notice was communicated by fiat. Id. at 219. Thus, the Commission insisted that a State can rescind a contract by decree, according to the contract's express terms, without creating a cause for international action.

Oppenheim's International Law explains that "[i]t is doubtful whether a breach by a state of its contractual obligations with aliens constitutes per se a breach of an international obligation, unless there is some such additional element as denial of justice, or expropriation, or breach of treaty, in which case it is that additional element which will constitute the basis for the state's international responsibility." OPPENHEIM'S INTERNATIONAL LAW at 927. But identifying precisely what "additional elements" turn a State's breach of contract into a treaty claim is not always clear. Some suggest that international responsibility should lie when a State exercises its sovereign power to repudiate a contract. See OECD DIRECTORATE FOR FIN. AND ENTER. AFFAIRS, WORKING PAPERS ON INTERNATIONAL INVESTMENT, No. 2006/3, INTERPRETATION OF THE UMBRELLA CLAUSE IN INVESTMENT AGREEMENTS 8 (2006). The opinion of the General Claims Commission in International Fisheries Co. suggests otherwise, at least when that repudiation is effected according to the terms of a particular contract provision. The General Claims Commission opinion in North American Dredging merely articulates the rule that international liability will lie when a sovereign breaches a contract with a foreign national and then denies the foreigner justice in its courts. While the Commission expressly disavowed its ability to draw a bright line between contract breaches that give rise to international responsibility and those that do not in Illinois Central Railroad, its subsequent opinions provide some guidance as to where such a line might be drawn.

Jennifer Thornton
*The author, Jennifer Thornton, is an Attorney-Adviser in the Office of the Legal Adviser at the United States Department of State, Office of International Claims and Investment Disputes. The views in this article are those of the author and do not necessarily reflect those of the U.S. Department of State or the U.S. Government.

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