MEXICAN UNION RAILWAY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 21, February , 1930, dissenting opinion by British Commissioner, undated. Pages 157-175.)

1. According to the Memorial of the British Government, the Mexican Union Railway (Ltd.), constructed and operated for several years under a concession, dated the 9th March, 1897, granted by the Mexican Government, which was based on an earlier concession, dated the 30th April, 1896, from the State of Sonora, a railway from Torres to Campo Verde in the State of Sonora.

In connexion with this undertaking the company owned and possessed under lawful title various works, buildings, rolling-stock, fittings, rails, chattels and other property and effects, the whole of which has been entirely lost or destroyed by revolutionary acts, during the period the 20th November, 1910, and the 31st May, 1920. The principal business of the railway was provided by the Creston Colorado Mining Company. For this mining company the railway company carried the usual supplies needed for a mining business, fuel for machinery, and also supplies for the needs of the employees of this mining company. Owing to the unsettled conditions in Sonora through revolutionary activities, the mining company was forced to close down and consequently the railway was deprived of most of its normal business. When the Mexican Government granted rates for passengers and freight it was understood that these were to be in pesos Mexican valued at 2 pesos for 1 dollar (U.S.). During the above-named period, as each fresh Government was formed, an issue of paper money was put into circulation. The example of the Government was followed by the military chiefs of all parties, and the railway was obliged to charge for fares and freight on the basis of this paper money. The railway was unable to induce business men to accept this paper money unless some Mexican official was present to punish them for their refusal. On the other hand, the Mexican Government insisted on the payment of taxes in Mexican gold. These taxes were paid by the railway during the whole of the years covered by this claim. In addition to these difficulties, the railway was subjected to constant attacks by revolutionaries, chiefly Indians. Up to February 1912, when Mr. L. Reed left for England, two trains had been held up by rebels, and Mr. Reed and Engineer Page were held prisoners for a time at Colorado.

A chronological survey of events is given in John Symond's affidavit of the 17th April, 1923 (annex 2).

The following is a short account of the principal losses suffered by the company during the years covered by the claim, taken from Mr. Symond's chronological survey (annex 2).

1912. The company was harassed by Indian rebels. Four bridges and a crib were burnt and two camps were looted. Work was constantly held up by the presence of rebels.

1913. During this year practically all work ceased owing to the revolution.

1914. During this year an escort bringing ore to Represo station was attacked by Indians, but with the help of Government forces they were driven off. Torres was attacked and looted by Indians. There was no Government protection for Torres.

1915. Telephone wire was constantly cut; the station and warehouse at Represo were looted and trains were constantly fired on by Indians. The Government was advised of these outrages, but did nothing to protect the railway. Owing to the lack of protection it was impossible to repair the track and bridges. Later in the year, Represo was again attacked; trains were derailed and another bridge was burnt. On the 16th October, State troops, under Colonel Fortunato Tenorio, took charge in Torres. This colonel ran trains night and day in the greatest disorder. The troops took over the manager's house and destroyed everything that they did not steal. The outside of

the station and the manager's house was torn down and burnt by them. In November, Sancho Villa and his defeated troops, returning from an attack on Hermosillo, held Colorado under the greatest disorder for two days, killing, looting and destroying property.

1916. After asking for State protection, the company's manager was ordered to go to Hermosillo by the State Governor, who informed him that if construction was not under way within sixteen days the concession would be annulled. It was not possible to do any ordinary railway business, but trains were run at all hours for the Government without payment. The company, however, were obliged to pay the employees, purchase wood, water and oil and do such repairs for the trains as they were able. The orders for these trains on behalf of the Government were invariably given by telephone or verbally; the only written orders obtained by the company for moving troops were signed by General A. R. Gómez for 372.49 pesos and General A. Mange, 1,124.20 pesos. The manager was forced to forward these orders to Mexico City for payment and to make a receipt duly stamped for the full amount. No money, however, was ever paid to the company.

1917. Three box-cars, loaded by and for General A. R. Gómez, were completely destroyed by explosion and fire in Torres. General Gómez refused to give the company any kind of receipt for these cars.

1918. A bridge at K. 47 was destroyed by fire and telephone wire was continually cut and carried away.

1919. Indians were again very troublesome, attacking trains and trucks. The inspector sent by the State Government to investigate conditions could not understand that the railway could continue to run at all under such conditions.

1920. The Government again threatened to cancel the concession as the railway had not complied with the contract. By this time the company was entirely without funds and running into debt and has since been forced to abandon entirely the railway.

The amount of the claim is £200,000 sterling. This sum represents the value of the property of the Mexican Railway at the time the outrages commenced and is less than the value of the property, viz., £219,476 8*s*. 0*d*., given in the balance-sheet of the company dated the 30th September, 1911. A part of the sum claimed is the value of the property mentioned in Mr. Symond's affidavit as having been destroyed by rebel forces.

2. This case is before the Commission on a Motion of the Mexican Agent to dismiss, based on article 11 of the Concession, reading as follows:

"La empresa será siempre mexicana aún cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o con cualquier otro carácter, serán considerados como mexicanos en todo cuanto a ella se refiera. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

[1] *English translation from the original report.* "The Company shall always be a Mexican Company even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such

In the opinion of the Mexican Agent this article renders the Commission incompetent to take cognizance of the damage sustained by the Company in question, which consented to be considered as Mexican in everything connected with any acts relating to the operation of the railway for which it had acquired a concession.

3. It is clear that the Mexican Government meant through this article to insert in the concession what is generally known in international law as the Calvo Clause.

4. Many international tribunals have had to deal with this clause, and it has recently been the subject of a decision of the General Claims Commission, Mexico and United States of America (Pages 21-34, *Opinions of Commissioners*, Vol. 1). In this decision, which was taken unanimously, our Commission concurs, and as it adopts the considerations, which led to the conclusion, it refers to them, not thinking it necessary to repeat them, or possible to express them better. This decision has been accepted by the British Government as good law, and they declared that they were content to be guided by it (p. 184 of the *Bases of Discussion for the Conference for the Codification of International Law)*.

5. The Commission is, however, aware that in the case before the General Claims Commission the scope was narrower than in the case now under consideration. In the former it was limited to the *execution of the work, to the fulfilment of the contract, to the business connected with the contract, and to all matters related to the contract*, whereas, in the concession granted to the Mexican Union Railway (Ltd.), it includes *all matters whose cause and right of action shall arise within the territory of the Republic, everything relating to the said company, and all titles and business connected with the company.*

While all the Commissioners are prepared to agree with and to follow the decision rendered by the General Claims Commission, only two of them are of opinion that the same considerations also apply to the claim of the *Mexican Union Railway*, and that article 11 of the concession is not invalidated because the words, in which it is expressed, comprise more than in the other case.

6. In the view of the majority of the Commission the difference between the two stipulations is not so important as to make the Calvo Clause in this concession null and void. They fail to see any very marked and essential divergence between the words *the business connected with the contract* in the first case, and the words *titles and the business connected with the company* in the second. They are of opinion that the intention of the Mexican Government, in inserting article 11 in the contract, was clear and did not go further than the legitimate protection of the rights of the country.

States possessing great natural resources which they are desirous to see developed, or wishing to improve the means of communication between the different parts of the country, or to promote the exploitation of public services, may follow different methods.

They can, when faced with a decision as to what persons or concerns a concession is to be given, make no discrimination whatever between aliens and their own nationals, and impose no special conditions when dealing with

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aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may consequently not intervene in any manner whatsoever."

the former. They may also reserve the exploitation of the wealth of the country and of public services for their own subjects and decline to give interests of vital national importance into the hands of the subjects of foreign Governments. And they may in the third place consider that they must not deprive their country of the advantages accruing from the investment of foreign capital and from foreign technical knowledge, and yet at the same time see to it that the presence of huge foreign interests within their boundaries does not increase their international vulnerability.

7. It is this third method which has been chosen by the Mexican Republic. It has accepted foreign co-operation in the economic development of the country, but has realized that this might expose the State to collisions and interventions of which its own history and the history of countries in similar circumstances has shown examples. In other words, the Government wanted to avoid the possibility that measures intended to promote economic prosperity might become a source of diplomatic friction or even international danger.

This aim seems completely legitimate, and does not in itself present any conflict with the acknowledged rules of international law.

How was this aim achieved in this case?

By inserting in the concession an article by which the foreign concern put itself on the same footing as national corporations, by which it undertook to consider itself as Mexican, to submit to the Mexican courts, and not to appeal to diplomatic intervention.

8. The Company accepted this stipulation for all matters whose cause and right of action should arise within Mexican territory. This covers a great deal, but does not exceed the limits of the legitimate guaranteeing of national interests because all that it means is that the fact of having granted the concession to an alien lessor, that such concern resides in the country as a result of the concession, and the operation of the concern under the terms of the concession must not create difficulties which would not have arisen had Mexico refused to accord privileges of this nature to others than Mexicans.

Onerous as this obligation may seem, it was the *conditio sine qua non* of the contract, which the Mexican Government would otherwise not have signed. It was accepted by persons who certainly realized the weight of contractual engagements. It cannot be considered as a unilateral clause, it cannot be detached from the rest of the contract; it is part of a whole and indissoluble system of rights and duties so balanced as to make it acceptable to both parties.

9. The advantages which the Company received in exchange for what it undertook were considerable; by the same deed the Government transferred to the Concessionnaire, without any consideration, ownership of all lands and supplies of water belonging to the State and required for the track, the stations, the sheds and other appurtenances. The concessionnaire was authorized for construction, operation and maintenance of the lines, to dispose of all materials afforded by the lands or the rivers owned by the State. In case ores, coal, salt or other minerals were found during the construction of the line, they were to become the property of the company.

It does not seem surprising that such far-reaching rights, including even the free disposal of national resources, were not granted to a foreign corporation until it had bound itself, in words allowing of no misunderstanding, always to act as a Mexican Company and, instead of invoking diplomatic intervention on the part of its own Government, to appeal to the means of redress open to Mexican citizens. This was the object of article 11, and it was article 11 upon

which the Mexican Government relied and which they thought would always be complied with.

Such was the contract under which the railroad was built and the concession carried out during a period of more than a quarter of a century; such the relation between the State and the Railway company. The contract may have been a source of profit or a source of loss, but it existed, it had been signed and it had to be taken as a whole.

If the Commission were to act as if article 11 had never been written, the consequence would be that one stipulation, now perhaps onerous to the claimant, would cease to exist and that all the other provisions of the contract, including those from which claimant has derived or may still derive profit, would remain in force.

The majority of the Commissioners deems that a decision leading to such a result could not be considered as based upon the principles of justice or equity.

10. In holding that under the rules of international law an alien may lawfully make a promise, as laid down in the concession, the majority of the Commission holds at the same time that no person can, by such a clause, deprive the Government of his country of its undoubted right to apply international remedies to violations of international law committed to his hurt. A Government may take a view of losses suffered by one of its subjects different to that taken by such subject himself. Where the Government is concerned, a principle higher than the mere safeguarding of the private interests of the subject who suffered the damage may be involved. For the Government the contract is *res inter alios acta*, by which its liberty of action cannot be prejudiced.

But the Commission is bound to consider the object for which it was created, the task it has to fulfil and the treaty upon which its existence is based. It has to examine and to judge the claims contemplated by the Convention. These claims bear a mixed character. They are public claims in so far as they are presented by one Government to another Government. But they are private in so far as they aim at the granting of a financial award to an individual or to a company. The award is claimed *on behalf* of a person or a corporation and, in accordance therewith, the Rules of Procedure prescribe that the Memorial shall be signed by the claimant or his attorney or otherwise clearly show that the alien who suffered the damage agrees to his Government's acting in his behalf. For this reason the action of the Government cannot be regarded as an action taken independently of the wishes or the interest of the claimant. It is an action the initiative of which rests with the claimant.

That being the case, the Commission cannot overlook the previous engagements undertaken by the claimant towards the respondent Government. A contract between them does not constitute *res inter alios acta* for the Commission. They are both, the Mexican Government and the claimant, standing before the Commission, and the majority is of opinion that no decision would be just or equitable which resulted in the practical annulment of one of the essential elements of their contractual relation.

By this contract the claimant has solemnly promised not to apply to his Government for diplomatic intervention but to resort to the municipal courts. He has waived the right upon which the claim is now presented. He has precluded himself by his contract from taking the initiative, without which his claim can have no standing before this Commission and cannot be recognizable. Quite apart from the right of the British Government, his claim is such that it cannot be pursued before a body with the jurisdiction intrusted to this Commission and circumscribed in Articles I and III of the Convention.

11. It has been argued that the view set out in the preceding paragraph conflicts with Article VI of the Convention, which provides that no claim shall be set aside or rejected on the ground that all legal remedies have not been exhausted prior to the presentation of such claim.

The Commissioners who are responsible for this decision cannot see that this provision applies to the case here dealt with.

The same argument was put forward before the General Claims Commission, Mexico and the United States, in the case quoted in section 4, and had the same strength there that it has here, because in that regard the two Conventions are identical and the difference in scope between the two clauses has no effect.

The General Claims Commission met the argument in question in the following words:

"It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of article V of the Treaty, to the effect that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim. This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of article I of the Treaty, and if under the terms of article I the private claimant cannot rightfully present its claim to its Government and the claim, therefore, cannot become cognizable here, article V does not apply to it, nor can it render the claim cognizable."

The majority of the Commission concurs in this opinion.

12. The question may arise whether the view expressed in this judgment does not lead to the ultimate conclusion that the Mexican Union Railway has, by signing article 11 of the concession, divested itself of its British nationality and all that it implies, to such a degree as to waive the right to appeal to its Government even in cases of violation of the rules and principles of international law.

It is obvious that there could only be grounds for this question if the Calvo Clause in this case were construed as intended to prevent the other party from applying for the diplomatic support of his Government in any circumstances whatsoever. Had that been the scope of the provision the Commissioners would unanimously have been of opinion that the clause was to be considered as null and void. Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation. But the majority of the Commission cannot see that article 11 of the concession aims so far. The claimant has not, by subscribing to it, waived its undoubted right as a British corporation to apply to its Government for protection against international delinquency; what it did waive was the right to conduct itself as if not subjected to Mexican jurisdiction and as possessing no other remedies than international remedies. What the claimant promised was to apply to the courts and to resort to those means of redress which are, according to the Mexican constitution and laws, open to Mexican citizens. The contract did not take from claimant the right to apply to its Government if its resort to the Mexican tribunals or other authorities available resulted in a denial or undue delay of justice. It only took away the right to ignore them.

This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon

which the claim is based occurred in 1920 and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims, similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

If by taking the course agreed upon by both parties, the claimant would have been unable to obtain justice, no international tribunal would have denied it access, on the ground of the engagement subscribed to by it. But the claimant omitted to pursue its right by taking that course, and acted as if said course had never been indicated by the State and accepted by it, and as there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to, the majority cannot regard the claimant as a victim of international delinquency.

13. The majority does not deny that one or more of the acts or omissions, alleged to have caused the damage set out in the Memorial, may in themselves constitute a breach of international law. But even if this were so, the Commissioners cannot see that it would justify the ignoring of article 11. It is one of the recognized rules of international law that the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.

In the Bases of Discussion for the Conference for the Codification of International Law, drawn up by a preparatory Committee of the League of Nations, the following request for information, addressed to the Governments, can be found (p. 137):

"Is it the case that the enforcement of the responsibility of the State under international law is subordinate to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?"

Most of the Governments have answered in the affirmative, among them the British Government, which replied in the following words:

"In general the answer to point XII is in the affirmative. As was said by His Majesty's Government in Great Britain in the memorandum enclosed in a note to the United States Government, dated the 24th April, 1916:

" 'His Majesty's Government attach the utmost importance to the maintenance of the rule that when an effective mode of redress is open to individuals in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights, resource must be had to the mode of redress so provided before there is any scope for diplomatic action' " (*American Journal of International Law*, 1916, Special Supplement, page 139),

and the note goes on to point out that this is the only principle which is correct in theory and which operates with justice and impartiality between the more powerful and the weaker nations.

"If a State complies with the obligations incumbent upon it as a State to provide tribunals capable of administering justice effectively, it is entitled to insist that before any claim is put forward through the diplomatic channel in respect of a matter which is within the jurisdiction of these tribunals and in which they can afford an effective remedy, the individual claimant (whether a private person or a Government) should resort to the tribunals so provided and obtain redress in this manner.

"The application of the rule is thus conditional upon the existence of adequate and effective local means of redress. Furthermore, in matters falling within the classes of cases which are within the domestic jurisdiction of the State the decisions of the national courts in cases which are within their competence are final, unless it can be established that there has been a denial of justice (see answer to point IV)."

It is this rule which made it necessary to stipulate expressly in Article VI of the Convention that no claim should be set aside or rejected on the grounds that all legal remedies had not been exhausted prior to the presentation of the claim. But the rule must apply to those claims which do not fall within the terms of the Convention because they can not be rightfully presented.

14. For the reasons developed in the preceding paragraphs the majority of the Commission holds the view:

(a) That the Anglo-Mexican Claims Convention does not override the Calvo Clause contained in article 11 of the concession.

(b) That the fact, that this article includes more than the interpretation and the execution of the contract does not bring it into conflict with international law and invalidate it.

(c) That the concession would not have been granted without incorporating the substance of article 11 therein.

(d) That article 11 must be respected as long as there has been no denial of justice, undue delay of justice or other international delinquency.

(e) That the claimant never made any attempt to comply with the terms of article 11 and that, therefore, there can be no question of denial of justice nor of undue delay of justice.

(f) That it is one of the accepted rules of international law that the responsibility of a State under international law is subordinated to the exhaustion of local remedies.

15. The Commission decides that the case as presented is not within its jurisdiction. The motion to dismiss is sustained and the case is hereby dismissed without prejudice to the right of the claimant to pursue his remedies elsewhere.

Dissenting opinion of British Commissioner

1. The question of the legality of what is known as the Calvo Clause has been long discussed by international lawyers and a number of rather conflicting decisions have been given upon it by various international commissions, which decisions have been cited and debated before us by the Agents of both sides. It is, however, not necessary for me to refer to these decisions (except to remark that there is not one of them which has approved so extensive a clause as the one in this case), for the whole present legal view on the subject has been admirably set out in the lucid and fair judgment in the case of the *North-American Dredging Company of Texas*, pronounced by Dr. Van Vollenhoven, President of the General Claims Commission of the United States and Mexico, and concurred in by both his colleagues. See *Report*, Vol. 1, pages 21 to 34.

Not only would this opinion be worthy of the highest respect in itself, but the Agents of both parties have specifically stated before us that they agree in general with what is laid down therein as being a correct statement of the law in the matter. Moreover, the British Government has replied to the question put by the League of Nations on the subject of the codification of international law as follows:

Question.—"What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy?"

Reply of Great Britain.—"His Majesty's Government in Great Britain accept as good law and are content to be guided by the decision of the Claims Commission between the United States of America and Mexico in the case of the North-American Dredging Company of Texas of the 31st March, 1926, printed in the volume of the *Opinions of the Commissioners*, page 21. It is laid down in this opinion that a stipulation in a contract which purports to bind the claimant not to apply to his Government to intervene diplomatically or otherwise in the event of a denial or delay of justice or in the event of any violation of the rules or principles of international law is void, and that any stipulation which purports to bind the claimant's Government not to intervene in respect of violations of international law is void, but that no rule of international law prevents the inclusion of a stipulation in a contract between a Government and an alien that in all matters pertaining to the contract the jurisdiction of the local tribunals shall be complete and exclusive, nor does it prevent such a stipulation being obligatory, in the absence of any special agreement to the contrary between the two Governments concerned, upon any international tribunal to which may be submitted a claim arising out of the contract in which the stipulation was inserted."

The Commission, therefore, has no hesitation in accepting the decision referred to above as a guide to the determination of the present motion to dismiss, and it only remains to apply the principles there laid down to the facts of the present case.

2. The first point raised by the British Agency was that the effect of article 11 of the contract was cancelled or overruled by Article 6 of the Convention, which provides that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of such claim.

I am not prepared to dissent from the view held by my colleagues that this defence to the motion to dismiss fails. It is quite true that a stipulation in a contract between the Mexican Government and a private party could be overruled by an agreement between the Mexican Government and the Government of which the private party is a citizen. But I think that it would have to be done in express terms. I agree with the opinion of the Commissioners in the Texas Dredging Company's case quoted in paragraph 11 of the majority opinion in this case, that the object of Article 6 was to relieve claimants entitled to present their claims to the commission from a general principle of international law, but not to grant jurisdiction to the Commission in respect of cases which they would otherwise not have power to hear. If the latter had been the intention of the British and Mexican Governments it would have been easy to add to Article 6 some such phrase as "Even when the claimant has expressly agreed to have recourse to such remedies." When a claim can properly be presented to the Commission in virtue of Article 3, full effect must be given to Article 6, but this latter would not render a claim cognizable which the Commission could not otherwise entertain.

3. Admitting, therefore, in principle, the validity of a clause of the nature of that contained in the contract of the present claimants, we must next consider the scope of the particular clause in question and the nature of the claim. Throughout the decision in the Texas Dredging Company's case and particularly in paragraphs 11, 22 and 23, it is stated that no general rule can be laid down as to the validity or invalidity of a clause partaking of the nature of a

Calvo Clause. It is the duty of the Commission to endeavour to draw a reasonable line between the sovereign right of national jurisdiction on the one hand and the sovereign right of national protection of citizens on the other. Each case involving application of a Calvo Clause must be considered and decided on its merits.

4. If a distinction is to be drawn between the Texas Dredging Company's case and this one, it can only be on one of two grounds—

(1) The difference in phraseology between the clauses in the two contracts; and

(2) The difference between the grounds on which the claims are based.

Dealing first with (1) it is necessary carefully to compare the two clauses. That in the Texas Company's case runs as follows:

"The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

In the present case the clause is as follows: [1]

"The Company shall always be Mexican, even though some or all of its members may be foreigners and it shall be exclusively subject to the jurisdiction of the courts of the Republic of Mexico in all matters whose cause or action may take place within the territory of the said Republic. The Company itself and all foreigners and successors of such foreigners, having an interest in its business either as shareholders, employees or in any other capacity, shall be considered as Mexicans in everything relating to the Company. They shall never be allowed to assert, with respect to the securities or business connected with the Company, rights of foreign status, under any pretext whatever. They shall only have the rights and means of asserting them which the laws of the Republic grant to Mexicans, and in consequence foreign diplomatic agents will not be allowed to intervene in any manner."

A careful comparison of the two clauses shows that the latter is much wider and more stringent than the former. The words "In any matter related to this contract" and "In all matters concerning the execution of such work and the fulfilment of this contract", on which Dr. Van Vollenhoven lays much stress in paragraphs 13 and 14 of his opinion, are not to be found in the clause in this case. They are replaced by the phrases "In everything relating to the Company" and "With respect to the securities and business connected with the Company", while, most important of all, the prohibition of intervention by foreign diplomatic agents is not confined as in the earlier case to "Any matter relating to the contract", but is absolutely general.

5. I am quite unable to agree with the opinion of the majority of the Commission expressed in their paragraph 6, that there is no very marked and

[1] The translation is mine and differs slightly both from that in the copy of the contract presented by the British Agent and that contained in the Mexican motion to dismiss, which do not entirely agree with each other. (Note by British Commissioner.)

essential divergence between the two clauses, and I also find myself bound to dissent from the view expressed in paragraph 12 of the majority opinion as to the intention of the Calvo Clause in this case.

It appears to me impossible to doubt, from the terms of article 11 of the contract, that it was the intention of the Mexican Government to prevent the claimant's Government from intervening diplomatically or otherwise in any case in which the Company might have suffered loss in relation to its existence, business or property, even though such loss had arisen through a breach of the rules and principles of international law. This is precisely the object which, in Dr. Van Vollenhoven's opinion, as stated in paragraph 22, would render the provision void. The same point is still more emphasized in Mr. Commissioner Parker's concurring opinion and indeed is admitted by my colleagues in their paragraph 12.

I am therefore forced inevitably to the conclusion that article 11 of the Mexican Union Railway Company's contract is repugnant to the general principles of international law and is void *ab initio*. The Mexican Government had only itself to blame for this result when it insisted on the insertion into the contract of a provision, the object of which could not be justified under international law.

This conclusion is in some ways unfortunate, and it is doubtless this consideration which induced the United States and Mexican General Commission to make the suggestion contained in paragraph 17 of their opinion, of which the intention evidently was that a sort of standard clause should be drafted "Frankly expressing its purpose with all necessary limitations and restraints", so that it could only be in the case of a departure from such a clause that a difficulty would arise. With this desire I am in hearty sympathy.

6. But I do not wish to base my opinion solely on the considerations set out in the preceding paragraph. It appears to me to be the only conclusion consistent with the strict rules of international law. But in our decisions we are bound by the terms of the Convention and under it the Mexican Government has agreed to accept liability beyond that strictly laid down by international law in respect of all claims justified by the principles of justice and equity. It may therefore, I think, fairly expect to be treated in the same way and it seems to me consistent with these principles that when a particular clause in a contract purports to bind a party in a manner which would be illegal, the Commission need not consider such a provision absolutely void, but might hold that it still retains its force to the extent of its legal limits.

I should therefore be prepared to recognize the clause as binding the parties in the manner and to the extent laid down in paragraphs 15 and 20 of Dr. Van Vollenhoven's opinion, i.e., the Mexican Union Railway Company would possess only the same rights as a Mexican Company in all matters arising from the fulfilment and interpretation of the contract and the execution of the work thereunder, and the British Government would only be entitled to intervene in the case of denial of justice, delay of justice, gross injustice or any other violation of international law.

7. Having laid down these principles, it remains to apply them to the facts of the present claim. When confronted with propositions *(c)* and *(d)* of paragraph 15 of the decision in the Texas Dredging Company's case, the Mexican Agent admitted that when a Calvo Clause existed, a foreign Power might be entitled to intervene in the case of a denial of justice, but he contended that where an appropriate tribunal existed (and the Mexican Government has set up a National Commission with power to deal with claims of the nature of this one whether put forward by Mexicans or foreigners), no breach of inter-

national law could exist until the claimant had applied to the tribunal in question and failed to obtain justice there.

This somewhat novel view of international law I am unable to accept. It appears to confuse principles of law with methods of procedure. Both international law authors and commissions have given many examples of international wrongs, such as failure to protect lives and property of foreigners from violence, arbitrary proceedings of public authorities, illegal acts of public officials, &c., which constitute breaches of international law having no connexion with denial of justice, which may constitute a breach in itself, as, for example, if a court refused to hear and determine a claim of a foreigner against a local citizen.

It is true that in any of the above cases of international wrong it is laid down that where "adequate and effective local means of redress exist" the claimant must have recourse to them before asking his Government to put forward his claim through the diplomatic channel. See answer of His Majesty's Government to point 12 of the questions in The Hague Conference on the codification of international law. But this does not mean that the wrong does not exist *ab initio*.

The theory also is quite inconsistent with the decision in the Texas Dredging Company case, which refers, in paragraph 20 and elsewhere, to denials of justice and *any other* violation of international law, and states definitely in paragraph 23 that the Commission will take jurisdiction "where a claim is based on an alleged violation of any rule or principle of international law." The adoption of the Mexican theory would in fact render any form of the Calvo Clause legal however extensive, and that is precisely what Dr. Van Vollenhoven's decision declares must not be allowed.

8. This brings me to the only remaining point of divergence between my view and that of the majority of the Commission. They admit in paragraph 13 that some of the acts and omissions alleged to have caused the damage set out in the Memorial might in themselves constitute a breach of international law. This fact in itself appears to me to justify the intervention of the British Government and its presentation of this claim to the Commission. My colleagues, however, still consider that their jurisdiction is ousted by the failure of the claimants to avail themselves of the remedies open to them under the national law of the Republic of Mexico. To this view Article 6 of the Convention seems to me a complete answer. As stated above in paragraph 2, this Article cannot be used to grant jurisdiction to the Commission in respect of claims which could not properly be presented to them. But once it has been admitted that the British Government is entitled to espouse a particular claim and present it to the Commission, the article is intended to prevent a revival of the argument of the Mexican Government based on the admitted general principle of international law. This is evidently the meaning and intention of paragraph 21 of the decision in the Texas Dredging Company's case.

9. There is also a matter of practical importance that should be referred to. It is admitted by all parties that the rule that local means of redress must be utilized, whether arising from express contract or from the general principles of international law, is conditional upon their being adequate and effective. In the *Robert E. Brown* case it was stated that "a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust". *(Ralston*, page 88, paragraph 117. Moore 3129.) Consequently this and every other international commission would have to assume the odious task of deciding whether the machinery set up in the defendant State was really capable of remedying the wrong done and whether any

particular decision could be reconciled with the principles of international law. A procedure of this kind would inevitably cause far more international friction than the assumption of jurisdiction by the Commission in respect of the claim itself. In this case no evidence has been offered as to whether the National Commission mentioned in paragraph 7 above during the eighteen years of its existence, has provided claimants with adequate and effective redress.

10. The conclusion, therefore, at which I arrive is that this claim being based on the violation of certain recognized principles of international law, the British Government is entitled to present it to the Commission and the latter has jurisdiction to determine it, provided the losses claimed do not arise solely from the fulfilment or interpretation of the contract or the execution of the work thereunder.

11. This brings us to the consideration of question (2), mentioned in paragraph 4 above, and again a very wide difference appears between the facts alleged in this case and those in that of the *Texas Dredging Company*.

In that case the claim was for breaches of the contract itself and the dispute was concerned with the interpretation of certain articles of the contract. Here the claim is chiefly based on tortious acts of revolutionary forces; on wilful destruction of the Company's property; on assaults on its employees and passengers; on commandeering of trains, &c. It appears to me impossible to consider these to be matters arising out of the execution of the contract. They cannot have been in the anticipation of the parties when they drafted the clause during the peaceful days of President Porfirio Díaz.

It is, of course, necessary to examine the facts and decide whether or not the allegations are proved before we can say whether the condition mentioned at the end of the preceding paragraph does or does not exist.

12. I cannot help feeling—though I say it with all respect—that my colleagues have been too much inflenced by what may be called the ethical aspect of the matter. They point out in paragraphs 8 and 9 of their opinion that it would be contrary to the principles of justice and equity to allow a claimant to appear before the Commission and ask for an award when he has definitely waived such right and has obtained a valuable concession by such waiver. This view is most reasonable and even laudable, but, in deciding this motion to dismiss, the Commission is dealing with an important principle of abstract international law affecting the rights of the Sovereign States who are the parties appearing before it and it seems to me, therefore, that we should not be influenced by the considerations mentioned above.

13. There is one other matter to which I feel it my duty to refer. During the hearing the Mexican Agent, evidently acting under direct instructions from his Government, stated that the question of the Calvo Clause was a vital one to the Mexican Government, and that if the Commission should take jurisdiction in this case, the Mexican Government would register a protest against such decision and would make a reservation as to its rights. I am unable to understand how the Mexican Government, after signing a Convention determining the powers of the Commission, can be justified in protesting against any decision at which they may arrive, unless, indeed, they suggest that the Commission has been acting corruptly.

The Mexican Agent proceeded further and referred to the attitude which the Mexican Government would adopt in the event of a hostile decision in this case, both with regard to the renewal of the mandate of the Commission—which in the absence of renewal expires next August—and towards the various

companies which, having signed the Calvo Clause, had presented claims to the Commission. Such a communication might, perhaps, have properly been made privately to the British Agency, but I cannot see any object in making it publicly to the Commission except in the hope of influencing their decision by considerations entirely extraneous to the merits of the question in dispute.

It is a well-known historical fact that the numerous international commissions that have been set up during the last hundred years have never allowed themselves to be intimidated or browbeaten by any Government, however powerful or influential.

This Commission will certainly prove no exception to the rule. It is needless to add that any threat which may be thought to have been contained in the communication made to them has had no influence whatever upon the decision at which they have arrived. It might, therefore, be considered better to ignore the matter altogether, as was done by the President of the Commission at the time and by the British Agent in his reply.

But I feel that the communication so made has a bearing on one aspect of the case. It was claimed by the Mexican Agency that the Mexican Union Railway Company should have submitted its case to the National Claims Commission referred to in paragraph 7 above. Seeing that the Mexican Government has thought fit to take the course here referred to with regard to this International Commission set up under a treaty, it is reasonable to suppose that it would not have hesitated to adopt similar or even stronger measures towards a National Commission set up by itself. This conduct goes far to explain and excuse the reluctance of the Mexican Union Railway Company and other foreign companies in a similar position to have recourse to the National Commission. It appears, therefore, to me to form an additional ground why this Commission should hold that the omission of the Company to submit its claim to the National Commission is not a bar to its presenting it here.

14. The majority of the Commission have summed up their views in paragraph 14 of their opinion, and it may be convenient similarly to summarize the points on which I agree with them or dissent from them.

I agree with proposition *(a)* that Article 6 of the Convention does not cancel article 11 of the contract.

I also agree with propositions *(c)* and *(e)*, which are questions of fact.

I disagree with proposition *(b)* and consider that the terms of article 11 of the contract are repugnant to the principles of international law.

Alternatively, I consider that article 11 should be respected only in the manner and to the limits indicated in paragraph 6 of my opinion, and to that extent I disagree with proposition *(d)*.

I agree with the general proposition stated in *(b)*, but consider that it has no application in this case in virtue of Article 6 of the Convention.

Conclusion

15. I am of opinion that the Commission has jurisdiction to decide any part of the claim which does not arise from the fulfilment and the interpretation of the contract or the execution of the work thereunder, and does not, therefore, accept the motion to dismiss, but will examine the merits of the claim on the basis laid down in this opinion.