INTERNATIONAL FISHERIES COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

Fernández MacGregor Commissioner:

This claim has been presented by the United States of America on behalf of a North American corporation known as the International Fisheries Company, which asserts that it has suffered damages as a result of the cancellation by the Government of Mexico of a contract or concession which it had granted to a Mexican Company called "La Pescadora, S.A." wherein the claimant possessed a considerable number of shares, for which reason it asks for an indemnity equal to nine hundred and eighty-five thousandths of the sum of $4,500,000.00, which according to it, was the value of the cancelled contract or concession, plus interest.

There have been presented in the instant claim many very important points of law the study of which requires extreme care. But many of them can be set aside if it is true as contended by the Mexican Agency, that this Commission is without jurisdiction to hear the claim in question by reason of the contract-concession, which is said to have been annulled by the Government of Mexico, having a clause wherein the persons obtaining the concession agreed to submit themselves absolutely to the Mexican Courts in everything pertaining to the interpretation and fulfilment of the contract,

the concessionaires and their legal successors, in the event of their being foreigners, being unable with respect to the said interpretation or fulfilment of the concession, to invoke the protection of their Government.

In other words, there is submitted for the consideration of this Commission a contract containing a clause of a nature which has generally been classified as the Calvo Clause, a situation in which this same General Claims Commission found itself when it decided the claim of the *North American Dredging Company of Texas*, docket No. 1223.

It is necessary, then, before entering into a consideration of the other points of law in the claim to decide this point, inasmuch as if it really appears that the instant case is similar to that of the North American Dredging Company of Texas, the incompetency of this Commission to determine the matter will be clear and will result in its not having to occupy itself with the other juridical problems involved in the claim.

The American Agency has made strenuous efforts to induce the new members of this Commission to revoke the jurisprudence established by the decision of their predecessors rendered in the case of the *North American Dredging Company of Texas*. This decision was attacked at the time of its issuance by the same American Agency through a protest and a petition for its reconsideration, notwithstanding that Article VIII of the Convention of September 8, 1923, reads that "The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions". It was not, therefore, strange that the opportunity presenting itself to deal with the same point of the validity of the Calvo clause in another claim, it should again discuss the matter fully.

After a full and careful examination, however, of the arguments of the American Agency, I am obliged to state that the opinion which I formed. also after mature deliberation, in the case of the *North American Dredging Company of Texas*, is not altered as to any of its points. The American Agency again expressed all the arguments submitted on the previous occasion, without the addition of new ones of any nature. Then, as now, there existed decisions of arbitral tribunals upholding each view, and the situation can be summed up in the words of Mr. Woolsey, a distinguished writer on International Law, who, commenting precisely upon the decision rendered in the case of the *North American Dredging Company of Texas*, said the following: "The Calvo clause has had an unusual history before claims commissions. In eight cases the validity of the clause, thus barring an international claim, has been upheld: in eleven cases, its efficacy to bar the jurisdiction of a claims commission has been denied, the tribunal dealing with the clause much as the common law courts did with a contractual stipulation for private arbitration, into which they read an unlawful effort to oust the courts of jurisdiction. (Authors note: For convenience, I refer to the analysis of the cases on the Calvo clause in Borchard, *Diplomatic Protection of Citizens Abroad*. pp. 800-810)". Taken from The American Journal of International Law, July 1926, Vol. 20, No. 4, p. 536.

This summary of the status of the question must now be modified, since to the number of decisions cited by Mr. Woolsey affirming the validity of the Calvo clause, there must be added the case of the *North American Dredging Company of Texas*, rendered by this Commission, and the one rendered by the Claims Commission between Mexico and Great Britain in the case of the *Mexican Union Railway Ltd.*, claim No. 36, wherein the validity of that clause was also affirmed.

It is proper to remark that with respect to the point under consideration, it is immaterial to know whether or not the application of the doctrine sustained in the case of the North American Dredging Company to the case decided by the British Mexican Commission was legitimate; it is sufficient to observe that the three Commissioners agreed to accept it as an applicable standard.

There are other circumstances favorable to the contention that the Calvo clause has already been accepted by the usage of nations. Both Agencies made reference to the research work conducted by the League of Nations with relation to the international law codification of the matter under discussion. The question submitted by the League of Nations to the chancelleries of the world was the following: What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy? Both Agencies agreed that the Government of Great Britain replied that His Majesty's Government accepted as good law and was contented to be guided by the decision of the Claims Commission between Mexico and the United States of America in the case of the *North American Dredging Company of Texas*, adding that it was laid down in that 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.

Without expressing an opinion upon the admissibility of the restriction made by Great Britain in referring to a special agreement between the Governments concerned to submit a claim arising from a contract containing the Calvo clause, to a particular international tribunal, it must be borne in mind that there is not before this Commission any special agreement of such nature. The point as to what claims fall within the jurisdiction of this Commission was discussed in the case of the *North American Dredging Company*, and reference is made to the pertinent part of the decision in that case for further light thereon.

With respect to the research work conducted by the League of Nations it may be observed that not all of the replies received from 19 States were unfavorable to the contention of the validity of the Calvo clause. The replies submitted by Germany, Australia, Bulgaria, Denmark, Great Britain, Hungary, Norway, New Zealand and the Netherlands, are in practical accord with the opinion expressed in the decision of the *North American Dredging Company of Texas*.

A study of basis of discussion No. 26, drawn up by the Committee for the Codification Conference, shows this similarity in points of view more clearly. The said Committee prepared the bases which it submitted, according to its own words, in the following manner:

"These bases of discussion are not in any way proposals put forward by the Committee. They are the result of the Committee's examination of the Government replies and a classification of the views expressed therein ....". (Vol. III page 7 of the work published by the League of Nations.)

Basis No. 26 reads:

"An undertaking by a party to a contract that he will not have recourse to the diplomatic remedy does not bind the State whose national he is and does not release the State with which the contract is made from its international responsibility.

"If in a contract a foreigner makes a valid agreement that the local courts shall alone have jurisdiction, this provision is binding upon any international tribunal to which a claim under the contract is submitted; the State can then only be responsible for damage suffered by the foreigner in the cases contemplated in Bases of Discussion Nos. 5 and 6." (*Op. cit.*, p. 135).

The last named bases refer only to what is properly called denial of justice in its most restricted acceptance, as may be seen from their provisions:

"Basis of Discussion No. 5.

A State is responsible for damage suffered by a foreigner as the result of the fact that:

1. He is refused access to the courts to defend his rights.
2. A judicial decision which is final and without appeal is incompatible with the treaty obligations or other international obligations of the State.
3. There has been unconscionable delay on the part of the courts.
4. The substance of a judicial decision has manifestly been prompted by ill-will toward foreigners as such or as subjects of a particular State." (*Op cit.*, p. 43.)

"Basis of Discussion No. 6.

A State is responsible for damage suffered by a foreigner as the result of the courts following a procedure and rendering a judgment vitiated by faults so gross as to indicate that they did not offer the guarantees indispensable for the proper administration of justice." (*Op. cit.*, p. 851.)

It will be seen by the foregoing that such an authoritative international body as the Committee of the League of Nations, after presenting it to the principal States of the world, establishes a doctrine which can be reconciled in all of its parts to that laid down by this Commission in the decision of the case of the *North American Dredging Company of Texas.*

With respect to the opinion of the Spanish-American nations in this particular it is necessary to bear in mind that they have all maintained the validity of the Calvo clause and have continued to insert it into all contracts and concessions granted to foreigners, an unquestionable fact which demonstrates that their silence with regard to the inquiry of the League, cannot be construed as being adverse to the validity of the so often cited Calvo clause.

In my opinion then, the instant case must be determined in accordance with the doctrine established in the decision of the *North American Dredging Company of Texas* case.

In that decision, the Commission stated that it was impossible for it to announce an all-embracing formula to determine the validity or invalidity of all clauses partaking of the nature of the Calvo clause, and that each case of this nature must therefore be discussed separately.

Firstly, then, a study should be made of the clause which is in question in this case in order to determine exactly its meaning and extent.

Article 32 of the contract-concession of March 10, 1909 entered into between the Department of Fomento of the Mexican Republic and the company called "La Pescadora, S.A.", reads as follows:

"The Concessionary Company or whosoever shall succeed it in its rights, even though all or some of its members may be aliens, shall be subject to the jurisdiction of the courts of the Republic in all matters the cause and action of which take place within its territory. It shall never claim, with respect to matters connected with this contract, any rights as an alien, under any form whatsoever, and shall enjoy only the rights and the measures for enforcing them that the laws of the Republic afford to Mexicans, foreign diplomatic agents being unable therefore, to intervene in any manner with relation to the said matters."

The said article unquestionably contains, in its two grammatically separate paragraphs, two distinct stipulations, although closely related. The first part reads: "The Concessionary Company *or whosoever shall succeed it in its rights*, even though all or any of its members may be aliens, shall be subject to the courts of the Republic, in all matters the cause and action of which take place within its territory". This part contains nothing but the general principle of International Law that all aliens are subject to the jurisdiction of the country in which they reside and must therefore abide by all laws and decrees of the lawful authorities of the country. No stipulation can be found in this part of Article 32, contrary in the slightest degree to any principle of international law.

The second part of Article 32 reads:

"It shall never claim, with respect to matters connected with this contract, any rights as an alien, under any form whatsoever, and shall enjoy only the rights and the measures for enforcing them that the laws of the Republic afford to Mexicans, foreign diplomatic agents being unable therefore, to intervene in any manner with relation to the said matters."

The first requirement, in order to construe this second part, is to find the subject to which the prohibitions contained therein, apply. The solution is furnished by the first part of Article 32 which fixes and determines the subject or subjects to which the standards must be applied, to the first part as well as to the second which is being discussed. This, then, is the "Concessionary Company or whosoever shall succeed it in its rights, even though all or any of its members may be aliens". These are the persons who shall not claim, *with respect to matters connected with the contract-concession* in question, any rights as aliens, under any form whatsoever; the ones who shall enjoy only the rights and the measures for enforcing them that the Mexican Republic affords to Mexicans themselves; and on behalf of whom foreign diplomatic agents under whose protection they may be (the Concessionary Company or the successors of its rights) are unable to intervene in matters relating to the contract-concession.

The language of this second part of Article 32 is perfectly clear; it does not require interpretation of any nature. It is clearly for the purpose of establishing that the persons who derived rights from the contract-concession of March 10, 1909, shall not bring into question matters with respect to that contract except in the courts of Mexico and conformably to Mexican law, diplomatic intervention, on the other hand, being prohibited with respect thereto.

The contractual provision under examination does not attempt in any manner to impede or to prevent absolutely all diplomatic intervention, but tends to avoid it solely in *those matters arising from the contract* itself,

with its fulfilment and interpretation. It certainly comes, therefore, within the doctrine laid down in the decision rendered in the case of the North American Dredging Company of Texas; this may be seen more clearly by a comparison of Article 32 with the article containing the Calvo clause which was the subject of examination in the case of the *North American Dredging Company of Texas*.

That clause reads:

"Article 18. 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 favor 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."

The clause just quoted appears to cover much more ground than does the one now under consideration; therefore the argument holds with greater force, for if the clause contained in the contract of the *North American Dredging Company* was declared valid and perfectly in accord with the principles of international law notwithstanding its apparent latitude, the clause contained in Article 32 of the contract-concession in which the International Fisheries Company is interested and which is more limited, contains nothing contradictory of the Law of Nations.

The American Agency has sustained that in the instant case the stipulation contained in Article 32 lacks effect with respect to the claimant company because that stipulation was accepted solely by the concessionary company of the fishing rights in question, which was a Mexican company called "La Pescadora, S.A." The Agency claims in this regard that the International Fisheries Company is only the possessor of a certain number of shares in "La Pescadora" and that it cannot be said therefore that the first named company has relinquished in any manner diplomatic intervention in matters relating to the contract-concession.

It is necessary, in this connection, to recall that paragraph 22 of the opinion in the case of the *North American Dredging Company of Texas*, established that in order for a clause of this nature to prosper, it must be applied only to claims based on express contractual provisions in writing and signed by the claimant or by some person through whom the claimant derives title to the particular claim.

Now "La Pescadora S.A." was, as its name indicates, a stock company organized in accordance with Mexican law. But in accord with the present theory with respect to stock companies, I do not believe it to be debatable that the holder of shares of stock therein is in the last analysis the beneficiary of a fixed part of the rights of the company, with the limitation that they cannot be exercised directly at any time except through the procedure and in the words established by the company's constitution and by-laws. This being the case it is clear that the stockholder not only *derives*, but directly has, (subject to the aforementioned limitation) all the rights accruing to him as a stockholder therein. By virtue thereof, it must be recognized that the International Fisheries Company, a stockholder of the Mexican fishing company which owned the contract-concession of March 10, 1909,

had the same rights and obligations which are derived from the contract-concession granted to the "Pescadora S. A." itself, with the limitation that the exercise thereof appertained to the appropriate company authorities.

The "Pescadora S.A." was organized for the purpose, among others, according to Article 1 of its charter, to acquire, possess, administer, operate, sell and otherwise dispose of the following industries:

"(a) Concessions and other Government titles, rights, privileges and exemptions ...."

In accordance with that Article, "La Pescadora S.A." acquired the contract-concession of March 10, 1909, the operation of which was to be conducted conformably to the bases stipulated therein. On the other hand, a stockholder of a Mexican stock company who acquires a share therein, approves all of the acts executed by the Board of Directors, and consequently, by the Company in the general meetings which must take place at least once a year. (Code of Commerce, Art. 202.)

Now the International Fisheries Company had acquired the stock, which it states it had, from "La Pescadora S.A." at a time prior to the acquisition by the second company of the contract-concession made with the Mexican Government on March 10, 1909, and certainly approved such acquisition together with all of its obligations in the meeting in which this matter was submitted. It must further be borne in mind that the International Fisheries Company had, according to the evidence, at that time 985 parts of all the stock, or almost the total amount, from which it is clear that it planned, negotiated and really carried out on its own behalf, through the medium of "La Pescadora S.A." the contract-concession with the Mexican Government, in the full knowledge of the stipulation required by this Government in Article 32. It appears, from all of these reasons, that the contention is not acceptable that the International Fisheries Company must not be considered as deriving rights from the very contract-concession in question. This is seen w th greater force in the fact that the International Fisheries Company in order to present itself before this Commission as a claimant, maintained the theory that it was the real party in interest, alleging that it was the party truly injured by the cancellation decreed by the Mexican Government; and it is not seen how it could have suffered the injury of which it complains had it not, through "La Pescadora S.A.", which was its instrument, enjoyed the privileges given by the same concession. So that the instant stipulation of Article 32 must be effective with respect to the International Fisheries Company

Incidentally it may be remarked that, with respect to the manner in which the International Fisheries Company acquired the stock of "La Pescadora S.A.", the evidence in support thereof produces such confusion that an examination into the very heart of the matter, would not dissipate it. For instance, the affidavit executed by Félix James and Juan José Bárcenas, who are respectively President Director and Secretary Director of "La Pescadora S.A." states that on August 5, 1908, 975 shares of stock in the said company were issued to Aurelio Sandoval, by certificate number 1, and that the said Aurelio immediately transferred the said 975 shares to the International Fisheries Company by assignment duly executed on the reverse of the said certificate; for which reason the International Fisheries Company immediately became, and has continued to be from that time, the owner of those 975 shares. Now the articles of incorporation of the International Fisheries Company leave no room for doubt that the said

company was not organized until the 1st day of November 1908, for which reason it cannot be understood how that same company, which *did not exist on August 5, 1908*, could legally acquire an interest in the form of stock in the company "La Pescadora S.A."

The American Agency further maintains that the instant case is not one of a claim based upon non-compliance of a contract on the part of the Mexican Government, but of a claim based upon a denial of justice as the result of an act of the Government of Mexico in decreeing the cancellation of a contract. It cites with respect to this allegation the following words of the decision rendered in the case of the *North American Dredging Company of Texas* in determining what the clause then in question took or did not take away from the contractor with relation to diplomatic intervention:

"It did not take from him (the claimant) his undoubted 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." (Paragraph 14) "What, therefore, are the rights which claimant waived and those which he did not waive in subscribing to Article 18 of the contract? .... (b) He did not waive any right which he possessed as an American citizen as to any matter not connected with the fulfilment, execution, or enforcement of this contract as such.

" (c) He did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations." (Par. 15, Opinions of Commissioners, Convention of September 8, 1923, between Mexico and the United States, pages 27 and 28.)

In order to weigh this argument, it is necessary to mention briefly the facts of the case pertinent to this point.

The Mexican Government decreed administratively the cancellation of the contract-concession dated March 10, 1909, basing its action on Article 35 which reads:

"Cancellation will be by administrative decree, a reasonable time being granted to the concessionary company to prepare its defense."

The causes of cancellation are set forth in Article 34 of the same contract among which are the following:

"Article 34.—This contract will be cancelled: X. Through failure to establish the canning factories within the time and according to the conditions fixed by Article 11.

"XII. Though failure to establish the shops referred to in Article 21."

"Article 11. Within a period of two years counting from the date of the publication of this contract, the concessionary company agrees to establish, for the utilization of the fisheries products, at least three canning factories for food products to be packed in sealed receptacles, the said factories to be erected in the places deemed desirable within the zones of operation, it having the right, upon the authorization of the Department of Fomento, to occupy *gratis* for that purpose, during the life of the contract, the necessary national unsurveyed lands, with the understanding that in all cases the factories will be established under such conditions as not to be detrimental to the health of the communities. Upon the expiration of the two years mentioned in this article, the concessionary company may establish such canning factories as it deems desirable to its interests provided always that it be done within the period of the contract.

"Article 21. The concessionary company binds itself to establish within the two years following the date of the publication of this contract, at least one

shop for the disposal of the fisheries products in each one of the towns of Mexico, Puebla and Guadalajara, which shops shall be sufficiently supplied to meet the requirements of the public."

As can be seen, the establishment of the factories and of the shops for the sale of the products of the "Pescadora S. A.", was considered by the parties to be of such importance, that they specifically agreed that the failure to establish them within the time limits plainly fixed, would be cause for the cancellation of the contract. Now the appropriate Department of Mexican Government deemed, according to the evidence submitted, that the concessionary company had not fulfilled those obligations imposed upon it by the concession-contract, and by reason thereof, under the authority given to it by Article 35, it declared the cancellation of the concession.

The question, therefore, which arose between the Company and the Mexican Government, was that of ascertaining whether or not the concessionary had become liable to the cancellation provided for in Article 34, and this question must necessarily be considered as included within what this Commission understood by fulfilment or interpretation of the contract containing a Calvo clause, when it decided the case of the *North American Dredging Company of Texas*. The cancellation in question, in the case which must now be decided, was not an arbitrary act, a violation of a duty abhorrent to the contract and which in itself might be considered as a violation of some rule or principle of international law, requisites to be established in order that the Commission might take jurisdiction, notwithstanding the existence of a clause partaking of the nature of the Calvo clause in a contract subscribed by a claimant. (Par. 23 of the decision cited.)

Even treating of claims arising from a contract wherein there is no clause providing that the alien contracting party renounce the protection of his Government for the purposes of that same contract, there is no ground for an international claim if the annulment of the contract has been made in accordance with its express terms. The rule upon this point has been expressed in a note dated July 25, 1860, from Mr. Cass, Secretary of State, to Mr. Lamar, United States Minister to Central America:

"What the United States demand is, that in all cases where their citizens have entered into contracts with the proper Nicaraguan authorities, and questions have arisen, or shall arise, respecting the fidelity of their execution, no declaration of forfeiture, either past or to come, shall possess any binding force *unless pronounced in conformity with the provisions of the contract, if there are any,* or if there is no provision for that purpose, then unless there has been a fair and impartial investigation in such a manner as to satisfy the United States that the proceeding has been just and that the decision ought to be submitted to." Moore's *Digest, VI,* 723-724.)

Mr. Borchard in making this very citation says that the rule in the cases in question has probably been best expressed in this note of Mr. Cass.

In the instant case there were clearly stipulations respecting the declaration of cancellation, owing to reasons invoked by the Government, and it was provided that that cancellation could be declared administratively by the Government itself.

However, this administrative declaration was not in any way final, since in conformity with Article 32, the company, if not in agreement with the decision of the Government, had the right to appeal to the Mexican courts for justice, as the Government of Mexico, can, as a general rule, be sued in its own Federal tribunals, as was made known by the Mexican Agency, and,

above all, since the contract itself contained a stipulation that all questions relating thereto were to be submitted to that jurisdiction.

The declaration of cancellation in question is quite distinct from a decree of nullification as Counsel for Mexico stated during the hearing. It may be said that a declaration of cancellation similar to the one made in this case by the Mexican Government is nothing more than the use of the right which every party to a contract has of ceasing to comply therewith when the other party thereto fails in his obligations. It is a plain and simple notice given by the Government to the concessionary company that as the latter had not fulfilled its obligations to erect factories and establish shops, it (the Government) considers itself authorized not to continue fulfilling its own obligations. This is the situation which is always being aired by private parties before courts having jurisdiction, and no reason is seen why the same fact, for the sole reason that one of the parties to the contract is a government, can constitute an international delinquency.

If every non-fulfilment of a contract on the part of a government were to create at once the presumption of an arbitrary act, which should therefore be avoided, governments would be in a worse situation than that of any private person, a party to any contract. The latter could cease to fulfill his contractual obligations when he believed that his co-contractor had first violated the contract, in the expectation of being sued by him in the courts if he was not satisfied. In that case he assumes the role of defendant, which is the more advantageous position in a suit.

But according to the contention of the American Agency, Mexico could not cancel the contract for non-fulfillment on the part of "La Pescadora S. A.", without first having had recourse to the courts; which means that it would always have to continue fulfilling the contract and to assume the difficult role of plaintiff, never enjoying the advantage that a private person would have under the same circumstances.

In the instant case the Government made use therefore of a right given to it by the contract, and so any question as to the grounds which the Government of Mexico had for acting in that sense or as to the interpretation of the clause of the contract upon which it based its reason for acting in that manner, were the matters specially provided for by Article 32 of the contract-concession respecting which diplomatic agents could not intervene.

It is worthy of note that in this case as in that of the *North American Dredging Company*, the American Agency maintained that the question was not one of non-fulfilment of contract, but one of international delinquency incurred directly by the State, of a denial of justice, of a wrongful act, and thus the Memorial of said claim spoke of interruptions to the work owing to *arbitrary orders* given by Mexican Government officials, of the *wrongful detention* of a dredge and its accessories, and of two launches which were a total loss. Notwithstanding the aspect given to them by the American Agency, the facts were held by this Commission to be matters relating to the contract to which the North American Dredging Company of Texas was a party.

The American Agency has said that the claimant could not have resorted, even if it had desired to do so, to the Mexican courts, inasmuch as at the time when the cancellation was decreed, the Mexican courts were not open to the administration of justice. The Mexican Agency has made known in this regard, that from the year 1917, until the date of the filing of this claim, six years passed, during which Mexican courts were open to the administration of justice, continuing in the same manner from the date

of the filing of the claim until the present. This line of argument, therefore, cannot be considered, inasmuch as a similar one was made in the case of the *North American Dredging Company of Texas*, and disallowed by the Commission in paragraph 18 of the decision in the following words:

"While its behavior during the spring and summer of 1914, the latter part of the Huerta administration, may be in part explained by the unhappy conditions of friction then existing between the two countries in connection with the military occupation of Veracruz by the United States, this explanation can not be extended from the year 1917 to the date of the filing of its claim before this Commission, during all of which time it has ignored the open doors of Mexican tribunals...."

The same conclusion which is reached by the employment of the foregoing reasons is also reached by the employment of another line of argument.

This claim has been filed on behalf of the International Fisheries Company, by reason of the stipulation of Article I of the Convention of September 8, 1923, which says that among the claims which this Commission must decide are the claims of "citizens of either country by reason of losses or damages suffered by any corporation, company, association or partnership in which such citizens have or have had a substantial and bona fide interest, provided an allotment to the claimant by the corporation, company, association or partnership of his proportion of the loss or damage suffered is presented by the claimant to the Commission hereinafter referred to...."

In order to resolve the point of jurisdiction which is being examined, it is not necessary to know whether or not the allotment in question in this case is properly made. That allotment may be considered for the moment as in existence. But in a case of this nature it is not sufficient that the Company, a national of the respondent country has suffered a loss of any kind, and that it has made to the claimant of another country a proportionate allotment thereof; that would not be a cause for international action. It is necessary that the loss which the national entity of the respondent country has suffered be one of the kind which gives rise or ground to an international claim in the supposition that that entity were an alien and therefore had the right to make claim. States according to a thoroughly established rule of international law, are responsible only for those injuries which are inflicted through an act which violates some principle of international law.

In the instant case, therefore, it is necessary to study not only whether "La Pescadora S. A." suffered a loss wherein the International Fisheries Company might have had a proportionate part, but also whether that loss suffered by "La Pescadora S. A.", is of such nature that if the said "La Pescadora S. A." were a North American national it would give to it the right to formulate an international claim.

Now the loss suffered by "La Pescadora S. A.", is the result of an act executed by the Mexican Government in decreeing the cancellation of the contract-concession of March 10, 1909. But as it has already been established that by reason of Article 32 of that contract-concession "La Pescadora S. A.", could not have made claim, even though it had been an alien, it is clear that the International Fisheries Company is likewise prevented from making claim, because the act of the Mexican Government which caused the loss wherein the International Fisheries Company has a part, is not an act involving international delinquency of any kind.

The instant case is included in the principles fixed by the Commission in the decision of the case of the *North American Dredging Company*, and

is not therefore within the jurisdiction of the Commission, it being disallowed, without prejudice to the claimant to seek whatever legal remedies he may have elsewhere.

Dr. H. F. Alfaro, Presiding Commissioner:

I am in accord with the opinion of the Mexican Commissioner, Lic. Fernández MacGregor.

Notwithstanding the extensive discussion by the American Agency of the important question of the validity of the so-called Calvo clause, I do not find any ground for modifying or revoking the doctrine established by this Commission in the matter of the North American Dredging Company of Texas. That decision has received the approval of the highest authorities on international law and constitutes an appreciable contribution to the progress of this science. The decision in question was of material assistance in clarifying the opinions previously expressed on the validity or invalidity of the said clause.

The decision mentioned, establishes therefore a just and reasonable middle ground. It protects, in a measure, the defendant State, preserving at the same time the rights of the claimant in the event of a denial of justice or international delinquency.

The clause in question, as understood by this Commission in the decision cited is not violative of any canon of international law and appears simply to enunciate that which independently of the clause is the rule of international law in the premises.

In this sense modern writers like Mr. Edwin M. Borchard state:

"The weight of authority supports the view that the mere stipulation to submit disputes to local courts is confirmatory of the general rule of international law and will be so construed by the national government of concessionaries". (Borchard, *The Diplomatic Protection of Citizens Abroad.* p. 809.)

This principle has been incorporated into several Pan American conventions and into treaties between European and Latin American States as well as into the laws and constitutions of the latter. (See, for example, Articles 1 and 2 of the Convention upon Rights of Foreigners, subscribed in the second Pan American Conference, in Mexico, 1901-2 and the treaties between the republics of Latin America and Europe, which are contained in Marten's *Recueil des Traités*, Vol 59, p. 474; Vol. 63, p. 690; Vol. 65, p. 843 *et seq.*) The United States, on its part, has declared, in general, its adhesion to it. The Department of State has frequently had occasion to assert it, one of the best expositions of the rule being, perhaps, the one made by Secretary of State McLane in 1834 in these words:

"Although a government is bound to protect its citizens, and see that their injuries are redressed, where justice is plainly refused them by a foreign nation, yet this obligation always presupposes a resort, in the first instance, to the ordinary means of defense, or reparation, which are afforded by the laws of the country in which their rights are infringed, to which laws they have voluntarily subjected themselves, by entering within the sphere of their operation, and by which they must consent to abide. It would be an unreasonable and oppressive burden upon the intercourse between nations, that they should be compelled to investigate and determine, in the first instance, every personal offense, committed by the citizens of the one against those of the other." (*Mr. McLane, Secretary of State to Mr. Shain,* May 28, 1834, Moore's *Digest,* VI, 259.)

I do not find that the property rights of the International Fisheries Company to the 985 shares of stock which the "La Pescadora" Company is said to possess, have been duly established. The evidence submitted is deficient and in some respects contradictory. But admitting the ownership asserted by the claimant, I am of the opinion that he is bound by clause 32 of the Consession Contract of the "La Pescadora" Company.

Decision

The Commission decides that the claim of the International Fisheries Company does not come within its jurisdiction and therefore disallows it without prejudice to the right of the claimant to employ such other legal remedies as it may have elsewhere.

Commissioner Nielsen, dissenting.

Claim in the amount of $4,500,000 with interest is made in this case by the United States of America against the United Mexican States in behalf of the International Fisheries Company, an American corporation. The claim is predicated on allegations with respect to the wrongful cancellation of a concession granted by the Government of Mexico to a Mexican corporation known as "La Pescadora, S.A.", in which the claimant possessed a beneficial interest as the owner of practically all of the stock. Conformably to provisions of Article I of the Convention of September 8, 1923, the claimant presented an allotment from the Mexican corporation covering 985/1000 of the loss suffered by reason of the cancellation of its concession.

The respondent government invoked in a plea to the jurisdiction the decision of this Commission in the case of the *North American Dredging Company of Texas, Opinions of Commissioners, 1927*, p. 21. In behalf of the claimant Government it was argued that the decision, irrespective of its correctness, which the United States did not concede, did not sustain the Mexican Government's contentions with respect to the bearing on the instant case of what the Commission held in the case of the *North American Dredging Company of Texas*. On the decision rendered in that case, my associates ground their decision in the instant case, and they reject the contentions of the United States that by the language of the opinion in that case the instant case is excluded from the operation of the decision in the former.

From some of the things said in the two opinions written in the dredging company case, particularly from the opinion written by the American Commissioner, it appears that the claim was rejected because claimant had not resorted to remedies afforded by Mexican tribunals. Counsel for the United States contended that the decision could have no bearing on the instant case, because, among other things, there were no judicial remedies open to "La Pescadora". The company's concession was cancelled by a Mexican military leader who undertook to combine in himself the exercise of military, executive, legislative and judicial power, and indeed no Federal courts functioned when General Carranza cancelled the company's concession. The only remedy open to the company was resort to the man who cancelled its concession. Clearly there was no remedy. The contentions of counsel I therefore consider to be obviously sound.

However, I was not a member of the Commission when the opinion in the *North American Dredging Company* case was rendered. I am constrained

to say that the opinion contains nothing of any consequence with which I agree. And therefore, since the opinion in the instant case is grounded upon the decision in the prior case, I must, in order to explain my views, indicate what I conceive to be the utter lack of any basis in law for any conclusion submitted in the former opinion.

The Commission's misconception of fundamental principles of law

I consider that the Commission construed the language of the contractual provisions involved in that case in such a way as to give them a meaning entirely different from that which their language clearly reveals—a meaning not even contended for by Mexico. In order to do that the Commission resorted to both elimination, substitution and rearrangement of language of the contractual provisions. These artifices were embellished by quotation marks. And the Commission went so far as to ground its interpretation fundamentally on the insertion in a translation of a comma, which does not appear in the Spanish text of the contract. It seems to me to be almost inconceivable that matters involving questions of such seriousness, not only with respect to important private property rights but with respect to international questions, should have been dealt with in such a manner. I am impelled to express the view that the Commission's treatment of matters of international law involved in the case did not rise above the level of its processes in arriving at its construction of the contractual provisions—a construction based on a non-existing comma.

The Commission's discussion of the restriction on interposition was characterized by a failure of recognition and application of fundamental principles of law with respect to several subjects. Principally among them are :

(a) The nature of international law as a law between nations whose operation is not controlled by acts of private individuals.

(b) The nature of an international reclamation as a demand of a government for redress from another government and not a private litigation.

(c) A remarkable confusion between substantive rules of international law that a nation may invoke in behalf of itself or its nationals against another nation, and jurisdictional questions before international tribunals which are regulated by covenants between nations and of course not by rules of international law or by acts of private individuals or by a contract between a private individual and a government.

International law recognizes the right of the nation to intervene to protect its nationals in foreign countries through diplomatic channels and through instrumentalities such as are afforded by international tribunals. The right was recognized long prior to the time when there was any thought of restrictions on its exercise. The question presented for determination in considering the effect of local laws or contractual obligations between a government and a private individual to restrict that right therefore is whether there is evidence of a general assent to such restrictions.

The Commission decided the case by rejecting the claim on jurisdictional grounds, although it admitted and stated that the claim was within the jurisdictional provisions of the Convention of September 8, 1923, which alone of course determined jurisdiction. Although the case was dismissed on jurisdictional grounds, the Commission made reference to international law but did not cite a word of the evidence of that law. A few vague references to stipulations of bilateral treaties have no bearing on the case, except

that possibly the language of those stipulations serves to disprove the Commission's conclusions. The most casual examination into abundantly available evidence of the law disproves those conclusions. The Commission did not concern itself with any such evidence.

The Commission seemed to indicate some view to the effect that the contractual stipulations in question were in harmony with international law because they required the exhaustion of local remedies, and that therefore the claim might be rejected. The Commission ignored the effect of Article V of the Convention concluded September 8, 1923, between the United States and Mexico, stipulating that claims should not be rejected for failure to exhaust local remedies.

The Commission found that the claim was within the language of jurisdictional provisions of the Convention but escaped the effect of that language by saying that the claimant could not "rightfully" present his claim to the Government of the United States. The claimant's right to appeal to his Government was of course determined by the law of the United States. There was no law declaring that the claimant could not "rightfully" present his claim to his Government for subsequent presentation to the Commission.

The Commission dismissed the case nominally on jurisdictional grounds, but did not concern itself with law pertaining to jurisdiction. The Commission nullified the jurisdictional provisions of the Convention, although the claim was obviously within the language of those provisions. It likewise nullified Article V.

The Commission stated repeatedly that contractual provisions could not bar the presentation of a claim predicated on allegations of "violations of international law" or of "international illegal acts". It also stated that the claimant did not waive his right to apply to his Government for protection against such acts. The claim of the North American Dredging Company of Texas was of course predicated on allegations of that nature. The Commission was authorized to consider such claims, yet it said that it was without jurisdiction in the case and threw out a case of the precise nature which it stated it was required by the Convention to adjudicate.

Typical of the Commission's processes of reasoning and its mental attitude is its discussion of "the law of nature", and "inalienable, indestructible, unprescriptible, uncurtailable rights of nations", and "policies like those of the Holy Alliance and of Lord Palmerston", and "world-wide abuses either of the right of national protection or of the right of national jurisdiction"—a severe indictment of the world—and "an inferior country subject to a system of capitulations" and similar matters.

The disregard of jurisdictional provisions of the Convention

The Commission in the dredging company case said that "the claim as presented falls within the first clause of Article I of the Treaty describing claims coming within this Commission's jurisdiction". That is, of course, true. But in spite of the fact that the two Governments framed a treaty giving the Commission jurisdiction over the case, the Commission decided that jurisdiction was determined by a contract signed between the company and Mexico in 1912 for the dredging of a Mexican harbor. It appears, therefore, that the Commission found that an American national could make a contract with the Mexican Government in 1912 which operated to destroy provisions of a treaty concluded between the United States and Mexico in 1923.

The instant claim, like the claim of the dredging company, is based on wrongful acts such as are referred to in the jurisdictional provisions of the Convention. More particularly, it is within the specific provisions stipulating jurisdiction when an allotment is presented, as was done in the present case. But my associates find that jurisdiction is determined by a contract with respect to rights to fish in Mexican waters made in 1909 *by a Mexican national* with the Mexican Government. So that in this case an American national did not even participate in the remarkable performance, which I do not understand, of wiping out the Commission's jurisdiction under a treaty made nearly a quarter of a century after the date of the contract with respect to fishing.

I shall discuss the two opinions in some further detail in connection with the consideration of other arbitral decisions.

The Presiding Commissioner in his concurring opinion states that the decision in the dredging company case had received the approbation of the highest authorities on international law. No authorities are mentioned. He says that he regards this opinion a notable contribution to the progress of the science of that law. He considers that the decision splendidly clarifies former concepts "with respect to the validity or invalidity" of the so-called Calvo clause. From the foregoing résumé of facts in relation to the much lauded opinion of the Commission and from some observations which I shall make hereinafter it will be seen that I do not agree with the views that the opinion is a splendid contribution clarifying former concepts.

I am unable to understand the Presiding Commissioner's statement that this decision in a certain manner protects a defendant State, leaving open methods of redress to a claimant in case of denial of justice or international delinquency. The Presiding Commissioner does not explain how the rights of a claimant are preserved by a decision which, in disregard of jurisdictional provisions of an arbitration treaty, throws a case out of court on supposed jurisdictional grounds and prevents any hearing on the merits to determine the question of international responsibility. It is true, as the Presiding Commissioner says, that the clause in question is not violative of any rule of international law. International law, which is a law for the conduct of nations, does not concern itself with contracts to dredge ports or to conduct fishing operations, or with any provisions of such contracts. On the other hand, it is equally clear that clauses in contracts of that kind cannot be declaratory of rules of international law.

Treaties between Latin American republics and European countries, to which the Presiding Commissioner refers, have no relation to the so-called Calvo clause. Moreover, it may be observed that European countries, practically without exception, deny the notion that a nation's rights under international law to protect its nationals or to have cases adjudicated under proper jurisdictional provisions of arbitration treaties can be nullified by a so-called Calvo clause.

The Presiding Commissioner quotes an excerpt from a communication addressed by Secretary of State McLane to Mr. Shain in 1834. In that communication, the Secretary of State called attention to the general rule of international law with respect to the exhaustion of local remedies by aliens in countries of their sojourn. Obviously, the advice given by the Secretary at an early day before the expedient of the Calvo clause had been invented had nothing to do with the effect of the so-called clause. Furthermore, it is specifically stipulated in the Convention of September 8, 1923, that this rule of international law shall not be given effect in the pending

arbitration. I am unable to perceive by what authority my associates may consider they have the right to ignore this important provision of the Convention.

With reference to the brief quotation which the Presiding Commissioner makes from Dr. Borchard's work, *The Diplomatic Protection of Citizens Abroad*, it may be interesting to call attention to brief portions of the draft convention with comments prepared by the Research in International Law, Harvard Law School, with respect to responsibility of states. Dr. Borchard was the Reporter.

"Article 2"

"The responsibility of a state is determined by international law or treaty, anything in its national law, in the decisions of its national courts, or in its agreements with aliens, to the contrary notwithstanding."

. . . . . .

"Article 17"

"A state is not relieved of responsibility as a consequence af any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the state of which he is a national."

"Comment"

"This Article deals with the effect of the so-called Calvo clause, which has taken different forms, by constitution, law or contract, either to make the alien a national for a particular purpose (Article 16) or to make the decisions of national courts final and unchallengeable in the international forum, or to provide that the alien for the particular purpose waives the diplomatic protection of his national state. The Article would establish that such provisions in constitutions, laws or contracts cannot defeat the rights of states derived from international law. It is thus a specific application of Article 2." *Supplement to the American Journal of International Law, April, 1929*, pp. 142, 202, 203.

When the Presiding Commissioner goes so far as to say that the United States "on its part has declared in general its adhesion to it", he evidently means to say that the United States has adhered to the principle of the Calvo clause. An examination of a single declaration made in behalf of the Government of the United States with respect to this subject would of course show that it has done nothing of the kind. And a statement based on information—such as could be obtained by casual examination of a few among numerous recorded precedents—could only be to the effect that the United States has declared a consistent opposition to any such principle as underlies the so-called Calvo clause. On the same page of Professor Borchard's work, from which the Presiding Commissioner quotes, are found the following declarations by Secretary of State Bayard:

"The United States has uniformly refused to regard such provisions as annulling the relations existing between itself and its citizens or as extinguishing its obligations to exert its good offices in their behalf in the event of the invasion of their rights.

. . . . . .

"No agreement by a citizen to surrender the right to call on his government for protection is valid either in international or municipal law." P. 809.

There is of course no uncertainty as to the attitude of the United States in objecting to the action of Commissions such as is taken in the instant case and such as was taken in the dredging company case, in refusing to hear on the merits, cases in which the jurisdiction was stipulated in jurisdictional provisions of arbitral agreements.

The Presiding Commissioner states that he does not find duly proved the rights of the International Fisheries Company with respect to the 985 shares of stock in the company "La Pescadora, S.A.", and that the proof is deficient and in some cases contradictory. No contradictions or deficiencies are mentioned. I am unable to perceive any connection of this point with the question of jurisdiction which Mexico contends may be raised by invoking the so-called Calvo clause.

It is said in Mr. Fernández MacGregor's opinion that the decision in the dredging company case was attacked by a protest and by a motion for re-hearing filed by the American Agency, in spite of the fact that Article VIII of the Convention of September 8, 1923, provides:

"The High Contracting Parties agree to consider the decision of the Commission as final and conclusive upon each claim decided, and to give full effect to such decisions."

I consider it to be regrettable that such statements should be made in a judicial opinion. The propriety of a respectfully presented motion for re-hearing is of course a matter properly to be determined when the motion comes before the Commission for decision. No "protest" was made. In that motion, now pending before the Commission, it is said:

"The Government of the United States of America, by its Agent, respectfully presents this Petition to the General Claims Commission for a re-hearing of the Motion of the Mexican Government to dismiss the case."

Motions for re-hearing have been presented to and entertained by other international tribunals. Such a motion of course in no way involves the repudiation by a Government of a final decision. And it may be observed that it is very different from a reservation such as is mentioned by Sir John Percival, British Commissioner in the Arbitration between Great Britain and Mexico under the Convention of November 19, 1926. In the dissenting opinion which he wrote in the case of the *Mexican Union Railway, Ltd.*, and which is mentioned in the opinion of my associates in the instant case, the British Commissioner said:

"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." *Decisions and Opinions of the Commissioners, London, 1931*, p. 167, 173.

Only one decision of this Commission (Order No. 120, of October 29, 1930) has been protested and repudiated. And repudiation in that instance did not come from the Government of the United States. There the Mexican Commissioner, acting as he explained under directions of his Government, made formal declarations in a dissenting opinion, as to the nullity of the majority ruling of the Commission. Minutes of October 29, 1930, with Annexes; Letter of November 29, 1930, from Señor G. A. Estrada, Mexican Secretary of Foreign Relations, to the Presiding Commissioner.

The nature of international law

International law is a law grounded on the general assent of the nations of the world. Its sources are treaties and customs, and the important sources of evidence of the law are judicial decisions of domestic and international tribunals, certain other kinds of public governmental acts, treaties and the writings of authorities. The existence or non-existence of a rule of international law is established by a process of inductive reasoning; by marshaling the various forms of evidence of the law to determine whether or not such evidence reveals the general assent that is the foundation of the law. No rule can be abolished, or amplified or restricted in its operation, by a single nation or by a few nations or by private individuals or by private individuals acting in conjunction with a government. No action taken by a private individual can contravene a treaty or a rule of international law, although it is the duty of a government to control the action of individuals with a view to preventing contravention of rules of international law or treaties.

The position of a nation as a member of the family of nations gives to it rights and benefits of international law and imposes on it the correlative requirement of complying with the duties of that law and of meeting all responsibilities which it imposes. Failure on the part of authorities of a nation to fulfil the requirements of a rule of international law is a failure to perform a legal duty, and as such an international delinquency, and a nation is responsible for acts of its authorities such as have been termed "internationally injurious". Oppenheim, *International Law*, Vol. I, p. 256, 3rd ed. In either case the responsible nation may properly be called to account by another nation.

The supreme law of all members of the family of nations is not its domestic law but is international law. Therefore, domestic law as well as the acts of officials must square with the law of nations. No domestic enactment of a nation can relieve that nation of any duty imposed upon it either by international law or by treaties, nor deprive any other nation of any of its rights. And assuredly no nation can by a contract with a private individual relieve itself of its obligations under international law nor nullify the rights of another nation under that law.

In a consideration of contractual stipulations in the nature of the so-called Calvo clause the question is presented whether such stipulations purport to limit rights accorded by international law. Obviously they do. Domestic laws have been enacted in certain countries to accomplish the same purpose. Thus by Article 38 of the Constitution of Ecuador of 1897, it was provided that every contract of an alien with the Government or with a citizen of Ecuador "shall carry with it implicitly the condition that all diplomatic claims are thereby waived". Article 149 of the Venezuelan Constitution of 1893, which was preceded by other Articles intended to restrict diplomatic intervention provided as follows:

"In every contract of public interest there shall be inserted the clause that 'doubts and controversies that may arise regarding its meaning and execution shall be decided by the Venezuelan tribunals and according to the laws of the Republic, and in no case can such contracts be a cause for international claims.'"

The right of intervention to protect nationals

Of course it is unnecessary to cite any legal authority to support an assertion that international law recognizes the right of a nation to intervene to protect its nationals in foreign countries, through diplomatic channels, and through instrumentalities such as are afforded by international tribunals.

Ignacio L. Vallarta, a distinguished Mexican lawyer, in an interesting report to his Government, said, in part, with respect to the right of protection:

"If there are truths which are universally accepted among Nations, one of these is that the State owes its protection to its citizens who are located in other countries. From Grotius to Bluntschli all publicists have taught that an offence to a citizen is indirectly an offence to the State whose duty it is to protect that citizen. The founder of international law has expressed in the following concise and vigorous phrase the importance of that duty of Nations: *Prima autem maximeque necessaria cura pro subditis . . . suit enin quasi pars rectoris,*' and the learned and contemporary German publicist epitomized thus, the doctrine which in our time governs this matter: 'A State has the right and the duty to protect its citizens who live abroad, by all the measures authorized by international law.' " *Exposición de Motivos del Proyecto de Ley sobre Etranjeria y Naturalización*, p. 100.

A well known South American author, writing as early as 1832, has said with respect to this subject:

"The protection of its citizens is the unquestioned right of any sovereign State, whenever they have been damaged as to their persons or interests by the government of another State, and particularly in the event their pecuniary credits are not paid which arise from contracts entered into by the foreign sovereign State or through its legally authorized agents. Indemnities owed by the foreign sovereign, are reduced to the same case, when resulting from an injury perpetrated by it or by persons legally acting in its name." D. Andrés Bello. *Principios de Derecho Internacional.* Vol. 1, pp. 65-66.

The question presented for determination in considering the effect of local laws or contractual stipulations between a government and a private individual to restrict that right therefore is, whether there is evidence of a general assent to such a restriction, just as there unquestionably is evidence of a general assent to the right of interposition in behalf of nationals, a right recognized long prior to the time when there was thought of such a restriction—a right exercised by all nations.

Domestic laws can not destroy rights secured by international law. Since one nation's rights can not be extinguished by local laws of another nation, then if such rights can be destroyed by contracts made by a nation with a private individual, the capacity for such an accomplishment must be attributed, not to some authority possessed by the contracting nation, but to the potency of the individual, or to some alchemistic legal product resulting from a combination of both.

Domestic laws are not finally determinative of an alien's rights. Nations which have been accorded membership in the family of nations can not isolate themselves from the system of law governing that membership and deny an established right of interposition, a right secured by international law. It is very interesting to note that the distinguished protagonist whose name has been given to these contractual stipulations, which are intended to preclude diplomatic interposition, evidently formulated his views in the light of a concept that a nation fulfils its duties by according to aliens the same treatment as is accorded to nationals, and that no nation should

intervene to obtain for its nationals anything more, either as regards rights or remedies. In his work on international law he says:

"America as well as Europe is inhabited today by free and independent nations, whose sovereign existence has the right to the same respect, and whose internal public law does not admit of intervention of any sort on the part of foreign peoples, whoever they may be." (*Le Droit International théorique et pratique*, 5th ed., I, Sec. 204, p. 350.)

"It is certain that aliens who establish themselves in a country have the same right to protection as nationals, but they ought not to lay claim to a protection more extended. If they suffer any wrong, they ought to count on the government of the country prosecuting the delinquents, and not claim from the state to which the authors of the violence belong any pecuniary indemnity." (VI, Sec. 256, p. 231.)

"The rule that in more than one case it has been attempted to impose on American states is that foreigners merit more regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside." (III, Sec. 1278, p. 140.)

It can scarcely be necessary to observe that such declarations do not define the character and scope of rights secured in favor of aliens by rules of international law or by stipulations of treaties. Conformity by authorities of a government with its domestic law is not conclusive evidence of the observance of legal duties imposed by international law, although it may be important evidence on that point. Acts of authorities affecting aliens can not be explained to be in harmony with international law merely because the same acts are committed toward nationals. There is of course a clear recognition in international law, generally speaking of plenary sovereign rights with respect to matters that are the subject of domestic regulation within a nation's dominions. But it is also clear that domestic law and the measures employed to execute it must conform to the supreme law of members of the family of nations which is international law, although there are certain subjects the domestic regulation of which can in nowise contravene that law.

Arbitral tribunals have repeatedly awarded indemnities in favor of aliens because of mistreatment in connection with imprisonment. It has been no defense in such cases that nationals suffered the same or similar mistreatment. Indemnities have been awarded because of lack of proper protection of aliens or of inadequate measures for the apprehension and punishment of persons who have committed wrongs against aliens. It has not been considered a proper defense in such cases that no better police or judicial measures were employed in cases affecting nationals. The question at issue in such cases is whether or not the requirements of international law have been met. Indemnities have been awarded because of injuries suffered by aliens as a result of the acts of soldiers or of naval authorities. It has been no defense in such cases that the government held responsible afforded no redress to nationals for tortious acts of authorities. Precedents of diplomatic and judicial action illustrating the general principle could of course be indefinitely multiplied.

The exhaustion of local remedies

It has been suggested that contractual stipulations and local legislation intended to preclude diplomatic interposition may be considered to be unobjectionable, if they are construed merely to mean that a person contract-

ing with a government binds himself to resort to local remedies and is not entitled to diplomatic intervention, unless he has suffered a denial of justice resulting from improper judicial action.

Apart from the question of the possibility of restricting by contractual stipulation rights secured by international law, it may be said that the effect of such stipulations or provisions of local laws so construed may not be essentially different from the effect of the rule of international law with respect to the requirement of a resort to local remedies prior to diplomatic intervention. That rule would seem clearly to make it unnecessary to attempt to limit interposition by contractual stipulations the scope of which is construed to be nothing more than a requirement that an alien must resort to local judicial remedies before diplomatic representation is permissible. Nations can by general assent thus restrict interposition. But individuals can not do so, nor can a nation do it through the means of a contract with an individual.

In connection with the narrow question of resort to local tribunals, it is well to bear in mind several pertinent considerations.

Denial of justice resulting from improper judicial procedure is not the only ground of diplomatic interposition. And of course, as is well known, the requirement with respect to resort to tribunals can have no application when remedies are wanting or are inadequate. Moreover, from a practical standpoint, much can be said in favor of the view that a denial of justice, broadly speaking, may properly be regarded as the general ground of diplomatic intervention. In other words, that on the basis of convincing evidence of a pronounced degree of improper governmental administration on the part of the legislative, executive or judicial branch of the Government, one nation may properly call another to account. The subject is interestingly treated by the distinguished jurist, Judge John Bassett Moore, in an address which he delivered before the American Society of International Law in 1915. In referring to the discussion of the phrase "denial of justice" at the Third International American Conference at Rio de Janeiro in 1906, and to a report adopted at that Conference with respect to the arbitration of cases having "an international character", Judge Moore said:

> "This thought was most admirably elucidated by one of the delegates of Brazil, Dr. Gastao da Cunha, who, after expressing his concurrence in the view above stated, remarked that the phrase 'denial of justice' should, subject to the above qualification, receive the most liberal construction, so as to embrace all cases where a state should fail to furnish the guarantees which it ought to assure to all individual rights. The failure of guarantees did not, he declared, 'arise solely from the judicial acts of a state. It results,' he continued, 'also from the act or omission of other public authorities, legislative and administrative. When a state legislates in disregard of rights, or when, although they are recognized in its legislation, the administrative or judicial authorities fail to make them effective, in either of these cases the international responsibility of the state arises. In all those cases, inasmuch as it is understood that the laws and the authorities do not assure to the foreigner the necessary protection, there arises contempt for the human personality and disrespect for the sovereign personality of the other state, and, in consequence, a violation of duty of an international character, all of which constitutes for nations a denial of justice.'" *American Society of International Law, Proceedings, 1915-1919,* pp. 18-19.

It would seem well also to bear in mind that nations in their relations with each other are not constantly engaged in directing legal shafts at each other. Relative rights and duties are of course ultimately defined by international law. But international comity must always play an important

part in the proper intercourse of states. Nations can by friendly discussion, without invoking strict legal rights, pave the way for adjustments that avoid the necessity for invoking such rights. The purpose to preclude even such discussion would seem clearly to be evidenced by local laws or contractual stipulations prescribing that an alien may not invoke the assistance of his government; that indeed he shall have none of the rights of an alien; and that he shall be considered as a national of a country other than that to which he owes allegiance by virtue of a proper, applicable law.

With reference to the rule of international law with respect to the exhaustion of legal remedies, it is also interesting to bear in mind that there has in recent years been a tendency, seemingly a very proper one, to eliminate that rule in connection with the adjudication of international controversies. The plea that a claimant has not exhausted his legal remedies may perhaps not infrequently be regarded as somewhat technical. It is not concerned with the fundamental question whether a wrong was initially committed by authorities of a respondent government. Governments, including those of Mexico and the United States, have considered it to be advisable, when establishing international tribunals to deal with complaints of wrong-doing, that international controversies should by such action be finally settled; that the tribunals should be empowered to pass upon the question whether wrong was committed, to afford redress for improper action, and to ignore the subject of resort to local remedies. Thus the arbitral agreement concluded August 18, 1910, between the United States and Great Britain contained the provision that no claim should "be disallowed or rejected by application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity of the claim". And by Article V of the Convention concluded September 8, 1923, between the United States and Mexico, the high contracting parties agreed 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".

Decisions of international tribunals

It is interesting that a high international tribunal has expressed the view that a contractual stipulation intended to preclude diplomatic interposition was incompatible and irreconcilable with an arbitral agreement providing for the adjudication of a claim, and a decision of an international commission was declared void by this tribunal, partly on the ground that the commission had disallowed a claim because a claimant had failed to resort, conformably to the contractual stipulation, to local remedies. In the so-called *Orinoco Steamship Company* case, a claim presented by the United States against Venezuela before the Permanent Court of Arbitration at The Hague, the tribunal had under consideration the effect of a contractual stipulation in this language:

"Doubts and controversies which may arise regarding the interpretation and execution of this contract shall be decided by the Venezuelan courts in accordance with the laws of the Republic, and in no case shall they give rise to international claims."

With respect to this provision the tribunal, speaking through Dr. Lammasch, said:

"Whereas it follows from the Agreements of 1903 and 1909—on which the present arbitration is based—that the United States of Venezuela had by convention renounced invoking the provisions of Article 14 of the Grell contract and of Article 4 of the contract of May 10, 1900, and as, at the date of said Agreements, it was, in fact, certain that no lawsuit between the parties had been brought before the Venezuelan courts and as the maintenance of Venezuelan jurisdiction with regard to these claims would have been incompatible and irreconcilable with the arbitration which had been instituted;". For the text of the award see *American Journal of International Law*, Vol. 5, p. 230.

The United States and the countries of which my associates are respectively nationals, Mexico and Panama, are parties to the international covenant which established this high court at The Hague. Of course, as the tribunal pointed out, when a nation by a treaty has agreed to arbitrate a case it cannot properly refuse to do so. It is at least equally obvious that an international tribunal cannot exercise an arbitrary discretion whether it will or will not try cases within its jurisdiction.

Decisions of other international tribunals dealing with contractual stipulations intended to preclude diplomatic intervention have frequently been discussed by writers who have treated this subject. In reference to the construction of such provisions and local laws of similar import, Judge John Bassett Moore, in the address which has been mentioned, made the following summary:

"Clauses such as this, when actually embodied in contracts, have on several occasions been discussed by international commissions, with results not entirely harmonious. In some cases the have been regarded merely as devices to curtail or exclude the right of diplomatic intervention, and as such have been pronounced invalid. In other cases they have been treated as effective, to the extent of making the attempt to obtain redress by local remedies absolutely prerequisite to the resort to international action. Only in one or two doubtful instances does the view seem to have been entertained that they should be permitted to exclude diplomatic interposition altogether.

"On the whole, the principle has been well maintained that the limits of diplomatic action are to be finally determined, not by local regulations, but by the generally accepted rules of international law." *Op. cit.*, pp. 22-23.

The theory that diplomatic action can be precluded has been generally rejected. Expositions of that theory in opinions of arbitral tribunals seem to reveal clearly in one form or another an erroneous conception of the nature and scope of international law, or of the nature of an international reclamation, and generally in addition, not only a confusion between rules of substantive international law and questions of jurisdiction, and in the case of opinions of arbitral commissions also a failure to give effect to jurisdictional provisions of arbitral agreements. That this conclusion is correct can probably be indicated by brief references to a few cases.

In the ultimate determination of responsibility under international law I think an international tribunal in a case grounded on a complaint of a breach of a contract can properly give effect to principles of law with respect to confiscation. International tribunals in dealing with cases growing out of breaches of contract are not concerned with suits on contracts instituted and conducted conformably to procedure prescribed by the common law or statutes in countries governed by Anglo-Saxon law, nor conformably to corresponding procedure in countries in which the principles of the civil law obtain. International law does not prescribe rules relative to the forms and the legal effect of contracts, but that law is, in my opinion, concerned with

the action authorities of a government may take with respect to contractual rights. If a government agrees to pay money for commodities and fails to make payment, it seems to me that an international tribunal may properly say the purchase price of the commodities has been confiscated, or that the commodities have been confiscated, or that property rights in a contract have been destroyed or confiscated. Claim is based in the instant case on allegations with respect to the confiscation of valuable contractual rights growing out of an arbitrary cancellation of a concession.

I assume that it is generally recognized that confiscation of the property of an alien is violative of international law, just as it is generally forbidden by domestic law throughout the world. See "*Basis of the Law Against Confiscating Foreign-Owned Property*" by Chandler P. Anderson, *American Journal of International Law, 1927*, Vol. 21, pp. 525 *et seq*. The extent to which principles of international law have been applied to this subject is interesting. While generally speaking the law of nations is not concerned with the actions of a government with respect to its own nationals, we find in international law a prohibition against confiscation even with respect to the property of a nation's own nationals. A well recognized rule of international law requires that an absorbing state shall respect and safeguard rights of persons and of property in ceded or in conquered territory. See American Agent's *Report* in the American and British Claims Arbitration under the Special Agreement of August 18, 1910, pp. 107 *et seq*; pp. 167 *et seq*.

In the *Turnbull* case before the American-Venezuelan Commission of 1903, Umpire Barge construed the effect of a contractual stipulation reading as follows :

"Any questions or controversies which may arise out of this contract shall be decided in conformity with the laws of the Republic and by the competent tribunals of the Republic."

Dr. Barge declared that the claimants had "deliberately contracted themselves out of any interpretation of the contract". With respect to the opinion of this Umpire, Judge John Bassett Moore has observed :

"In a word, he declared in the *Turnbull* case that, as the claimants had 'deliberately contracted themselves out of any interpretation of the contract and out of any judgment about the ground for damages for reason of the contract, except by the judges designed (designated?) by the contract,' they had, in the absence of a decision by those judges that 'the alleged reasons for a claim for damages really exist,' 'no right to those damages, and a claim for damages which parties have no right to claim can not be accepted.' It may be superfluous to remark that, according to this view, there can be no room whatever for international action, in diplomatic, arbitral, or other form, where the renunciatory clause exists, unless indeed to secure the execution of the judgment of a local court favorable to the claimant; for, if the parties have 'no right to claim' damages which the local courts have not found to be due, it is obvious that international action of any kind would be as inadmissible where there had been an adverse judgment, no matter how unjust it might be, as where there had been no judgment whatever." *International Law Digest*, Vol. VI, pp. 306-307.

It will be seen that the Umpire dismissed this case on what he considered to be jurisdictional grounds. The claimants, in his opinion, had eliminated the case from the jurisdiction of the Commission. This is assuredly peculiar reasoning, since the jurisdiction of the Commission was defined by Article I of an arbitral protocol concluded between the United States and Venezuela,

February 17, 1903. The article embraced "All claims owned by citizens of the United States of America against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the commission" created by the protocol.

Jurisdiction may be defined as the power of a tribunal to determine a case conformably to the law creating the tribunal or other law defining its jurisdiction. *U. S.* v. *Arredondo*, 31 U. S. 689 ; *Rudloff Case, Venezuelan Arbitrations of 1903*, Ralston's *Report*, pp. 182, 193-194 ; Case of the *Illinois Central Railroad Company*, Docket No. 432, before this Commission, *Opinions of the Commissioners, 1927*, pp. 15, 16.

Generally speaking, when a point of jurisdiction is raised, we must of course look to the averments of a complainant's pleading to determine the nature of the case, and they will be controlling in the absence of what may be termed colorable or fictitious allegations. Matters pleaded in defense with respect to the merits of the case are not relevant to the question of jurisdiction. *Odell* v. *F. C. Farnsworth Co.* 250 U. S. 501 ; *Smith* v. *Kansas City Title Co.* 255 U. S. 180 ; *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.* 258 U. S. 377.

There is of course no rule of international law that concerns itself with the jurisdiction of arbitral tribunals. Nations deal with that subject in arbitral agreements which they conclude for the purpose of creating arbitral tribunals to determine the rights of nations and of claimants. The claimants have nothing to do with the determination of the jurisdiction of such tribunals. Business arrangements which they may enter into from time to time with a government can not be invoked to nullify the jurisdictional provisions of international arbitral covenants concluded by nations. Contracts made by private persons to exploit lands or mines or to dredge a harbor or as in the instant case to conduct fishing operations do not determine the jurisdiction of arbitral tribunals. With respect to the contractual provision involved in the *Turnbull* case, Umpire Barge said that "the will of the contracting parties, which expressed will must be respected as the supreme law between parties, according to the immutable law of justice and equity ; *pacta servanda*, without which law a contract would have no more worth than a treaty, and civil law would, as international law, have no other sanction than the cunning of the most astute or the brutal force of the physically strongest".

It may be noted with reference to observations of this kind, making use of somewhat high-sounding relative terms, that a contractual stipulation drafted many years prior to an arbitration treaty should certainly not have, in determining the jurisdiction of an arbitral tribunal "more worth than a treaty" which created the tribunal and defined its jurisdiction. And it would seem that the failure to give the intended effect to a contractual stipulation designed to deprive a nation of its rights of interposition under international law would not be such a blow at that law as to put it in a condition in which it could "have no other sanction than the cunning of the most astute or the brutal force of the physically strongest".

It is interesting that in an earlier case in the same arbitration, the *Rudloff* case, decided by the same Umpire on November 4, 1903, Dr. Barge said that "absolute equity" permitted the commission to give relief in favor of a claimant, notwithstanding similar contractual provisions intended to limit diplomatic intervention, and notwithstanding the fact that at the time the decision was rendered a suit instituted by the claimant against the

Government of Venezuela was pending before local courts. The Umpire said:

"Now, whereas the Government of Venezuela, by its honorable agent, opposes that in article 12 of the contract entered into by the predecessor in interest of the claimants, the parties stipulated that the doubts and controversies which might arise by reason of it should be decided by the tribunals of the Republic, it has to be considered that this stipulation by itself does not withdraw the claims based on such a contract from the jurisdiction of this Commission, because it does not deprive them of any of the essential qualities that constitute the character which gives the right to appeal to this Commission; but that in such cases it has to be investigated as to every claim, whether the fact of not fulfilling this condition and of claiming in another way, without first going to the tribunals of the Republic, does not infect the claim with a *vitium proprium*, in consequence of which the absolute equity (which, according to the same protocol, has to be the only basis of the decisions of this Commission) prohibits this Commission from giving the benefit of its jurisdiction (for as such it is regarded by the claimants) to a claim based on a contract by which this benefit was renounced and thus absolving claimants from their obligations, whilst the enforcing of the obligations of the other party based on that same contract is precisely the aim of their claim;". *Venezuelan Arbitration of 1903*, Ralston's *Report*, p. 193.

On the other hand, in the *Orinoco Steamship Company* case in the same arbitration, decided February 20, 1904, Dr. Barge declared that the rule of absolute equity could not permit a contract containing the customary stipulation with respect to interposition to be made "a chain for one party and a screw press for the other". *Ibid.*, pp. 72, 91.

And in the *Woodruff* case in the same arbitration, decided October 2, 1903, Dr. Barge held that contractual stipulations purporting to confer exclusive jurisdiction on local courts deprived the arbitral tribunal of jurisdiction. *Ibid.*, p. 158. He said: "by the very agreement that is the fundamental basis of the claim, it was withdrawn from the jurisdiction" of the commission. He stated, however, that a citizen could not impede the right of his Government to bring an international claim in case of a denial of justice or undue delay of justice. Presumably he had in mind denial of justice resulting from wrongful action on the part of the local judiciary. In this case the Umpire had under consideration the following contractual provision:

"Doubts and controversies which at any time might occur in virtue of the present agreement shall be decided by the common laws and ordinary tribunals of Venezuela, and they shall never be, as well as neither the decision which shall be pronounced upon them, nor anything relating to the agreement, the subject of international reclamation;"

In a memorandum transmitted by Secretary of State Root to the President in 1908, and forwarded by the latter to the Senate, the following comment is made on the opinions of Dr. Barge which I have briefly discussed:

"The opinions of the learned umpire are absolutely irreconcilable and do not even show a consistent progression. It was at one time thought that equity varied with the length of the chancellor's foot. It is perhaps not entirely unfair to suggest that in this case 'absolute equity' seems to have varied with the seasons of the year." *Correspondence Relating to Wrongs Done to American Citizens by the Government of Venezuela*, pp. 83-84.

Mention may be made of another case coming before another tribunal. The opinion in that case apparently was grounded to some extent on views

similar to those expressed in opinions rendered by Dr. Barge. In the case of the *Nitrate Railway Co., Limited*, (cited in Ralston, *The Law and Procedure of International Tribunals*, p. 67) a claim presented by the Government of Great Britain against Chile, the arbitral commission considered the effect of a stipulation relating to the transfer of concessionary rights. It was provided in a concession that if a transfer granted by the Government of Chile should be made in favor of foreigners they should remain subject to the laws of the country without power to exercise diplomatic intervention.

A majority of the commission, the British Arbitrator dissenting, held that the commission was without jurisdiction. The Commission said with respect to contractual stipulations purporting to bind foreigners "to place themselves upon a footing of equality with nationals" and "not to invoke the intervention of the governments to which they belong", that "no principle of international law forbids citizens to agree personally to such contracts" but added "which furthermore do not obligate foreign Governments". It was further stated that the arbitral agreement stipulated that the claims to be arbitrated "should be countenanced by the Legation of His Britannic Majesty"; that it resulted from the nature itself of arbitrations as well as from the text and spirit of the convention, that the arbitral tribunal replaced, "in order to determine a given category of business, the diplomatic action existing on their account between both Governments"; that consequently the individuals or societies which had bound themselves by contract freely celebrated not to have recourse personally to diplomatic protection, likewise could not "invoke, directly or personally, the intervention of the British Legation, nor seek the jurisdiction of this tribunal". Such statements seem clearly to reveal a failure of the recognition of fundamental principles which have been mentioned, namely, the nature of international law, the nature of an international reclamation, and the difference between substantive rules of international law and the jurisdiction which two nations engaged in arbitration may prescribe for a judicial tribunal which they create.

It was said that no principle of international law forbade the contractual stipulations in question. But that statement had no bearing either on the question of the right of the British Government to present a case under the terms of an arbitral agreement, or on the question whether the claimant's property rights in a contract had been improperly violated by Chilean authorities. International law neither authorizes nor forbids aliens to make contracts with the authorities of a government. It is concerned with the action of authorities of a government with respect to contractual rights; with the question whether such rights have been confiscated. The Commission, having stated that the contractual stipulations intended to restrict diplomatic interposition "do not obligate foreign governments", proceeded, seemingly in a remarkable way, to negative its own declaration by refusing to consider the complaint of wrongful violation of contractual rights preferred by the British Government before the Commission. It stated that claims embraced by the arbitral treaty were such as "should be countenanced by the Legation of His Britannic Majesty" and that the Commission had replaced "the diplomatic action".

The British Government had a right to present this claim under the terms of the arbitral agreement which declared the purpose of both Governments "to put a friendly end to the claims brought forward by the British Legation in Chile". The reasoning of the tribunal does not seem to explain how contractual stipulations entered into between Chile and a concessionaire could operate to deprive the Commission of authority to pass upon the

the complaint of the British Government to the effect that they and the British subject had been wronged by action of Chilean authorities for which it was contended Chile was responsible.

An extract from an opinion of an international tribunal among those which have grounded their opinions on reasoning very different from that underlying the opinions to which reference has been made may be cited as evidence of correct statements of the law.

In the *Martini* case before the Italian-Venezuelan Commission of 1903. *Venezuelan Arbitrations of 1903*, Ralston's *Report*, p. 819, consideration was given to the effect of the following contractual stipulation:

"The doubts or controversies which may arise in the interpretation and execution of the present contract will be resolved by the tribunals of the republic in conformity with its laws, and in no case will be the ground for international reclamation."

Mr. Ralston, Umpire, declared that, even if the dispute presented to him could be considered to be embraced within the terms "*Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contracto*," in his judgment the objection might be disposed of by reference to a single consideration which he stated as follows:

"Italy and Venezuela, by their respective Governments, have agreed to submit to the determination of this Mixed Commission the claims of Italian citizen against Venezuela. The right of a sovereign power to enter into an agreement of this kind is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so. But aside from this, Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the Mixed Commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The Umpire can not accept an interpretation that by indirection would change the plain language of the protocol under which he acts and cause him to reject claims legally well founded." *Ibid.*, p. 841.

Similar, sound views were expressed by Judge Little, American Commissioner, in a dissenting opinion in the *Flannagan, Bradley, Clark & Co.* case in the United States-Venezuelan arbitration under the Convention of December 5, 1885. He said:

"The majority of the commission express doubt whether that part of article 20 which binds the American concessionaries not to make a judgment, etc., the subject of an international claim is valid. I would go further, applying the objection to and holding invalid all that part inhibiting international reclamations. I do not believe a contract between a sovereign and a citizen of a foreign country not to make matters of difference or dispute, arising out of an agreement between them or out of anything else, the subject of an international claim, is consonant with sound public policy, or within their competence.

"It would involve *pro tanto* a modification or suspension of the public law, and enable the sovereign in that instance to disregard his duty towards the citizen's own government. If a state may do so in a single instance, it may in all cases. By this means it could easily avoid a most important part of its international obligations. It would only have to provide by law that all contracts made within its jurisdiction should be subject to such inhibitory condition.

For such a law, if valid, would form the part of every contract therein made as fully as if expressed in terms upon its face. Thus we should have the spectacle of a state modifying the international law relative to itself! The statement of the propostion is its own refutation. The consent of the foreign citizens concerned can, in my belief, make no difference—confer no such authority. Such language as is employed in article 20, contemplates the potential doing of that by the sovereign towards the foreign citizen for which an international reclamation may rightfully be made under ordinary circumstances. Whenever that situation arises, that is, whenever a wrong occurs of such a character as to justify diplomatic interference, the government of the citizen at once becomes a party concerned. Its rights and obligations in the premises cannot be affected by any precedent agreement to which it is not a party. Its obligation to protect its own citizen is inalienable. He, in my judgment, can no more contract against it than he can against municipal protection.

"A citizen may, no doubt, lawfully agree to settle his controversies with a foreign state in any reasonable mode or before any specified tribunal. But the agreement must not involve the exclusion of international reclamation. That question sovereigns only can deal with.

"So much of article 20 as refers to that subject I regard as a nullity, and therefore cannot, even if in harmony with my colleagues as to the comprehension of its terms, concur in the dismissal of the claims on that ground." Moore, *International Arbitrations*, Vol. 4, pp. 3566-3567.

In the *North American Dredging Company of Texas* case, *supra*, before this Commission, a motion filed by the Government of Mexico to dismiss the claim on the ground that the Commission had no jurisdiction in view of the contractual stipulations, to which I have already referred, was sustained by the Commission. The Commission's opinion contains the substance of all the odd declarations found in other opinions in which similar holdings have been made, and it may be said contains numerous more remarkable things. By a process of reasoning in generalities the Commission leads up to a specific interpretation of the contractual stipulations involved. The Commission defines the issues before it as follows:

"The problem presented in this case is whether such legitimate desire may be accomplished through appropriate and carefully phrased contracts; what form such a contract may take; what is its scope and its limitations; and does clause 18 of the contract involved in this case fall within the field where the parties are free to contract without violating any rule of international law?"

Generally speaking, the correct definition of the issues in the case would appear to be (1) whether the claim was within the language of the jurisdictional provisions of Article I of the arbitration convention as a claim of an American citizen arising since July 4, 1868, and (2) whether on the merits of the case there was a proper defense to the claim preferred by the United States that Mexican authorities had violated the claimant's rights in a contract with the Mexican Government, a contract the existence of which was not denied.

The inquiry propounded by the Commission whether the parties to this contract were free to contract without violating any rule of international law would seem to be easy to answer. International law being a law for the conduct of nations, did not operate on the North American Dredging Company of Texas, and it could not violate any rule of international law. Whether Mexico, on whom the law of nations is binding, could violate a rule of law by a contract with respect to the performance of some work of dredging is probably an uninteresting, academic question. As has been heretofore observed, violations of the law of nations occur by the failure of a nation

to live up to the obligations of the requirements of that law. While the signing of the contract with a private concern would scarcely in precise language be declared a violation of international law, certainly any attempt to frustrate another nation's rights of interposition secured by international law would not be in harmony with that law.

With respect to the construction of the so-called Calvo clause the Commission says:

"The problem is not solved by saying yes or no; the affirmative answer exposing the rights of foreigners to undeniable dangers, the negative answer leaving to the nations involved no alternative except that of exclusion of foreigners from business."

It may be true that if a nation were precluded from interposing in behalf of its nationals they would be subject to "undeniable dangers". But it is difficult to concede the other alternative that, if a nation is not accorded the right or indeed does not even desire the right to exclude interposition, it must exclude foreigners from business within its dominion. Most of the nations of the world do not insist on such rights but emphatically contend that those rights can not be extinguished by contractual stipulations. However, they have not as a result found themselves confronted by an inescapable alternative of excluding aliens from business. One of these nations is the United States within whose dominions there are a great many more aliens than can be found in any other country. Similar somewhat extreme expressions are found in the following passage:

"By merely ignoring world-wide abuses either of the right of national protection or of the right of national jurisdiction no solution compatible with the requirements of modern international law can be reached."

The Commission had before it the seemingly simple question whether there has been any general assent among the nations of the world to this peculiar expedient to restrict the well established rule with regard to the right of interposition for the protection of nationals. For that purpose, it would not seem to be necessary for the Commission to take account of "world-wide abuses either of the right of national protection or of the right of national jurisdiction", whatever may be the facts—not discussed in the opinion—with respect to such a severe indictment of the world.

It is "quite possible" said the Commission "to recognize as valid some forms of waiving the right of foreign protection without thereby recognizing as valid and lawful every form of doing so". It is difficult to perceive, however, since international law is a law made by the general consent of nations and therefore a law which can be modified only by the same process of consent among the nations, how the contract of a private individual with a single nation could have the effect either of making or modifying international law with respect to diplomatic protection.

But the Commission declares that it "also denies that the rules of international public law apply only to nations". The theory that the law of nations applies only to the conduct of nations is referred to as "antiquated", and it is said that:

"As illustrating the antiquated character of this thesis it may suffice to point out that in article 4 of the unratified International Prize Court Convention adopted at The Hague in 1907 and signed by both the United States and Mexico and by 29 other nations this conception, so far as ever held, was repudiated."

Just what language in this proposed treaty, which has never come into effect, the Commission relies upon to show a repudiation of the thesis that international law is a law for nations only is not indicated. If any rule of procedure which *nations* might agree upon as to the manner of presenting a case to the proposed international court could have any bearing on the nature of international law, paragraph two of Article IV permitting a neutral individual to present a case to the court "subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place" might be considered to show the complete control which nations exercise in matters pertaining to international proceedings. And further, if such far-fetched illustrations may be employed, it may be noted with more pertinency that the court was obligated to decide cases conformably to rules of international law or of applicable treaty stipulations, And it may still further be noted that twelve powers in an additional protocol made it clear that the action of the international court should not be considered as an appeal from their respective domestic courts, but merely as "an action in damages for the injury caused by the capture", the question whether an injury had been committed being one of international law, to be resolved in accordance with the principles of that law with respect to denial of justice resulting from judicial proceedings. Charles, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers, 1910-1913*, Vol 3, pp. 251, 262.

Rights inder international law may inure to the benefit of private individuals, but the guarantee of the observance of such rights is found in the conduct of the nations who have the legal authority to invoke the rights against each other. A nation can not call to account a private citizen of another nation on the ground that such citizen has violated international law. These exceedingly elementary principles which the Commission characterizes as "antiquated", may be illustrated by a few very brief passages from the notable work of the eminent authority, Dr. Oppenheim:

"The Law of Nations is a law for the intercourse of States with one another, not a law for individuals ...

" individuals belonging to a State can, and do, come in various ways in contact with foreign States in time of peace as well as of war. The Law of Nations is therefore compelled to provide certain rules regarding individuals ... Since... the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations." *International Law*, Vol. I, pp. 2, 456, 3rd ed.

It may be interesting to observe the difference between Dr. Oppenheim's interpretation of the effect of the unratified convention of The Hague with reference to an international prize court and the Commission's interpretation. Dr. Oppenheim says:

"The assertion that, although individuals cannot be subjects of International Law, they can nevertheless acquire rights and duties from International Law, is untenable as a general proposition. International Law cannot grant *international* rights to individuals, for international rights and duties can only exist between States, or between the League of Nations and States. International Law cannot give *municipal* rights to individuals, for municipal rights and duties can only be created by Municipal Law. However, where International Law creates an independent organisation—for instance, the proposed International Prize Court at The Hague, or the European Danube Commission, and the like—certain powers may be granted to commissions, courts, councils, and

even to individuals concerned. These powers are legal powers, and are therefore justly called rights, although they are neither international nor municipal rights, but only rights within the organisation concerned. Thus the unratified Convention XII of the second Hague Peace Conference provided for an International Prize Court to which—see Articles 4 and 5—individuals could bring an appeal. Thereby a right would be given to individuals; but it would be neither an international nor a municipal right, but only a right within the independent organization intended to be set up by Convention XII." *Ibid.*, pp. 459-460.

The Commission proceeds to state that there "was a time when governments and not individuals decided if a man was allowed to change his nationality or his residence". And it is observed that to acknowledge that "a person may voluntarily expatriate himself" but that he may not by contract "to any extent loosen the ties which bind him to his country is neither consistent with the facts of modern international intercourse nor with corresponding developments in the field of international law and does not tend to promote good will among nations." The subject of expatriation, is a domestic matter in no way governed by international law. Whether a nation shall through its domestic law adopt a liberal policy with respect to expatriation of its nationals as some nations do, or less liberal policy as other nations do, or shall from time to time make changes in that policy, as nations do, is a matter with which international law is not concerned, and certainly a matter which has no relevancy to the question whether a citizen of one country can by a contract with another country nullify the right of the former to seek redress for a wrong to itself and to its national.

The Commission then proceeds to a discussion under the caption "Lawfulness of the Calvo clause". This caption seems to indicate again a failure of appreciation of the principles of law involved in the questions under consideration. There are of course no provisions of penal laws either of the United States or of Mexico that undertake to make a Calvo clause unlawful; and of course there is no rule of international law of that character.

The Commission further states:

"What must be established is not that the Calvo clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo clause and denying to an individual the right to relinquish to any extent, large or small, and under any circumstances or conditions, the protection of the government to which he owes allegiance."

It would seem that, precisely contrary to what the Commission states, clearly the question for solution is whether the Calvo clause is universally accepted or universally recognized. The principle underlying it is one asserted by a few nations in comparatively recent times. The rule of international law with respect to the right of interposition for the protection of nationals abroad was recognized long before these nations became members of the family of nations. In an international arbitration two nations come before a tribunal to which they have agreed to submit a controversy or numerous controversies. A respondent government invokes as the basis of a jurisdictional plea, as some commissions conceive, or as a substantive defense, a Calvo clause restricting rights of interposition. It would be a curious burden to impose on the other nation, that it should prove that there existed a general rule of international law condemning the Calvo clause. It would seem that it might rely on the general rule of international law, recognized a century before the Calvo clause was thought of, and expect the respondent government to prove that the rule with respect to the right

of interposition had, by the general assent of the nations, been restricted by the operation of the Calvo clause. And with respect to jurisdiction over the case, it would of course rely on the jurisdictional provisions of the arbitral agreement and not on some rule of international law. There is no rule of international law, customary or conventional, prescribing for nations the jurisdiction of arbitral commissions which the nations may establish from time to time.

Touching this point the Commission further says:

"It is as little doubtful nowadays as it was in the day of the Geneva Arbitration that international law is paramount to decrees of nations and to municipal law; but the task before this Commission precisely is to ascertain whether international law really contains a rule prohibiting contract provisions attempting to accomplish the purpose of the Calvo clause."

Unquestionably the Commission is right in the view it indicates to the effect that municipal law must square with international law. It follows of course that, if acts committed pursuant to domestic law contravene international law to the injury of aliens, governments to which such aliens belong have the right of interposition. The task before the Commission therefore was to see whether by international law the effect sought to be attributed to the Calvo clause had been generally recognized; not to see whether there was in international law some specific provision condemning the Calvo clause. International law relates to conduct of states; it has nothing to do with the conduct of a dredging company in making an agreement to dredge a harbor or a river bed. A domestic law at variance with international law may be said to be in derogation of that law, although perhaps a nation could not be charged with a violation of international law until some action pursuant to the domestic law were taken.

The Commission states that the "right of protection has been limited by treaties between nations in provisions related to the Calvo clause". It observes that Latin-American countries are parties to most of the treaties, but that such countries as France, Germany, Great Britain, Sweden, Norway and Belgium and in one case the United Sates have been parties to treaties containing such provisions. No provisions are cited except in the case of the treaty concluded by the United States, so that it is inconvenient to discuss the legal effect of other treaties which the Commission may have had in mind. The Commission cites article 37 of the treaty concluded September 6, 1870, between the United States and Peru, which reads as follows:

"As a consequence of the principles of equality herein established, in virtue of which the citizens of each one of the high contracting parties enjoy in the territory of the other, the same rights as natives, and receive from the respective Governments the same protection in their persons and property, it is declared that only in case that such protection should be denied, on account of the fact that the claims preferred have not been promptly attended to by the legal authorities, or that manifest injustice had been done by such authorities, and after all the legal means have been exhausted, then alone shall diplomatic intervention take place."

When the Commission speaks of the "right of protection" it seems reasonable to suppose that it has in mind the right secured by international law. And therefore if the treaty stipulations cited by the Commission in no way limit rights accorded by international law, it can not properly be said that these stipulations have been "limited" by the treaties. Article 37 obviously

limits no such rights. It is declaratory of international law. It secures for the nationals of each country national treatment, so-called, in the other country. It recognizes the right of interposition if complaints have not been promptly attended to by the legal authorities, meaning presumably the judicial authorities, and likewise recognizes the right of interposition in a case of manifest injustice committed by authorities. It asserts the rule of international law with respect to the necessity for the exhaustion of local remedies prior to diplomatic intervention.

But even if two governments had by this article agreed to restrict their right of interposition secured by international law, no pertinent argument could be deduced from such an agreement. To provide for such restriction is of course something that sovereign nations have a right to contract to do. In the Convention of September 8, 1923, the two Governments agree not to invoke in defense of a claim the rule of international law just mentioned with respect to the exhaustion of legal remedies. In the Convention of September 10, 1923, Mexico stipulated that its responsibility in claims embraced by that Convention should "not be fixed according to the generally accepted rules and principles of international law". It need not of course be pointed out that the action of the United States and Peru in reciprocally limiting by a treaty the right of interposition would have been something very different from an attempt of one of these nations to take away from the other only a right of interposition and to undertake to do that by some contract with a private citizen, and not by a treaty between the two Governments.

It would seem to be fortunate for the Commission's line of reasoning with respect to the other treaties which it mentions that it did not quote any provision upon which it relies, or even furnish any citation where one may be found. As has been observed, obviously the action of two nations in reciprocally placing limitations upon rights of interposition could have nothing in common with an agreement between a government and an individual to limit another government's right of interposition. But furthermore, it will be seen from an examination of treaties of the character which the Commission mentions that they do not contain provisions which in any way restrict such rights possessed by each contracting party under international law to interpose in behalf of its nationals.

Article X of the Treaty of Amity and Commerce concluded between Bolivia and Germany July 22, 1908, reads as follows:

"As the result of legal claims or complaints of individuals in matters of a civil, criminal or administrative character, diplomatic representatives of the Contracting Parties shall not intervene, provided there be no denial of justice, abnormal or illegal judicial delay, or failure to execute a judgment which shall have attained legal force, or lastly if after all legal remedies have been exhausted there should exist a manifest violation of Treaties existing between the Contracting Parties or of the principles of international law or of private international law universally recognized by cultured nations." (English translation from Spanish text.)

It will be seen that this article recognizes the right of intervention on account of denial of justice, and more broadly, on account of certain delays in judicial proceedings which it is conceivable might not be serious enough to be a sound basis for a complaint of a denial of justice. The article further recognizes the right of interposition in case of failure to give effect to judgments—another form of denial of justice. The right of interposition is broadly recognized for violation of treaties and of principles of international law.

As a matter of fact, intervention or interposition as a matter of right to vindicate rights secured by international law of course covers all complaints with respect to which a nation properly may intervene to protect its nationals. Even the specifically mentioned interposition with respect to violation of treaties might be regarded as within that broad category, since a violation of a treaty is a violation of international law. But the article even adds a violation of "private international law". Obviously this article so far from limiting the right of protection under international law, is declaratory of that right and perhaps even broader in its scope.

To the same general effect is Article X of the Treaty of Commerce concluded between Great Britain and Bolivia July 5, 1912, which reads as follows:

"The High Contracting Parties agree that during the period of existence of this Treaty they mutually abstain from diplomatic intervention in cases of claims or complaints on the part of private individuals affecting civil or criminal matters in respect of which legal remedies are provided.

"They reserve however the right to exercise such intervention in any case in which there may be evidence of delay in legal or judicial proceedings, denial of justice, failure to give effect to a sentence obtained in his favor by one of their nationals or violation of the principles of International Law." (English text.)

Still another illustration may be quoted. In the *Solis* case, decided by this Commission, *Opinions of the Commissioners, 1929*, pp. 48, 52, the Commission referred to a specific provision relating to responsibility for acts of insurrectionists. It was observed that Mr. Plumley, Umpire in the British-Venezuelan arbitration of 1903, referred to the following stipulation found in a treaty concluded in 1892 between Germany and Colombia as declaratory of international law:

"It is also stipulated between the contracting parties that the German Government will not attempt to hold the Colombian Government responsible, unless there be due want of dilligence on the part of the Colombian authorities or their agents, for the injuries, oppressions, or extortions occasioned in time of insurrection or civil war to German subjects in the territory of Colombia, through rebels, or caused by savage tribes beyond the control of the Government." Ralston, *Venezuelan Arbitrations of 1903*, p. 384.

The Commission's opinion in the dredging company case contains the following paragraph:

"What Mexico has asked of the North American Dredging Company of Texas as a condition for awarding it the contract which it sought is, 'If all of the means of enforcing your rights under this contract afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not to call directly upon your own Government to intervene in your behalf in connection with any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection?' and the claimant, by subscribing to this contract and seeking the benefits which were to accrue to him thereunder, has answered, 'I promise'."

Perhaps the passage interpreting the contractual stipulations in question is not to be regarded as a paraphrase, since it is put in quotation marks. It seems to be a remarkable attempt to express the meaning of the contract

in language other than that which the contracting parties used. The Commission recites that the contract contained a query of the claimant company whether if all the "means of enforcing" its rights should be "wide open" to the claimant. would he promise not call directly on his own Government for assistance. And by signing, the Commission says, the claimant answered this query by the words "I promise".

The contract between the Mexican Government and the claimant, which was considered in the case of the *North American Dredging Company of Texas*, contained a provision which the Commission in the English text of the opinion written in that case translated freely 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 favor 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." [1]

The contract recited that the contractor and persons associated with him should be considered as Mexicans in all matters within the Republic of Mexico concerning the execution and fulfilment of the contract and when the United States, speaking in behalf of the claimant, alleged non-fulfilment of the contract in a manner violative of international law, Mexico, under its interpretation of the legal effect of that contract, regards the claimant as a Mexican and therefore not entitled to assistance from the United States. The contract provided that, with respect to all matters connected with it, including "rights or means to enforce" it, the claimant should have only the rights granted by the Mexican Government to Mexicans. The United States asserted in its behalf and in favor of the claimant a right of redress under international law for violation of contractual rights by Mexico and a right secured by a claims convention to obtain a determination of the claim.

The contract recited that the claimant, that is, the contractor, and all connected with the claimant, were "deprived of any rights as aliens", and that under no conditions should the intervention of foreign diplomatic agents be permitted in any matter related to the contract. The United States contended that Mexico had not the authority under international law to deprive these Americans of rights secured to them as aliens.

The Commission propounds and answers a question which it evidently regards as fundamental. It says:

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[1] "*El contratista y todas las personas que, como empleados o con cualquier otro carácter, tomaran parte en la construcción de la gran obra objeto de este contrato, directa o indirectamente, serán considerados como mexicanos en todo lo que se relacione, dentro de la República, con la ejecución de tal obra y con el cumplimiento de este contrato; sin que puedan alegar con respecto a los intereses o negocios relacionados con éste, ni tener otros derechos ni medios de hacerlos valer, que los que las leyes de la República conceden a los mexicanos, ni disfrutar de otros más que los establecidos a favor de éstos; quedando, en consecuencia, privados de todo derecho de extranjería, y sin que por ningún motivo sea de admitirse la intervención de agentes diplomáticos extranjeros en ningún asunto que se relacione con este contrato.*"

"Under the rules of international law may an alien lawfully make such a promise? The Commission holds that he may, but at the same time holds that he can not deprive the government of his nation of its undoubted right of applying international remedies to violations of international law committed to his damage. Such government frequently has a larger interest in maintaining the principles of international law than in recovering damage for one of its citizens in a particular case, and manifestly such citizen can not by contract tie in this respect the hands of his government."

It is added that any attempt so to bind the Government is "void". It is an odd question to propound whether a private person or a corporation may under international law lawfully make a certain kind of contract. International law contains no penal provisions forbidding acts on the part of either individuals or corporations, and no rules af any kind imposing any obligations except obligations binding on states. It is in connection with the conscientious performance of international duties by governments that international law has its sanction.

The Commission declares that a nation can not deprive a government of invoking remedies to right wrongs under international law. The United States in behalf of the claimant alleged a violation of contractual rights. And it was the duty of the Commission to determine whether there had been any violation of international law by destruction of contractual rights. It is therefore not perceived why the Commission did not take jurisdiction in the case, when the Commission explicitly declared even with respect to the action of the claimant that he had not "waived" his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations.

With respect to the object of the contract the Commission says:

"The obvious purpose of such a contract is to prevent abuses of the right to protection, not to destroy the right itself—abuses which are intolerable to any self-respecting nation and are prolific breeders of international friction."

Obviously the Commission, in speaking of a purpose to prevent "abuses of the right to protection" must have had in mind abuses in connection with protection with respect to the specific contract under consideration, because that contract could not prevent in connection with other transactions "abuses which are intolerable to any self-respecting nation" and "prolific breeders of international friction". The Commission here ascribes to Mexico an intent to fathom the general character of future, atrocious abuses on the part of the United States which did not take place, although the action of the Government of the United States was limited to the presentation of a claim to the Commission. Mexico undoubtedly attempted to forestall intervention, but when the Commission attempts to define a purpose to avoid abuses which have not taken place, it is perhaps not strange that fantasy should take such flights as to describe non-existent things as "intolerable to any self-respecting nation" and "prolific breeders of international friction".

There would seem to be a want of logic in the Commission's apparent desire to attribute a measure of viciousness to the assertion of legal rights as compared with the denial of rights. The United States asserted in this case a right of interposition secured by international law and a right of adjudication secured by an arbitration treaty, the jurisdictional provisions of which in explicit language covers, as the Commission States, the claim

presented by the United States. Mexico denied the rights asserted under international law and under the treaty. With the denial of the rights the Commission finds no fault, but the assertion of the rights evokes from the Commission remarkable expressions with regard to abuses of the right of protection and the impairment of the sovereignty of nations. With respect to the right of a nation to prefer a reclamation against another nation it is proper and useful to bear in mind that the right is fundamentally grounded on the theory that an injury to a national is an injury to the state to which the national belongs.

It is remarkable for the Commission to state that the contract was not indended to destroy the right of interposition, when the contract states that the claimant and those associated with him should be deprived of any rights as aliens. One of the methods of interpretation by which the Commission reaches this conclusion is interesting. As has been observed, it relies for construction on the use of punctuation. The opinion contains the following paragraph:

"What is the true meaning of article 18 of the present contract? It is essential to state that the closing words of the article should be combined so as to read: 'being deprived, in consequence, of any rights as aliens *in any matter connected with this contract*, and without the intervention of foreign diplomatic agents being in any case permissible *in any matter connected with this contract*'. Both the commas and the phrasing show that the words 'in any matter connected with this contract' are a limitation on either of the two statements contained in the closing words of the article."

The Commission at the outset of its opinion makes use of a translation of the contractual stipulations under consideration. It is exceedingly interesting to examine first, what the Commission has stated in quotation marks; next, the actual language of the contract, and finally, the translation which the Commission used.

The language appearing in the contract is:

"*.... quedando, en consecuencia, privados de todo derecho de extranjería, y sin que por ningún motivo sea de admitirse la intervención de agentes diplomáticos extranjeros en ningún asunto que se relacione con este contrato.*"

The translation of the above quoted portion of the contract used by the Commission is as follows:

"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."

The Commission says:

"Both the commas and the phrasing show that the words 'in any matter connected with this contract' are a limitation on either of the two statements contained in the closing words of the article."

It may well be plausibly argued, as is done by the Commission, that with a comma after the word "aliens" in the first line of the translation, and a comma after the word "permitted" in the second line, the phrase " in any matter related to this contract" might well be considered to modify both the verb "are deprived" and the verb "shall be permitted". But it will be noted from the text of the contract that there is no second comma in that text. Article 18 clearly states that the contractor and persons associated with him are deprived "of any rights as aliens." Of course it would be fatuous to suppose that Mexico intended to do anything more than to deprive these

persons of their rights as aliens in all matters relating to the fulfillment of the contract. That it was intended to deprive them of those rights was not denied in argument by Mexico. The Mexican Government could have no purpose to deprive these Americans of rights of aliens for purposes other than those of preventing them from obtaining assistance from their Government with respect to the preservation of their rights under the contract, either through remedies that might be obtained diplomatically or from an international tribunal. The substance of the article being clear, the effect of an imaginary or even of a real comma might not be important. But when the Commission properly at the outset of its opinion refers to the question under consideration as one of much importance, it is assuredly worthy of note that the Commission's construction of Article 18 is based on a comma which does not appear in the text of that article.

The Commission states that the article "did not, and could not, deprive the claimant of his American citizenship and all that that implies". That is true, and for that reason the Commission should not have deprived the claimant of the rights secured to him and to his Government to have his case adjudicated conformably to the requirements of the Agreement of September 8, 1923.

The article, it is further said, "did not take from him his undoubted 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". (Italics mine.) Since there is mention of "other authorities", it would appear from this statement that the Commission considered that a denial of justice could result from authorities other than those belonging to the Mexican judiciary. The foundation of the claim was that other authorities had deprived the claimant of his rights under the contract. He appealed unsuccessfully to such authorities that he be accorded what he considered to be his rights. The Commission added that under the conditions stated by it the basis of the claimant's appeal would be "an internationally illegal act", and mention is made of a possible denial of justice in case the claimant had resorted to Mexican courts. But the claim is based on a complaint of "an internationally illegal act"—an act in the nature of those for which the Commission repeatedly in cases growing out of violation of contracts has afforded redress.

The Commission after having stated, as has been previously pointed out, that the contract consisted in an inquiry of the claimant if he would promise not to ignore remedies "wide open" to him and an answer by him "I promise", proceeds to explain at some length things which it is said the claimant "waived" when he said "I promise". It is stated that the claimant "waived his right to conduct himself as if no competent authorities existed in Mexico; as if he were engaged in fulfilling a contract in an inferior country subject to a system of capitulations; and if the only real remedies available to him" were international remedies. It would seem that perhaps it was beyond the scope of the understanding of the claimant as well as beneath the dignity of the Government of Mexico to stipulate waivers of this kind from the claimant. The Commission does not cite the language of the article which is considered to embrace such waivers. It is further said that the claimant did not waive any right he possessed as an American citizen as to any matter not connected with the fulfilment, execution or enforcement of this contract as such. That seems to be obvious enough. It would seemingly be strange if it should ever have occurred to Mexico to denaturalize the claimant in every respect because he had entered into a

contract to perform some dredging work. The Commission proceeds to state that the claimant "did not waive his undoubted right as an American citizen to apply to his Government for protection against the violation of international law (internationally illegal acts) whether growing out of this contract or out of other situations". That of course is true; nor did he or could he waive in behalf of the United States its right to intervene in his behalf to assert a violation of international law. The Commission was created to hear complaints with respect to allegations of "internationally illegal acts". It has passed upon such complaints in cases of other allegations of breaches of contract, and since the Commission itself explains that the claimant did not and could not affect the right of his Government to extend to him its protection in general or to extend to him its protection against breaches of international law, no reason is perceived why his case should have been thrown out of court.

The Commission proceeds to declare that when a contractual provision "is so phrased as to seek to preclude a Government from intervening, diplomatically or otherwise, to protect its citizen whose rights of any nature have been invaded by another Government in violation of the rules and principles of international law, the Commission will have no hesitation in pronouncing the provision void". It may be misleading to use such expressions as "void" or "invalid" or "illegal" in referring to the so-called Calvo clause. An inaccurate use of terminology may sometimes be of but little importance, and discussion of it may be merely a quibble. But accuracy of expression becomes important when it appears that inaccuracy is due to a confusion of thought in the understanding or application of proper rules or principles of law. Thus reasoning in terms of domestic law with respect to matters governed solely by international law must necessarily lead to erroneous conclusions. Reasoning from principles of domestic law may often be useful in connection with the application of principles of international law, but analogous reasoning and comparisons of rules of law can also be misleading or entirely out of place when we are concerned with rules or principles relating entirely or primarily to relations of states toward each other. An act may be void under domestic law, either when it is so specifically declared, or though not so declared, is committed in violation of some legal enactment. Perhaps it is not very inaccurate to designate as void a contract by which a nation contracts with a private citizen to restrict another nation's right of interposition, although international law is not concerned with any action a private individual may take in connection with the making of some contract to sell goods or to perform services. This point with respect to the nature of international law becomes important when the fate of large property interests is decided on an issue raised by a tribunal whether international law prohibits an individual from making a contract that limits the nation's right of interposition.

A Government contracting with an individual to prevent him from appealing to his Government might presumably through local procedure, giving effect to local law, enforce the contract against the individual. The standing of such action on the part of a Government under international law is perhaps little more than an interesting academic question. It would seem not unreasonable to conclude that, since a Government and a private individual could not contract to destroy the right of interposition of another Government under international law, a Government might feel justified in objecting to any injurious measures directed against its national, because,

in derogation of the terms of his contract he had appealed to his own Government.

Except by expatriation a private person can by no act of his own forfeit or destroy his Government's right to protect him. His acts may of course give rise to considerations of policy which may influence the attitude of his Government with respect to his appeal for assistance.

If it was the view of the Commission that a contractual provision could not stand in the way of the protection of a citizen in connection with a complaint of "violation of the rules and principles of international law" then of course this case should not have been dismissed by the Commissioner. Similar statements are made by the Commission. Thus it is said:

"Where a claim is based on an alleged violation of any rule or principle of international law, the Commission will take jurisdiction notwithstanding the existence of such a clause in a contract subscribed by such claimant."

. . . . . .

"It is clear that the claimant could not under any circumstances bind its Government with respect to remedies for violations of international law."

The Commission was created to hear cases based on complaints of violation of international law. The instant case was of course presented for an adjudication of such a complaint. Certainly the basis of the claim was not a complaint of a violation of some rule of etiquette.

The Commission proceeds to state that no "provision in any constitution, statute, law, or decree, whatever its form, to which the claimant has not in some form expressly subscribed in writing", will preclude the claimant from presenting his claim to his Government or the Government from espousing it and presenting it to this Commission for decision under the terms of the treaty. The Commission by this *dictum* with respect to some form of local law which is not involved in the case states that the right of the Government of the United States to have the case tried before an international tribunal conformably to the requirements of the arbitration treaty cannot be destroyed. It would therefore seem that, as has already been suggested, the capacity to have the case thrown out of court as was done must be attributed not to authority possessed by Mexico, but to that of the claimant or to some legal operation resulting from the combination of both.

In a concurring opinion by one of the Commissioners it is stated that Article 18 of the contract in question as construed by the two other Commissioners "in effect does nothing more than bind the claimant by contract to observe the general principle of international law which the parties to this Treaty have expressly recognized in Article V thereof". What was actually done in Article V of course was to stipulate that effect should *not* be given to the rule of international law with respect to the requirement of a resort to legal remedies. Certainly the elimination by the treaty of any application of that rule cannot be adduced as an argument that the rule should be applied.

It would seem to be a remarkably narrow construction of the sweeping language of Article 18 to say that its scope is merely to prescribe in substance the requirement of international law with respect to resort to legal remedies. The Mexican Government did not in argument contend for any such construction. The Commissioner in his separate opinion attributed such a construction to his associates. But let it be assumed that such an interpretation is proper, and that a nation and an individual may contract with respect

to another nation's right of interposition under international law. The Commission was still confronted with the provision of Article V of the arbitration agreement that no claim should be disallowed by the application of the rule of international law with respect to resort to local remedies. It is clear, therefore, that the Commission, in the light of its own narrow construction of the language of Article 18 as to its effect in precluding the United States from intervening should have ignored as of no effect a contractual provision construed merely to bind a claimant "to observe the general principle of international law". Of course the claimant was not bound by any such rule of international law, since neither that rule nor any other rule of international law is binding on the claimant. The Government of the United States might have been bound by that rule, and the Mexican Government might have invoked it, if the rule had not been eliminated by Article V of the arbitral agreement, as it was.

It was the duty of the Commission to give effect to the clearly expressed intent of Article V of the arbitration agreement. The intent and clear legal effect of that Article is that claims shall not be dismissed because of failure of claimants to resort to local remedies. Therefore, to reject the claim was to nullify the clear intent and legal effect of provisions by which the two Governments stipulated that claims should not be rejected on the ground that there had not been a resort to legal remedies. It is indeed interesting to perceive how the Commission deals with this question.

It is stated in the Commission's opinion that "the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction". That is obviously true, and therefore the claim should not have been rejected by the Commission. But the Commission continues, stating that the claim is not one "that may be rightfully presented by the claimant to its government for espousal". In other words, even though the two Governments have agreed by language which the Commission states includes the claim as presented, the Commission concludes that the claimant could not rightfully present it to the claimant's Government. It follows that the logical conclusion of the Commission is that some contract made by the claimant with the Government of Mexico in the year 1912, operated to the future destruction of the effect of an international covenant made between the United States and Mexico 11 years later than the date of the contract between the claimant and Mexico. The Commission states that the claimant had not "the right to present" its claim to the Government of the United States. If it had not that right it must have been because some proper, applicable law denied it the right. The Commission did not cite any Mexican law which it considered had extraterritorial effect so as to operate on American citizens in their own country; it could of course not cite any law of the United States; and it is equally certain that international law, to which the claimant is not subject, contains no rule forbidding it to present to its government the claim which it did present. Even if there had been some Mexican law which the Commission might consider to be pertinent, such law could of course not override a treaty between the United States and Mexico concluded in 1923.

It is unlikely that in an arbitration such as that provided for by the Convention of September 8, 1923, either of the contracting parties would present a claim to the Commission unless it had been requested to do so by a claimant. The Claims Convention in the conventional way refers to claims presented to each Government since the signing of the Claims Convention of July 4, 1868. If it be accepted as a jurisdictional requirement that the

claim of the North American Dredging Company of Texas should have been presented to the United States and should not have been espoused by the later on its own initiative, we are confronted with the fact that the claim was so presented, and this was not contested.

But the Commission says that the claimant could not "rightfully present this claim to the Government of the United States for its interposition". The Commission's connotation of the term "rightfully" is not explained. It is certainly not derived from any rule or principle of law. Assuredly if an important claim involving a very considerable amount is to dismissed on the ground that a thing has not been "rightfully" done the denial of rightful conduct should be grounded on some legal prohibition. As Dr. Borchard says with respect to the duty of protection, whether "such a duty exists toward the citizen is a matter of municipal law". *Diplomatic Protection of Citizens Abroad*, p. 29. A claimant's right to protection from his Government is determined by the law of that Government. The right of the Government to extend protection is secured by international law. And the merits of a complaint in any given case are determined by that law. The executive department of the Government of the United States which is charged with the responsibility of conducting the foreign relations of the Government, including the protection of lives and property of citizens abroad, knew that the claim had been rightfully presented to it. For the Constitutional function of the executive department to receive and present this claim the Commission substituted provisions of the contract to dredge the port of Salina Cruz as construed by the Commission.

The Commission under its remarkable interpretation of that contract evidently considered it had a right to use its discretion as to what kind of claims it would consider might be "rightfully" presented to the United States for interposition and what claims should be barred from presentation to the Government of the United States by the contract for dredging. It said that such a contract could not preclude the United States from receiving and presenting claims "for violations of international law". Of course a violation of that law was the basis of that claim, but in view of the contract, the Commission said, the claimant could not "rightfully" present his case to the United States, and the United States in its turn, in spite of international law and of the jurisdictional provisions of the Claims Agreement, could not "rightfully" espouse it. An imaginary claim involving a complaint of a violation of international law could, in the opinion of the Commission, be rightfully presented, but an actual claim of that nature concerned with allegations of confiscation of property and property rights could not be rightfully presented.

And with respect to a hypothetical case it is stated that, if the claimant had resorted to Mexican tribunals and had suffered a denial of justice he could have presented his claim to his Government, which in turn could have had its day before the Commission. That is a remarkable conclusion in view of the contractual provisions upon which the Commission relies to forbid the claimant from presenting his claim "rightfully" to the United States. They specifically forbid the claimant from having any recourse except the means "granted by the laws of the Republic to Mexicans", which course excluded any means secured by international law or by treaty arrangements—any means other than application to Mexican judicial or administrative authorities.

If one might allow himself to speculate as is done so freely in the Commission's opinion as to what might have happened had certain things happened

that never did happen, it would be interesting to conjecture what the Commission's decision would have been *if a claim had* been presented predicated on a denial of justice resulting from the acts of a Mexican tribunal in construing law and facts in connection with a suit for breach of contract. The contract clearly precluded resort to diplomatic redress with respect to such a complaint. And the Commission relied on the contract in throwing out the claim on the ground that it was not "rightfully" presented to the United States.

In discussing the "illegality" of the contractual provision in question under the Commission's theory that international law has some bearing on the standing of a contract of this kind, the Commission states that, since it is impossible to prove that illegality, "it apparently can only be contested by invoking its incongruity to the law of nature (natural rights) and its inconsistency with inalienable, indestructible, unprescriptible, uncurtailable rights of nations". "Inalienable rights" it is said, "have been the cornerstones of policies like those of the Holy Alliance and of Lord Palmerston; instead of bringing to the world the benefit of mutual understanding, they are to weak or less fortunate nations an unrestrained menace". Whatever these rights, which the Commission mentions, may be, it would seem to be unnecessary to discuss them, since the United States invoked none of them, nor any of the policies of the Holy Alliance and of Lord Palmerston.

A few other passages in the Commission's opinion may be referred to briefly to indicate its attitude with respect to this claim.

The Commission decided that the case was not within its jurisdiction, in spite of the fact that it stated that the clear language of the jurisdictional provisions of Article I of the Convention of September 8, 1923, embraced the claim. The question before the Commission was whether the United States had a right to press this claim before the Commission embraced by the jurisdictional article. That is all the United States undertook to do in this case and yet the Commission saw fit to cite the case apparently as a horrible example. It was said : "If it were necessary to demonstrate how legitimate are the fears of certain nations with respect to abuses of the right of protection and how seriously the sovereignty of those nations within their own boundaries would be impaired if some extreme conceptions of this right were recognized and enforced, the present case would furnish an illuminating example". Assuredly it seems to be strange that, with respect to the action of the United States in presenting a claim embraced by the jurisdictional article of an arbitration treaty, use should be made of language concerning abuses of the right of protection, the serious impairment of the sovereignty of nations, and extreme conceptions of the right of protection.

As has been said, the Commission dismissed the case because it declared it had no jurisdiction. In the American Memorial were allegations with respect to arbitrary interference with work to be performed under a contract; non-payment for work performed; and the seizure of property. Evidence accompanied the Memorial in support of such allegations. On the part of Mexico there was no denial of these allegations; no allegations that Mexico had observed the contract with the claimant; no evidence of any kind, merely a motion to dismiss on jurisdictional grounds. That motion the Commission granted on such grounds. Nevertheless the Commission proceeded, although questions of evidence bearing on the merits of the case were not involved in the jurisdictional point, to charge the claimant with having breached his contract, and with having forcibly removed a dredge to which under Article 7 of the contract the Government of Mexico

considered itself entitled as security for the proper fulfilment of the contract. Nothing was said in the opinion with respect to allegation supported by evidence that Mexico breached the contract.

Pertinent evidence of international law

As has been observed, the question presented for determination in considering the effect of contractual stipulations between a government and a private individual to restrict the right of interpretation is, whether there is evidence revealing a general assent among the nations to such a restriction, just as there is evidence of general assent to the right of interposition. There is no conventional international law effecting such a restriction. Is there any customary law?

In considering that simple problem in the light of discussions of arbitral tribunals such as have been referred to, it is essential to sweep aside a congeries of notions prompting such questions as whether any principles of international law, which is a law for nations and not for citizens, forbids citizens to enter into contracts intended to limit interposition, and whether a private person on whom international law imposes no obligations violates a rule of international law by making such a contract. It is of course necessary to recognize that the requirements of international law with respect to aliens is not met by the so-called "national treatment". It is likewise necessary to distinguish between jurisdiction to pass upon international reclamations—a subject determined by arbitral agreements—and international law determinative of the merits of such reclamations. It is important to understand that when an international tribunal is concerned with an international reclamation, whether such reclamation is predicated upon allegations of breech of contract or allegations of other wrongful action, the tribunal is called upon to determine whether authorities of a respondent government have committed acts rendering the government liable under international law. And it may be added that it should be borne in mind that the tribunal in dealing with such questions of law is not concerned with anticipated or imaginary "world wide abuses" or "undeniable dangers". or the "law of nature".

In examining the evidence of international law bearing on the question of assent to the particular form of restriction of interposition under consideration, the odd opinions of certain international tribunals which have been discussed furnish little evidence of any such assent, particularly when these opinions are compared with well reasoned opinions of other arbitral tribunals. See in particular the *Martini* case and other cases cited in Moore, *International Law Digest*, Vol. VI, p. 301 *et seq.*; Borchard, *Diplomatic Protection of Citizens Abroad*, p. 805 *et seq.*; Ralston, *The Law and Procedure of International Tribunals*, p. 58 *et seq.*

The appearance of these contractual stipulations in a few concessionary contracts can contribute but little to proof of convincing evidence of general assent.

Treaty stipulations referred to in the opinion of the Commission in the *North American Dredging Company of Texas* case, even if they limited intervention authorized by international law, which they clearly do not, would of course be no evidence of assent on the part of any nation to allow its rights of interposition to be destroyed by contract between some other nation and a private individual.

With respect to the connotation of "general assent" which is the foundation of international law, it is interesting to note that the eminent authority, Dr. Oppenheim, in spite of the very general assent given to the Declaration of Paris, does not affirm that this treaty has become international law. Many nations signed, others adhered subsequently to the signing of the treaty. The United States has observed the treaty in practice and affirmed that it should be regarded to be international law. Nevertheless Dr. Oppenheim conservatively says:

"The few States, such as the United States of America, Spain, Mexico, and others, which did not then sign, have in practice, since 1856, not acted in opposition to the declaration, and Japan acceded to it in 1886, Spain in 1908, and Mexico in 1909. One may therefore, perhaps, maintain that the Declaration of Paris has already become, or will soon become, universal International Law through custom." *International Law*, Vol. I, pp. 74-75, 3rd ed.

The position of the United States rejecting any idea of this limitation on interposition has been shown not only by contentions advanced before arbitral tribunals, but by repeated declarations in diplomatic correspondence. Moore, *International Law Digest*, Vol. VI, p. 293 *et seq.* The attitude of the Government of the United States may be illustrated by brief passages from memoranda transmitted by Secretary of State Root to the President of the United States in 1908, and by the latter forwarded to the Senate in relation to certain difficulties between the United States and Venezuela. Among other things it was said:

"The answer may be given in the words of Secretary Bayard to Mr. Scott, minister to Venezuela, June 23, 1887:

" 'This Government can not admit that its citizens can, merely by making contracts with foreign powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligation to protect them in case of a denial of justice. (Moore, *International Law Digest*, Vol. VI, p. 294.)'

"That is to say, it is not in the power of a private citizen by private contract to affect the rights of his Government under international law. The very greatest effect which can be conceded to such a contract is that noted in the reply of the English Government to the Orinoco Trading Company in this very case, quoted by the umpire on page 219 of his opinion:

" 'Although the general international rights of His Majesty's Government are in no wise modified by the provisions of this document, to which they were not a party, *the fact that the company have so far as lay in their power deliberately contracted themselves out of every remedial recourse in case of dispute, except that which is specified in article 14 of the contract*, is undoubtedly an element to be taken into serious consideration when they subsequently appeal for the intervention of His Majesty's Government. (Ralston's *Report*, p. 90.)'

"That is, the highest effect which can be given to such an agreement is to say that the fact of its existence is a matter fit to be addressed to the discretion of the intervening government. If, nevertheless, the Government sees fit to interfere, its rights are in no wise affected." *Correspondence Relating to Wrongs Done to American Citizens by the Government of Venezuela*, p. 79.

. . . . . .

"To preclude the claimant in this case from relief, the Calvo clause—'All the doubts and controversies arising from the interpretation and wording of this contract shall be decided by the courts of the Republic of Venezuela in accordance with its laws, and in no case can they become the foundation for international claims'—is triumphantly invoked. It is true that the claimant company itself waived all rights of diplomatic intervention as far as it was concerned, but an unaccredited agent may not renounce the right or privilege of the Gov-

ernment, and for the purposes of this claim, and the company is nothing more than a private citizen. A citizen may waive or renounce any private right or claim he possesses; he may not renounce the right or privilege of this Government. It is not merely the right and privilege, it is the duty, of the Government to protect its citizens abroad and to see to it that the dignity of this Government does not suffer injury through violence or indignity to the private citizen. Take the case of an act which may at once be a tort and a crime: It is a familiar doctrine that the injured party may waive the tort; he can not waive the crime. The reason is that he may waive a right or privilege which he possesses in his private capacity; he can not waive the right of the public nor the interest of the public, because he is not the agent of the public for such purposes. It therefore follows that this Government may intervene with entire propriety to protect the rights of its citizens, even although such citizens have contracted away the right to diplomatic intervention in so far as it lay in their province." *Ibid.*, p. 116.

The following passage found in Moore's *International Law Digest*, may be quoted as illustrative of the attitude of the German Government as expressed in 1900:

"The position of the German Government with reference to the non-intervention clause in Venezuelan contracts was thus reported by the American minister at Caracas: 'I have had another talk with the German minister on the subject. He said: "I have under instructions notified the Venezuelan government that my government will no longer consider itself bound by the clause in most contracts between foreigners and the Venezuelan government which states that all disputes, growing out of the contract, must be settled in the courts of this country. Our position is that the German government is not a party to these contracts, and is not bound by them. In other words, we reserve the right to intervene diplomatically for the protection of our citizens whenever it shall be deemed best to do so, no matter what the terms of the contract, in this particular respect, are. It would not at all do to leave our citizens and their interests to the mercy of the courts of the country. The Venezuelan government has objected with very much force to this attitude on our part, but our position has been maintained". It is apparently not at this time the purpose of the German government to interfere diplomatically in all contractual claims, but rather to contend for its right to do so '. " Vol. VI, p. 300.

A short time ago a committee of the League of Nations addressed to governments the following inquiry:

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

The replies may be quoted to show that obviously there has never been even an approach to a general assent to any rule or principle that the right of a nation under international law to interpose in behalf of its nationals may be restricted by a contract between a citizen and some other nation. The replies made by the Governments were as follows (*League of Nations, Conference for the Codification of International Law* .... Vol. III, pp. 133-135; *Supplement to Vol. III*, pp. 4, 22):

SOUTH AFRICA

An agreement between a national of a particular State and a foreign Government not to have recourse to the diplomatic remedy is, as regards his own Government, *res inter alios acta* and would therefore not debar his Government from maintaining the principles of international law if it felt so inclined. Such an agreement may also be considered void as being against *bonos mores internationales*, seeing that it would tend to relieve the State in question of its duty to live up to the precepts of international law.

GERMANY

In principle, the answer to the question whether an individual may contract not to have recourse to the aid of his State in defending his interests should be in the negative. In submitting such a claim, the State maintains its own right, of which no private individual can dispose. But it is possible to deduce from agreements of this kind that the individual foregoes his right to regard himself as injured by certain events, so that the State's claim would be devoid of any effective basis.

AUSTRALIA

A contract by the individual not to have recourse to the diplomatic remedy in case of denial of justice or violation of international law should be regarded as void.

AUSTRIA

Since the matter under consideration is not responsibility towards the injured private person, but international responsibility, renunciation of recourse to the diplomatic remedy on the part of the individual should not, in principle, affect the case.

BELGIUM

Renunciation of recourse on the part of the individual concerned does not affect the claim of the State, which he has no power to bind.

BULGARIA

When a State has acted in self-defence, even when the person concerned has contracted not to have recourse to the diplomatic remedy, the State is entitled to disclaim responsibility.

CANADA

Only when such a contracting out is allowed by the laws of the State of which the individual is a national.

DENMARK

.... No private individual however, can renounce the right of his State, in international law, to plead the violation of treaties or of international law itself.

FINLAND

Contracting not to have recourse to the diplomatic remedy should be regarded as admissible and valid at law provided the contract has been concluded freely and without constraint.

HUNGARY

In case (d), the individual concerned has only contracted not to enforce his claims by having recourse to a certain remedy—he has not relinquished the right itself; in such circumstances, therefore, he may cause the responsibility of the State to be established through some other channel.

JAPAN

Such "renunciation of protection" on the part of the individual is deemed to be ineffective in affecting the State's right to diplomatic protection of its citizens or subjects.

NORWAY

If the foreigner in question has contracted not to have recourse to action through the diplomatic channel, we presume that the State will nevertheless not be freed from its international responsibility in the cases mentioned in reply to point IV. This applies even if the renunciation expressly includes these cases, since such renunciation cannot be regarded as binding on the foreigner's country of origin.

NETHERLANDS

In this case responsibility may be disclaimed unless the contract was concluded under stress of physical or moral constraint.

POLAND

It is only as regards point (d) (Calvo clause) that an express reservation should be made—namely, that the renunciation by a private individual of diplomatic protection (both the renunciation and consequential exclusion of settlement by international arbitration of the question whether an international wrong has been committed) is not valid and remains without legal effect as regards the State defending the injured party.

SWITZERLAND

Renunciation of this kind by an individual would not necessarily bind the State of which he is a national; the latter would always be entitled to hold another State responsible for an act contrary to international law committed in respect of one of its nationals, even if the national in question decides not to complain or has given an undertaking not to do so. For, at international law, there is only one injured party and that party is not the individual, but the State. "In protecting its nationals against foreign States", as Anzilotti very rightly observes, "the State protects its own interests against all unlawful interference, that is to say, against all pretensions of a foreign State not based on international law." In other words, a State is not internationally responsible because an injustice has been committed against an individual, but because such injustice constitutes an act contrary to international law and injures the rights of another State. Conversely, we may agree with Anzilotti that, "as the State in this instance merely exercises its own right, it is never bound to take action against the State which has caused unlawful prejudice to its nationals; it simply possesses the right to do so and it may exercise this right or not as it prefers".

CZECHOSLOVAKIA

.... On the other hand, a renunciation of this kind should in no way prejudice the right of the country itself to intervene, if it holds that right independently of the desire of the person to be protected.

It will be noted that among the replies received only two, the very brief ones from Finland and The Netherlands, may perhaps be considered to give some support to the idea that contractual stipulations between a nation and a private citizen can have the effect of limiting the diplomatic interposition of another nation, although these two replies do not specifically discuss that subject.

The answer of Great Britain, in which India and New Zealand concurred, and which contains a reference to the case of the *North American Dredging Company of Texas*, is not altogether clear. The view of the British Government evidently is 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". (Italics inserted.) That view appears to be in harmony with the position maintained by the British Government in the past. But the opinion is further expressed 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". Presumably, however, the British Government, in spite of the use of the words "complete and exclusive", do not mean that the judicial proceedings growing out of a suit on a contract could not properly be the subject of diplomatic discussion or of a claim before an international tribunal, in connection with a complaint of a denial of justice predicated on such proceedings. It is evidently further the view of the British Government that contractual stipulations are not "obligatory" when there is a special agreement between the two governments concerned. From the standpoint of the British Government evidently there is no difference in the effect of such a contractual stipulation and the effect of the rule of international law with respect to the necessity for exhausting legal remedies.

The other nations all say that a contractual stipulation does not restrict a nation's right of interposition. Whether the British Government's position is different is probably nothing but a fanciful, academic question. From a theoretical, strictly legal standpoint a difference probably exists, since the meaning of the British reply seems to be that a contractual stipulation prevents interposition in behalf of a citizen, unless he has resorted to the courts and suffered a denial of justice. But diplomatic interposition is not justified under international law, generally speaking, unless there has been a resort to courts. So the sole point raised by the British reply as compared with the others is whether diplomatic interposition can, as a purely theoretical matter, be limited by a contract between a nation and an alien. This is particularly illustrated by the fact that the British Government evidently take the position that, in spite of contractual stipulations, diplomatic interposition is justified not only in cases of denials of justice predicated on judicial proceedings, but also on "any violation of the rules or principles of international law". The *North American Dredging Company of Texas* case was of course predicated on contentions with respect to violation of international law. The contract invoked in that case explicitly provided that the claimant should have no remedy except by application to Mexican authorities, thus excluding beyond any doubt all diplomatic interposition.

The reply of the United States to the Committee, consisting of quotations and citations, was in harmony with the position it has maintained over a long period.

As has been stated, the United States contended that the decision in the dredging company case, irrespective of its correctness, was not controlling in the instant case. It was pointed out that the Commission in its opinion in the former case concerned itself with matters relating to the performance of a contract and did not deal with an annulment of a contract such as is involved in the instant case. Reference was made in the dredging company case to the vital point as to the failure of the claimant to resort to local remedies. This point was emphasized by all the Commissioners, even though the Convention by its Article V forbids the dismissal of a claim on any such ground.

It would be a strange assumption that the Commission could properly disregard not only the jurisdictional provisions of the Convention of September 8, 1923, but also the provisions of Article V. But even if that assumption be indulged in, the Commission could not well undertake to impose on the claimant more than is required by the rule of international law with respect to the exhaustion of legal remedies. Judge John Bassett Moore lays down the following rule: "A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust". *International Law Digest*, Vol. VI, p. 677. A claimant cannot be required to endeavor to exhaust non-existing remedies. The man who cancelled "La Pescadora's" concession for a long period combined in himself legislative, judicial and executive functions, including the military. The local remedies which the owner of the concession had were against General Carranza who cancelled the concession. His decrees have been upheld by the Mexican Government. At the time of cancellation no federal courts functioned. There were of course, therefore, no local remedies to which the company could have recourse. The rule as to the necessity for resort to local remedies has no application where remedies do not exist. It does not require the institution of a suit against the head of a State. But it is indicated in the opinion of my associates that there were remedies in *1917*. I do not believe that the rule of international law that no attempt need be made to exhaust remedies which do not exist can be modified by my associates so as to be stated that a claimant to whom no remedies are open must anticipate that some might be open to him within three or more years. Moreover, since General Carranza's words and acts were law, it is difficult to perceive how they could be overthrown after 1917. And the contract of concession could not require the company to attempt to resort to non-existing remedies. *Elton* case, decided by this Commission, *Opinions of Commissioners, 1929*, p. 301, *La Grange* case, *ibid.*, p. 309.

Furthermore, it should be noted that in the instant case the concession cancelled belonged to a Mexican national and not to an alien. If the cancellation was wrongful, the American claimant company is not debarred from pressing its claim on the basis of the allotment made to it, irrespective of the conduct of the Mexican national in failing to seek redress against General Carranza's action. The rule of international law relates to aliens. The Mexican corporation was not an alien in Mexico and the claimant was not a party to the contract containing the Calvo clause, nor was it an assignee.

Had the claimant company been a party to the contract for the concession and had it in some way, according to the theory of my associates, been obligatory on it to anticipate that legal remedies might come into existence three years after the cancellation of the concession, it would be pertinent to bear in mind the provisions of the Federal Code of Procedure with respect to *amparos*. Article 779 of the Code of Federal Procedures of 1897 (Lozano, page 144) fixed a period of *fifteen days* within which *amparo* proceedings might be instituted to test the validity of "*actos del órden administrativo*". It is interesting in this connection to examine the comments of Dr. Emilio Rabasa on Article 14 of the Mexican Constitution of 1857 and his severe criticism of the effect thereon of the *amparo* law, establishing the presumption that unless an *amparo* is taken within fifteen days against violatory acts they are considered to be legalized by consent.

With respect to the question of resort to local remedies, it may be interesting to quote still further from the dissenting opinion of Sir John Percival in the case of the *Mexican Union Railway, Ltd., supra*. He said:

".... 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 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."

Reference is made in the opinion of my associates to the provision in the contract of concession with respect to cancellation by administrative proceedings. The propriety of the cancellation would appear to be a matter pertaining to the merits of the case and not a jurisdictional point. I may observe, however, that I am unable to perceive that, because a contract contains provisions with respect to cancellation in case of breach, a cancellation must be regarded as proper irrespective of the question whether any breach was committed by the concessionnaire.

Mr. Fernández MacGregor's opinion contains a quotation from a brief article written by Professor Borchard [the article is erroneously attributed to Mr. Woolsey] in which it was said that "the validity" of the Calvo clause had been upheld and that in eleven cases "its efficacy to bar the jurisdiction of a Claims Commission has been denied".

It is interesting to have in mind that a considerable percentage of the decisions giving effect to the Calvo clause comprises decisions rendered by Dr. Barge in the American-Venezuelan Arbitration of 1903.

Of these opinions, to whose jurisdictional theory my associates adhere, Secretary of State Root, in an instruction of February 28, 1907, to the American Minister in Venezuela, said in part:

"And not only did the umpire, in disallowing these claims upon the ground of the Calvo clause, do violence to the terms of the protocol in the manner already stated, namely, by refusing to examine them on their merits, but also by disallowing these claims he violated the express provisions of the protocol that all claims submitted should be examined in the light of absolute equity 'without regard to objections of a technical nature, or of the provisions of local legislation." *Foreign Relations of the United States, 1908*, pp. 774-775.

It was said of these opinions in the memorandum Secretary Root sent to the President in 1908: "in these cases 'absolute equity' seems to have varied with the seasons of the year". I have quoted the views of the distinguished jurist J. B. Moore with respect to these opinions. It was of these opinions that a distinguished lawyer of New York, with much experience in international affairs, said in connection with an address delivered before the American Society of International Law in 1910:

"These contradictory decisions, absurdly reasoned, and resulting in mutually destructive conclusions, fit only for *opera bouffe*, would afford material for the gaiety of nations, were it not that the ripple of laughter dies on the lips when we consider the gross injustice thus perpetrated on private claimants. Decisions such as these have retarded the cause of international arbitration as a solvent for the disputes of nations beyond any possibility of computation. They deserve to be set in a special pillory of their own, so that international arbitrators shall know that however absolute their authority may be in the case in hand, there is a body of public opinion which will fearlessly criticize and condemn such absurd and despotic rulings, and so that at least the possibility of a just criticism shall have its full effect as a deterrent cause in preventing the repetition of such offenses." Mr. R. Floyd Clark, *American Journal of International Law, Proceedings 1910-1912*, p. 162.

I sympathize with Mr. Clark's views as regards the effect of such decisions both on private rights and on the cause of international arbitration. As the Protocols were ignored in these cases, so, as I have pointed out, the Convention of September 8, 1923, was ignored in the dredging company case and in the instant case before this Commission. There may be some room for condonement with respect to the action taken in the Venezuelan cases. And while I of course agree with the views of the distinguished gentleman I have quoted respecting Dr. Barge's opinions, I feel certain that it would be unfair to those opinions to compare them with that written in the dredging company case. No doubt Dr. Barge sincerely considered that he might in "equity" give or withhold jurisdiction as he saw fit, although of course jurisdiction was fixed by the agreement of arbitration, as was pointed out by the court at The Hague. However, the Commission in its opinion in the dredging company case, which is now the basis of the opinion of my associates in the instant case, declares that "the claim as presented falls within the first clause of Article I of the Treaty, describing claims coming within this Commission's jurisdiction". In the case of the *Illinois Central Railroad Company, Opinions of the Commissioners, 1927*, p. 16, the Commission in disposing of a motion to dismiss the case on jurisdictional grounds said: "The Treaty is this Commission's charter". The Commission discussed Article I of the Convention and held that the claim was within the language of that Article. That claim was based on allegations of a breach of contract as was the claim in the dredging company case. The United States had a right to have an adjudication of the latter case on its merits. And it has a right to have such an adjudication of the instant case. The only loophole which the Commission finally found to avoid the trial of these cases, for the

determination which the two governments had by agreement stipulated, was to become, so to speak, a lawmaking body for the United States. The Commission in effect undertook to decree retroactively the unlawfulness of the presentation by the dredging company of its claim to the Department of State and declared that claimant could not "rightfully" present its claim to its government. In throwing out the instant case, my associates ignore applicable jurisdictional provisions, including those pertaining to allotment, even more specific than those nullified in the dredging company case.

An analogy between domestic law and international law

An analogy drawn from domestic jurisprudence may be interesting and also useful in considering the relationship of governments to the law of nations, when the same principles of inescapable logic are applicable to the two legal situations compared. The States of the United States possess a considerable measure of sovereignty. Each has its own Constitution, statutes and judiciary, but the Constitution of the United States is the supreme law of all. The Constitution confers certain rights on citizens to resort to Federal tribunals. It has repeatedly been held by the Supreme Court of the United States that a State statute requiring certain actions to be brought in a State court does not prevent a Federal court from taking jurisdiction of such action. *Cowles* v. *Mercer County*, 7 Wall. 118; *Lincoln County* v. *Luning*, 133 U. S. 529; *Chicot County* v. *Sherwood*, 148 U. S. 529. And statutes requiring so-called foreign corporations, as a condition of being permitted to do business within a State, to stipulate not to remove into the courts of the United States suits brought against such corporations in the courts of the States have been adjudged unconstitutional and therefore void. Likewise contractual stipulations by which corporations agreed not to have recourse to the Federal courts instead of the State courts have been declared void. *Home Ins. Co.* v. *Morse*, 20 Wall. 445; *Barron* v. *Burnside*, 121 U. S. 186; *Southern Pacific Co.* v. *Denton*, 146 U. S. 202.

In other words, neither the law of a State nor a contract made by a State with a private citizen or a business concern can nullify the requirements of the supreme law of the United States. And so likewise, as has been pointed out, neither a nation's domestic legislation nor a contract it may make with a private individual or business concern can nullify another nation's right of interposition, secured by the supreme law of the members of the family of nations, nor nullify an international covenant. Whatever may be said of the ethical principles of an individual who takes action at variance with the terms of a contract he signs, his action can of course not result in setting aside either a nation's constitution or the law of nations.

In the dredging company case, the Commission concerned itself much with the ethical aspects of the presentation of the case, which the Commission stated came within the jurisdictional provisions of a treaty concluded by Mexico with the United States. Nothing was said with respect to the action on the part of Mexico to prevent the hearing of the case. Judicial tribunals, in dealing with legal questions, are not concerned with the ethics of attempts to nullify provisions of a nation's constitution or to nullify a nation's right under international law or under a treaty to protect its nations. Perhaps it may be said that it would scarcely be worth while to undertake to draw ethical distinctions between acts of parties concerned with any such transactions.

I consider it to be important to mention an interesting point that has arisen since the instant case was argued. Rule XI, 1, provides:

"The award or any other judicial decision of the Commission in respect of each claim shall be rendered at a public sitting of the Commission."

The other two Commissioners have signed the "Decision" in this case. However, no meeting of the Commission was ever called by the Presiding Commissioner to render a decision in the case, and there has never been any compliance with the proper rule above quoted.