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THE CALVO CLAUSE IN LATIN AMERICAN CONSTITUTIONS AND INTERNATIONAL LAW

MANUEL R. GARCIA-MORA*

When Carlos Calvo, the famous Argentine jurist, stated that in disputes between an alien and a government, the former has to resort to local remedies waiving diplomatic protection from his own government, he did not even suspect that he was originating one of the most controversial clauses in the Law of Nations. Publicists today have concentrated their efforts on attacking this clause rather than on ascertaining its true purpose and juridical significance.¹ Hence, it must be said from the beginning that the purpose of this article is to make an attempt to place the Calvo Clause in its original context, for despite the brilliant criticism of its enemies, it is still very much misunderstood by the governments and internationalists with which it comes in contact.

I. *Nature of the Calvo Clause.*

The origins of the Calvo Clause may be traced back to the 19th century when European governments practiced aggression and conquest on the basis of the inability of weak countries to meet their financial obligations.² At this time, Calvo wrote in the Spanish edition

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¹ The Calvo Clause is treated in the most varied forms in the following books: G. H. Hackworth, *Digest of International Law* (hereinafter *Digest*) (Washington. Government Printing Office, 1934), Vol. V, pp. 635-654, Edwin M. Borchard, *Diplomatic Protection of Citizens Abroad* (New York: The Banks Law Publishing Co., 1915), pp. 795-809; M. M. McMahon, *Conquest and Modern International Law*, (Washington. The Catholic University of America Press, 1940), pp. 193-197, Clyde Eagleton, *Responsibility of States in International Law* (New York: New York University Press, 1928), sec. 49; Linden A. Mander, *Foundations of Modern World Society*, (Stanford. Stanford University Press, 1947), pp. 562-569; C. G. Fenwick, *International Law*, 3rd edition, (New York: Appleton Century Crofts, 1948), pp. 285-294, J. L. Brierly, *The Law of Nations*, 2d edition, (Oxford. Oxford University Press, 1938), pp. 181-183, *Oppenheim's International Law*, Lauterpacht's edition, (London. Longmans, Green and Co., 1944), p. 312, H. W. Briggs, *The Law of Nations: Cases, Documents and Notes*, (New York: S. Crofts and Co., 1938), pp. 522-523, P. C. Jessup, *A Modern Law of Nations*, (New York: The MacMillan Co., 1948), pp. 110-112.

² A discussion of non-payment of debts as a pretext for conquest may be found in M. M. McMahon, *Op.Cit.* p. 93ff.

of his book that in the event of a State's insolvency, aliens were not entitled to a higher degree of protection than domestic creditors and therefore, foreign citizens had to submit their claims to local courts.³ Later, in the French edition of his treatise, Calvo elaborated his doctrine to the point where it became a more logical one. It is largely based on the following propositions 1) that equality, sovereignty and independence are paramount rights of the States, 2) that States, being equal, sovereign and independent, have the right to expect non-interference from other States, and finally, 3) that aliens have to abide by the local law of the State wherein they reside without invoking diplomatic protection of their governments in the prosecution of claims arising out of contracts, insurrection, civil war or mob violence.⁴

This is the so-called Calvo Doctrine, which has given rise to the Calvo Clause. Some international lawyers make a sharp distinction between these two institutions,⁵ overlooking completely the fact that the Calvo Clause is a corollary of the Calvo Doctrine.

Historically, the Calvo Doctrine was directed to the Latin American countries, especially to Mexico where Napoleon III had sent an expedition in 1861 to make effective certain claims of French citizens against the Mexican government.⁶ Out of the Calvo Doctrine the Latin American countries developed the Calvo Clause, which is incorporated in contracts entered into between Central and South American governments on the one hand, and aliens on the other. These contracts specifically provide that the aliens shall resort to local remedies or the settlement of disputes arising under the contract, and shall further waive the diplomatic intervention of his own government. Since 1886 many Latin American States have incorporated into their constitutions and laws the provision that every contract between an alien and a government must, of necessity, contain a Calvo Clause.⁷ From a comprehensive study of present Latin American Constitutions I have been able to determine four variations of the Calvo Clause.⁸

In the first place, there are the provisions that exclude diplomatic protection under any circumstances. An example of such may be found

³ Carlos Calvo, *Derecho Internacional Teorico y Practico*, (Buenos Aires, 1868).

⁴ Carlos Calvo, *Le Droit International Theorique et Pratique*, 5th edition, (Paris, 1896), Vol. sec. 256, pp. 231-232.

⁵ C. G. Fenwick, *Op.Cit.* p. 285, n. 42.

⁶ Arthur Nussbaum, *A Concise History of the Law of Nations*, (New York: The MacMillan Co., 1947), pp. 211-212.

⁷ H. W. Briggs, *Op.Cit.* pp. 522-523.

⁸ The English texts of the constitutional provisions that will follow are taken from *The Constitutions of the Americas*, edited by Russell Fitzgibbon and others, (Chicago The University of Chicago Press, 1948).

in the present Mexican Constitution, which in dealing with the capacity to acquire ownership of lands and waters of the Nation, provides that:

"Only Mexicans by birth or by naturalization or Mexican companies have the right to acquire ownership of lands, waters, and their appurtenances or to obtain concessions for the exploitation of mines, waters or combustible minerals in the Mexican Republic. The State may concede the same right to aliens provided they agree before the Ministry of Foreign Relations to consider themselves as nationals with respect to said properties and not to invoke the protection of their Governments in reference to same, should they fail to respect the agreement, they shall be penalized by losing to the benefit of the Nation the properties they may have acquired."⁹

Secondly, other constitutions give the right of diplomatic protection only in cases of denial of justice. In this category belongs the Constitution of Bolivia, which states that:

"Foreign subjects and enterprises are, in respect to property, in the same position as Bolivians, and can in no case plead an exceptional situation or appeal through diplomatic channels unless in case of a denial of justice."¹⁰

Thirdly, the provisions that qualify the meaning of denial of justice, such as the Constitution of Nicaragua, which says that:

"Aliens may not use diplomatic intervention except in cases of denial of justice. The latter will not be so understood in the case of an executory verdict unfavorable to the claimant. Those who violate this provision will lose the right to reside in the country."¹¹

And finally, the constitutional provisions which do not contain a Calvo Clause, but rather incorporate the Calvo Doctrine providing that the alien for all purposes is subject to treatment and obligations equal with nationals. This type is found in the Constitution of Cuba, which provides that:

"Aliens residing in the territory of the Republic shall be considered as equal to Cubans

1st. With regard to the protection of their persons and their goods.

2nd. With regard to the enjoyment of rights recognized in this Constitution, with the exception of those granted exclusively to nationals.

⁹ Art. 27, paragraph 1st. Also the Constitutions of Ecuador, Art. 177, Peru, Art. 32, and Venezuela, Art. 108.

¹⁰ Art. 18.

¹¹ Art. 25. Also the Constitution of Honduras, Art. 19, which is similar to the Nicaraguan provision.

3rd. With regard to the obligation of respecting the socio-economic system of the Republic.

4th. With regard to the obligation of observing the Constitution and the Law

5th. With regard to the obligation of contributing to the public expenses in the form and to the amount provided by law

6th. With regard to submission to the jurisdiction and decisions of the tribunals of justice and the authorities of the Republic.

7th. With regard to the enjoyment of civil rights, under the conditions and within the limitations prescribed by law"¹²

No one can fail to see that the purpose of these constitutional provisions is to compel aliens to use internal courts before they resort to diplomatic channels.¹³ This point should be clear thus far. However, many publicists as well as several Governments, have attacked the Calvo Clause on various grounds. Thus, Professor Brierly contends that the Calvo Clause attempts to exclude altogether the responsibility of States towards aliens.¹⁴ A more substantial argument has been advanced and maintained by the United States Department of State, rejecting the Calvo Clause on the ground that an unaccredited agent may not renounce the right or privilege of the government in protecting its citizens abroad.¹⁵ The British Government, on the other hand, has felt that the Calvo Clause cannot be applied to tortious acts of revolutionary forces or to wilful destruction of aliens' property, and that in claims arising out of these torts, the governments have the right of espousing the claims of their nationals.¹⁶ It is not altogether clear whether the British Government accepts the Calvo Clause in claims arising out of contractual obligations. However, from the opinion rendered by the British Commissioners who have participated in cases involving the Calvo Clause, it is fair to attribute to the British Government approval of the clause in contract cases.¹⁷

One can of course readily appreciate that the validity of the Calvo Clause has been sharply debated from the standpoint of International

¹² Art. 19. Also the Constitutions of El Salvador, Art. 45 and Costa Rica, Art. 12. It should be mentioned that at the time of the writing of this article the Constitution of Costa Rica was undergoing a complete revision by a constitutional convention.

¹³ As a summary, the following Latin American countries have provisions for a Calvo Clause: Bolivia, Art. 18, Ecuador, Art. 177, Honduras, Art. 19; Mexico, Art. 27, Nicaragua, Art. 25, Peru, Art. 32; and Venezuela, Art. 108. The following countries have provisions for the Calvo Doctrine only: Costa Rica, Art. 12, Cuba, Art. 19 and El Salvador, Arts. 45 and 47

¹⁴ J. L. Brierly, *Op.Cit.* p. 181.

¹⁵ Memorandum of Mr. Root, Secretary of State, to the President, March 27, 1908, G. H. Hackworth, *Digest*, p. 636.

¹⁶ Dissenting opinion of the British Commissioner in the British-Mexican Claims Commission, G. H. Hackworth, *Digest*, pp. 647-650.

¹⁷ *Ibid.*

Law Inasmuch as some Latin American States still use the Calvo Clause in contracts with aliens, it would be profitable to proceed to a discussion of the Clause in the light of the Law of Nations, resorting as much as possible to the decisions of arbitration courts on the subject.

II. *Local Remedies, Denial of Justice and the Calvo Clause.*

Traditional International Law has accepted the doctrine that matters of immigration, naturalization and nationality fall completely within the jurisdiction of the States.¹⁸ However, in matters of expulsion, which involves more drastic consequences for aliens, judicial theory has been inclined to condition the right of States to expel aliens on the fulfillment of certain requirements.¹⁹ Aside from this extreme measure to which a State may resort, it is safe to say that since the States have an unfettered control of immigration and emigration, it will necessarily follow that they also have the right to impose conditions before the admission of aliens is granted.²⁰ One of these conditions may be the obligation to resort to local remedies as regards reparations for damage sustained by a foreigner.²¹ The rule of local remedies, however, is extremely difficult to square with the desire of some States to obtain a better treatment for citizens. This desire is motivated by a lack of confidence on the part of the States which think of themselves as having a superior standard of civilized justice. But for any State to allow foreign States to interfere on behalf of their citizens would amount to giving aliens a degree of consideration which its own nationals obviously do not receive. If an alien desires to go to a foreign country where the administration of justice is not based on the same principles and postulates as his own, he is presumed to know all these facts and it may be convincingly argued that he is just taking an ordinary risk.²² This assumption would even be more tenable in the case of aliens who go to countries that expressly provide in their constitutions that aliens residing in their territory are equal to nationals "with regard to the

¹⁸ Chinese Exclusion Case: *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). For more recent decisions see, *Carmichael v. Delaney*, 170 F (2d) 239 (C.C.A. 9th, 1948), *United States ex rel. Lapidest v. Watkins*, 165 F (2d) 1017 (C.C.A. 2d, 1948), and *United States ex rel. Tinler v. Carus*, 166 F (2d) 457 (C.C.A. 3rd, 1948).

¹⁹ *Boffolo Case, Italy-Venezuela Arbitration Before the Italian-Venezuelan Mixed Claims Commission*, 1903. H. W. Briggs, *Op.Cit.* pp. 492-496.

²⁰ *Fong Yue Ting v. United States* (1893), 149 U.S. 698, *Colyer v. Skeffington*, (1920) 265 Fed. 17

²¹ Edwin M. Borchard, *Op.Cit.* pp. 817-818. However, Professor Borchard here adds the corollary that the remedies for a violation of his rights must exist in the local courts. This is only natural, since "an alien cannot resort to local remedies when there are none to be had."

²² *United States (Rosa Gelbrunk Claim) v. Salvador, United States-Salvador Claims Arbitration*, 1902. H. W. Briggs, *Op.Cit.* pp. 503-507 at p. 504.

protection of their persons and their goods."²³ Therefore, from the standpoint of his own country, an alien cannot plead ignorance of these constitutional provisions that compel him to resort to local remedies. It is clear, however, that only in the event that local remedies are exhausted without obtaining justice, may diplomatic protection be allowed.²⁴ On the other hand, it appears that the exhaustion of local remedies has been subject to arbitrary interpretation in every specific case.²⁵ It seems to be a question of fact whether local remedies have been exhausted. The fact that an alien has not obtained a favorable judgment does not necessarily mean that local remedies have been exhausted and that therefore, a denial of justice has been established.²⁶ Denial of justice is a very restricted doctrine which depends upon certain considerations of fact. As long as the State of residence furnishes all aliens with all means of protecting their rights by an adequate judicial procedure on the same grounds as nationals, denial of justice cannot be invoked.²⁷ Furthermore, equality of treatment does not mean that the alien has to be regulated by his own national law, or that in determining his guilt or innocence, the State of residence has to resort to the institutions and practices of the State of which the alien is a national.²⁸ Nor does it mean that an alien has the right to invoke diplomatic protection from his own government. As has been expressed by an Argentine Minister of Foreign Affairs "equal treatment means equal protection from the law, not special diplomatic protection."²⁹ A different approach was suggested in the *Neer* case decided by a General Claims Commission established by the United States and Mexico, where the Commissioners were of opinion that even though denial of justice could not be established, nevertheless better methods in prosecuting the criminals could have been used.³⁰ It should be observed that when an arbitration court determines that "better methods could have been used

²³ Constitution of Cuba, Art. 19.

²⁴ *Harvard Research on the Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners*, p. 149.

²⁵ G. H. Hackworth, *Digest*, pp. 501-526.

²⁶ In order to avoid this arbitrary interpretation of denial of justice, the Constitution of Honduras has established in Article 19 that "aliens may not have recourse to diplomatic channels except in cases of denial of justice. For this purpose, denial of justice is not understood to mean an executed verdict that is unfavorable to the claimant." The same stipulation is found in the Constitution of Nicaragua, Art. 25.

²⁷ Edwin M. Borchard, *Op.Cit.* pp. 27-39.

²⁸ In this connection, see the note from the United States Department of State to the American Legation in Panama, G. H. Hackworth, *Digest*, pp. 541-542.

²⁹ Note of the Argentine Foreign Minister to the British Legation in Buenos Aires, quoted by Daniel Antokoletz, *Tratado de Derecho Internacional Público*, Tercera Edición, (Buenos Aires, 1938), Vol. II, pp. 608-609.

³⁰ H. W. Briggs, *Op.Cit.* pp. 505-507

in the prosecution of a criminal", the court is setting up a somewhat indefinite standard, which depends entirely upon the subjective appreciation of the court itself. Moreover, it is relevant to remark that from the standpoint of traditional International Law, a State does not have the obligation to furnish aliens with more protection and more advantages than it supplies to its own nationals, even if the protection given by the State of residence falls below the protection accorded by the State of which the alien is a citizen.³¹ As Professor Borchard has aptly said. "the resident alien does not derive his rights directly from International Law, but from the municipal law of the State of residence."³² It will logically follow that if in a primitive State only primitive methods are available both to aliens and nationals, the responsibility of the State is not involved, since it has given to aliens the same protection and the same means of redress which it is capable of giving under the circumstances. Thus, in the *George J Salem case*,³³ (United States v Egypt), the arbitration commission declared.

"As a rule, a foreigner must acknowledge as applicable to himself the kind of justice instituted in the country in which he did choose his residence including all deficiencies of such jurisdiction, imperfect as it is like any other human work."

The same principle was applied in the *Gelbtrunk case*,³⁴ where it was held that

" The State to which he (the alien) owes national allegiance has no right to claim for him as against the nation in which he is resident any other or different treatment in case of loss by war—either foreign or civil—revolution, insurrection or other internal disturbance caused by organized military force or by soldiers, than that which the latter country metes out to its own subjects or citizens."

Of course, if there were an objective international standard of justice, the alien's national State would have grounds for demanding more than equality of treatment for its own nationals in the event that the local standards fell below such an international standard of justice. However, it seems that judicial authority³⁵ as well as the writings of the

³¹ Article 5 of the Harvard Draft Convention on the Responsibility of States says. "A State has a duty to afford to an alien means of redress for injuries which are not less adequate than the means of redress afforded to its nationals."

³² Edwin M. Borchard, *Op.Cit.* p. 27

³³ G. H. Hackworth, *Digest*, p. 543.

³⁴ C. G. Fenwick, *Cases on International Law* (Hereinafter *Cases*) (Chicago Callahan and Co., 1935), pp. 226-228.

³⁵ *Gelbtrunk Claim case*, *supra*, n. 34.

best qualified experts on the subject,³⁶ expressly admit that there is no "international standard of justice" and that the only duty a State has with regard to aliens, is to give them the same protection which it gives to its own citizens.

So much for the doctrines of local remedies and denial of justice. The question still remains as to whether the Calvo Clause is within the conceptions thus far discussed. There has been the repeated assertion today that the Calvo Clause is nothing more than a promise to use local remedies and therefore, it is unnecessary as well as harmless.³⁷ This contention obviously fails to take into account the full implications of a Calvo Clause. Assuming that there is a Calvo Clause with regard to waiving diplomatic protection except in cases of denial of justice, this provision is much more fundamental than appears at first sight. Some interpretations have expanded the meaning of the Calvo Clause even in the determination of what might be termed substantive rights. The Calvo Clause in these cases not only waives diplomatic protection in matters arising under the contract, but it goes a step further in providing that such questions as denials of justice will be determined by the laws of the forum.³⁸ In other words, the Calvo Clause aims at excluding completely the diplomatic interposition of any other nation, for even the determination of whether or not this interposition is warranted is finally decided by the local law. It is therefore clear, that the Calvo Clause is more than a promise to use local remedies, and perhaps is more ambitious than the original Clause developed under the Calvo Doctrine. Moreover, the Calvo Clause today has teeth in its provisions, for most of the constitutions that incorporate a Calvo Clause provide that the violation of it will terminate the rights that the aliens have

³⁶ Clyde Eagleton, *Op.Cit.* p. 83. See also Judge Guerrero's Report on the Responsibility of States for Damages Done in Their Territories to the Person or Property of Foreigners, submitted to the Committee of Experts for the Progressive Codification of International Law. Cited by H. W. Briggs, *Op.Cit.* p. 508.

³⁷ P. C. Jessup, *Op.Cit.* p. 111.

³⁸ For example, a law of El Salvador issued in September 29, 1886 stated that a denial of justice occurred only when a court refused to render a decision in a litigation submitted to it. Cited by Daniel Antokoletz, *Op.Cit.* Vol. II, p. 609. Also the Civil Code of the Republic of Panama provides in article 2 that "a court that refuses to decide a case on grounds of obscurity or insufficiency of the law, will incur responsibility." This responsibility may be denial of justice. It seems, therefore, that in these two countries refusal to decide a case is the only ground for claiming denial of justice. Compare the interpretation of denial of justice maintained by the Government of the United States, G. H. Hackworth, *Digest*, pp. 526-555.

acquired under the contract.³⁹ This means that the Calvo Clause is no longer an expression of wishful thinking, but has become a highly complicated institution with its own enforcing machinery

Along the same lines, to say that the Latin American states have insisted on the application of the Calvo Clause in order to escape their international responsibility,⁴⁰ is to pass superficial judgment without going into the actual significance and implication of the problem involved. Furthermore, to say that the Calvo Clause is not useful anymore since the same result may be accomplished by the rule of local remedies,⁴¹ is to ignore completely that what the Latin American countries wish to avoid is the constant interference in their administration of justice on purely discretionary grounds. The rule of local remedies is not powerful enough to prevent this interference, as has been proved in the past.⁴² That explains why the Latin American States have resorted to a contract, which from the standpoint of legal theory has more validity than the doctrine of local remedies since the latter has no enforcing machinery but is merely a vague promise, without any binding obligation, of using local courts in the event of disputes arising under a contract. The experience in the application of the local remedies doctrine will warrant the contention that in many cases governments have questioned the existence of local remedies and have accordingly invoked denial of justice. In this way, a litigation has ensued which, although it could have been adequately handled by the local courts, saving the litigants time and money, has usually taken an inordinately long time to resolve since it had to be decided by an arbitration court. By the Calvo Clause's insistence on the use of local remedies, it has become a sanction of International Law, for the alien cannot resort to his government in violation of his contractual obligations unless a clear denial of justice is established. Contrary to what Professor Jessup suggests, it should be the rule that if the international tribunal finds that the aliens did not resort to local remedies, disregard-

³⁹ On this, the Mexican Constitution provides that "should the aliens fail to respect the agreement (Calvo Clause), they shall be penalized by losing to the benefit of the Nation the properties they may have acquired," Art. 27, paragraph 1st. The Honduran Constitution provides that the violation of the Calvo Clause will result in losing the claims to the country, and the "claimant shall forfeit his rights to live in the country", Art. 19; also the Constitution of Nicaragua provides that violation will terminate the right of the alien to live in the country, Art. 25.

⁴⁰ J. L. Brierly, *Op.Cit.* p. 181.

⁴¹ P. C. Jessup, *Op.Cit.* p. 111.

⁴² H. W. Briggs, *Op.Cit.* pp. 509-522.

ing the operation of the Calvo Clause which they freely signed, the costs of litigation should be collectible as part of the judgment against the claimant.⁴³

III. *The North American Dredging Co. case revisited.*

Our discussion of the Calvo Clause would not be complete without discussion of the *North American Dredging Co. case*,⁴⁴ which was decided by the General Claims Commission set up under the Convention concluded between the United States and Mexico in 1923. The case put before the Commission by the Government of the United States on behalf of the North American Dredging Company of Texas for the recovery of the sum of \$233,523.30 with interest. This amount represented losses and damages allegedly suffered by the Company for breaches of a contract for dredging at a Mexican port. The contract was signed between the Company and the Mexican Government, in Mexico City, and it contained a Calvo Clause providing that the contractor and all persons would be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of the work as well as the fulfillment of the contract. Moreover, the Company agreed not to invoke the diplomatic protection of foreign diplomatic agents in any matter related to the contract.⁴⁵ The decision of the case naturally revolved around the validity of the Calvo Clause.

The position of the United States regarding the validity of the Calvo Clause emphasized primarily that a private citizen cannot give up the rights of his government.⁴⁶ According to the State Department, the Calvo Clause purports to destroy the right of the government, since the alien agrees not to invoke its diplomatic protection. In this respect, it should be emphasized that the North American Dredging Company without pressure of any sort, except the one that may have been derived from the desire to obtain the concession, agreed to sign the Calvo

⁴³ P. C. Jessup, *Op.Cit.* p. 11.

⁴⁴ C. G. Fenwick, *Cases*, pp. 236-243, also H. W. Briggs, *Op.Cit.* pp. 524-533.

⁴⁵ The exact provision of the contract was "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 fulfillment 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." Quoted by G. H. Hackworth, *Digest*, p. 641.

⁴⁶ Memorandum submitted by Mr. Root, Secretary of State, to the President, G. H. Hackworth, *Digest*, p. 636.

Clause, with full knowledge of its legal implications and consequences.⁴⁷ Furthermore, the Calvo Clause embodied in the contract did not deny entirely the right of diplomatic protection but, following the usual method, sought to compel the Company to resort to Mexican laws and Mexican courts. It also appears from the records that the Company signed the contract with no intention of fulfilling its provisions.⁴⁸ The Commission decided that this case did not fall within its jurisdiction.

Obviously, the Commission decided the case in the light of existing International Law⁴⁹ It is fully recognized by the decision that International Law grants the States the right to protect their citizens when subject to discrimination or undue treatment abroad. But it must be remembered that the Calvo Clause does not limit this right. It merely imposes on aliens certain conditions perfectly legal under International Law⁵⁰ Calvo himself did not exclude diplomatic protection in all cases, but admitted that there were some instances where interposition rested on incontestable rights.⁵¹ Moreover, if the jurisdiction of the alien's government is temporarily suspended by the operation of the Calvo Clause, the alien is not left without any substitute, but can always resort to local remedies until adequate redress is obtained.⁵² On the other hand, the analogy is advanced that the Calvo Clause would be comparable to a case "under the law of the United States in which the contracting parties seek to oust the jurisdiction of the courts."⁵³ This analogy seems to ignore the fact that private individuals may voluntarily exclude the jurisdiction of national courts by an agreement to settle a dispute out of court, and that even in the prosecution of tort cases the court will not act unless it is requested to do so by private initiative. Similarly, the right of protection of citizens abroad depends upon the right of the individual, and if the latter chooses to renounce such protection by signing a contract to that effect, the State concerned should not have anything else to say, since according to Professor Jessup "the rights which appertain to the individual may be waived by the individual."⁵⁴

The opposite contention may be advanced that in all traditional textbooks on International Law it is stated that individuals do not derive

⁴⁷ C. G. Fenwick, *Cases*, at p. 239.

⁴⁸ *Ibid.* at p. 242.

⁴⁹ *Contra*, dissenting opinion of Umpire Nielsen in the International Fisheries Claim case; quoted by H. W. Briggs, *Op.Cit.* pp. 533-541.

⁵⁰ On these conditions and their validity, see Oppenheim, *Op.Cit.* Vol. I, p. 112.

⁵¹ Cited by Samuel F. Bemis, *The Latin American Policy of the United States*, (New York: Harcourt, Brace and Co., 1943), p. 230.

⁵² This argument answers Professor Jessup's objection, *Op.Cit.* pp. 111-112.

⁵³ *Ibid.* p. 112.

⁵⁴ *Ibid.* p. 111.

their rights directly, but rather indirectly, from International Law which operates through the medium of the State. From a present-day standpoint, it cannot be questioned that individuals are subjects of international rights given to them directly by International Law. We must be logical and finally admit that behind the State are the individuals who are directly affected by whatever practice the States choose to consider as binding. Moreover, one needs no special effort to see that there have been a great many treaties of a humanitarian character which incorporate individual rights in the positive Law of Nations and that these rights are made effective through international institutions.⁵⁵ In another connection, it would be a very sad affair indeed if it were claimed that individuals have obligations under the Law of Nations, as the Nuremberg Trials proved,⁵⁶ but that on the other hand, it is denied that individuals have rights under International Law. It certainly makes no sense to say that under the Law of Nations individuals have duties, but no rights. Such legal theory would not be an imperative but a preferential postulate. Continued adherence to it under changing conditions, will produce more chaos than order in the international community.

The conclusion is thus inescapable that a consistent approach to the problem of International Law will have to give rights to individuals in the same way as it has demanded obligations and responsibilities from them. When the Calvo Clause is considered in this light, the fundamental objection of the United States that the Clause is invalid because individuals do not have rights under International Law loses all its value.⁵⁷

In commenting on the Dredging Company Case, Umpire Nielsen said.

"Domestic laws cannot destroy rights secured by International Law. Since one nation's rights cannot 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."⁵⁸

⁵⁵ For instance, the Commission on Human Rights of the United Nations, Oppenheim, *Op.Cit.*, Vol. I, pp. 584-585.

⁵⁶ Hans Ehard, *The Nuremberg Trial against the Major War Criminals and International Law*, *Am. Jour. of International Law*, (1949), Vol. 43, p. 223, at pp. 233-235.

⁵⁷ P. C. Jessup, *Op.Cit.* p. 111.

⁵⁸ Quoted by H. W. Briggs, *Op.Cit.* p. 535.

With deference for the authority of Umpire Neilsen, it is suggested that the rights of the United States Government were not destroyed by a domestic enactment of Mexico, but by the free will of the Company which entered into the contract. In this connection, Mr. Nielson lost sight of the fact that it was the act of the Company that destroyed the right of the Government of the United States, and not the Mexican provision. The whole question, therefore, had to revolve around the rights of the Company to waive the protection of its government under International Law. It should be observed that Mr. Nielsen wrote his dissenting opinion in 1931 with regard to the *International Fisheries Company case*, when it was universally accepted that International Law applied only to States, not to individuals. From the preceding paragraph, it may be concluded that such an argument could not be successfully maintained today when the tendency is to give rights and obligations to individuals and corporations directly under International Law.⁵⁹ If this proposition is accepted, Mr. Nielsen's objection against the decision in the Dredging Company case loses all logical basis.

Even if the case is considered strictly from the standpoint of traditional International Law, it appears from the facts that the Company did not even attempt to exhaust local remedies before invoking the protection of the Government.⁶⁰ Therefore, the Company could not possibly establish denial of justice, and the Government of the United States could not legally espouse this claim until local remedies were exhausted. As the Commission pointed out, the Company could legally have resorted to the United States Government for protection only if resort to Mexican tribunals or other authorities available to it "resulted in a denial or delay of justice. In such a case the claimant's complaint would be not that his contract was violated but that he had been denied justice."⁶¹

It should be added that the Calvo Clause in this case, as in any other case, did not aim at escaping international responsibility for breaches of contract on the part of Latin American Governments. It would be more accurate to say, from the standpoint of the original purpose of the Clause, that it aims at preventing the diplomatic protection of aliens from "being an instrument of oppression used by strong States against weak ones,"⁶² and in so far as this end is accomplished, the Calvo Clause enforces specific postulates of the Law of Nations.

⁵⁹ C. G. Fenwick, *International Law*, pp. 131-133.

⁶⁰ C. G. Fenwick, *Cases*, p. 242.

⁶¹ *Ibid.* p. 241.

⁶² The Mexican Jurist Garcia-Robles submitted this project to the Inter-American Bar Association at Havana in 1944. See on this, C. G. Fenwick, *International Law*, p. 293, n. 71.

Analyzing the contentions of both Governments in the light of the decision rendered, the Dredging Company case represents an attempt at reconciling two opposite claims of apparently equal weight. Without openly admitting or denying the validity of the Clause, the Commission said

"Under the rules of International Law may an alien lawfully make such a promise? (That is, not to invoke diplomatic protection) The Commission holds that he may, but at the same time holds that he cannot deprive the government of his nation of its undoubted right of applying international remedies to his damage. But while any attempt to so bind his government is void, the Commission has not found any generally recognized rule of positive International Law which would give to his government the right to intervene to strike down a lawful contract." ⁶³

Umpire Nielsen finally contended that in the Brief of the United States Government there were allegations with respect to arbitrary interference of the Mexican Government in the work of the Company, that there was no payment for work performed and that there was even seizure of property. He further stated that these charges were not denied by the Mexican Government.⁶⁴ But again, even from the standpoint of the same International Law which Umpire Nielsen sought to preserve, resort to diplomatic protection was not available to the Company until local remedies were exhausted, especially when it was established beyond doubt that local remedies were open all the time and there was a solemn word on the part of the Company to use them in the event of any dispute arising under the contract.

IV Conclusion.

Whether or not the Calvo Clause is legal is extremely difficult to say in the presence of so many conflicting opinions. Later in the decision of the *International Fisheries Company case*,⁶⁵ also between the United States and Mexico, decided in 1931, the Commission said that "it did 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."⁶⁶ The same opinion was held by a British-Mexican Commission in the *Mexican Umon Railway case*.⁶⁷ But even though the validity of the Clause has been upheld in many cases, it is equally true that the Calvo Clause has been rejected in many

⁶³ C. G. Fenwick, *Cases*, p. 239.

⁶⁴ H. W. Briggs, *Op.Cit.* p. 541.

⁶⁵ G. W. Hackworth, *Digest*, pp. 643-647

⁶⁶ *Ibid.* p. 645.

⁶⁷ *Ibid.* pp. 647-650.

other instances.⁶⁸ It is my personal opinion that a true understanding of the Calvo Clause will lead to the conclusion that, if adhered to by all States, it performs the function of enforcing International Law by compelling individuals to accept and use local remedies. The Calvo Clause stands for non-intervention, which is a universally recognized postulate of the Law of Nations. Hence, this article should have proved that there is nothing incompatible between the Calvo Clause and International Law

The controversy over the Calvo Clause still continues, as manifested in the writings of several publicists.⁶⁹ The Latin American States have made several moves to incorporate the Clause into a Pan-American Convention.⁷⁰ Thus, the Convention on the Rights of Aliens, which was adopted in 1902 in Mexico City at the Second Pan-American Conference, had a provision to the effect that whenever an alien has a claim against a State or its citizens, he shall present it to the competent authorities of the country without resorting to diplomatic protection except where there is a manifest denial of justice.⁷¹ This Convention was never ratified by the United States, but the consensus of opinion today seems to be that, even though the United States and the European countries have opposed the Calvo Clause in principle, nevertheless they conform to it as a matter of practice except in cases of a clear denial of justice.⁷²

⁶⁸ Professor Briggs has pointed out that of twenty seven cases involving the Calvo Clause, eleven have denied the validity of the Clause and sixteen have upheld it. *Op.Cit.* p. 541.

⁶⁹ C. G. Fenwick, *International Law*, p. 293, n. 71.

⁷⁰ See on this, The Codification of International Law in the Americas, *Law and Treaty Series, No. 20*, Juridical Division, Pan-American Union, October, 1946, p. 25.

⁷¹ M. M. McMahon, *Op.Cit.* p. 194.

⁷² *Ibid.* pp. 195-196.