

INTERNATIONAL VALIDITY OF THE CALVO CLAUSE —PURSUING THE RATIO DECIDENDI OF CERTAIN ARBITRAL AWARDS—†

By TAKESHI MINAGAWA*

Contents: 1. Question of validity of the Calvo clause.—2. Leading cases of the Calvo clause: the Dredging Co. case and the Union Railway case.—3. Existence of any prohibitive rule of international law.—4. Relationship with the local remedies rule.—5. Relevance of private will or conduct in the diplomatic espousal of claims.—6. General rules of diplomatic protection.—7. International validity of the Calvo clause analysed from the viewpoint of general international law.—8. The Calvo clause and denial of justice.

1. The Calvo clause is defined as “a stipulation in a contract between an alien and a government whereby the alien agrees not to call upon his state of nationality for protection in any issue arising out of the contract.”¹

As to the international validity of the Calvo clause, international arbitrators as well as publicists come to the divergent conclusions.² If the Calvo clause is held to be internationally valid, it will operate to restrict the exercise of right of diplomatic protection or jurisdictional right of international tribunals with reference to any issue falling within the scope of the Calve clause. Leaving alone the persistent disagreement of views, there is the much-cited precedent concerning this subject, that is, the decision of the American-Mexican Claims Commission in the North American Dredging Company case (1926).³ The decision given by the Great Britain-Mexican Claims Commission in the Mexican Union Railway case (1930) is equally of significance, which adopted the same juridical position with the decision in the Dredging Co. case.⁴ These are often mentioned as the “leading case” or “*décision-type*” on the question of international validity of the Calvo clause.⁵

* Professor (*Kyōju*) of International Law.

† The writer's article (in Japanese) dedicated to Studies in Honour of Professor Yoshinaga.

¹ Jiménez de Aréchaga, *International Responsibility*, in *Manual of Public International Law* (ed. by Sørensen), 1968, p. 590.

² These are categorized into three versions respectively maintaining: (1) the complete validity, (2) the complete invalidity and (3) the limited validity of the Calvo clause. Cf. Ténékidès, *Considérations sur la clause Calvo*, in *Revue générale de droit international public*, 1936, p. 275.

³ *Reports of International Arbitral Awards*, Vol. IV, pp. 26-35.

⁴ *Reports of I.A.A.*, Vol. V, pp. 115-129.

⁵ In response to the inquiry of a committee of the League of Nations, the Government of the United Kingdom stated to “accept as good law and are content to be guided by the decision of the Claims Commission” in the Dredging Co. case. This may be a pragmatic judgement, but it should be questioned on what basis the Calvo clause is legally justified.

In both of the above cases, the Commissions concordantly decided in the *dispositif* that "the case as presented is not within its jurisdiction." Such a decision having been reached, the Commissions held that the Calvo clause was internationally valid, and as such, applicable in the said cases. Certainly, the Commissions did not recognize the full efficacy of the Calvo clause for all purposes of diplomatic or judicial action. However, the preclusive effect of the Calvo clause within a limited scope was definitely upheld by the Commissions. On what basis was framed the positive judgement of the so-called limited validity of the Calvo clause? The aim of the present writer is to reconsider the basis of international validity of the Calvo clause, pursuing the *iter* of judgement by the Commissions in these leading cases.

2. When we trace the reasoning given by the Commissions, it would be convenient to consider seriatim on the following points: (1) permissibility for an alien to waive to invoke the diplomatic protection by the State of his nationality, (2) disjunctive operation of the Calvo clause in conjunction with the local remedies rule and compromissory clause, and (3) relevancy of the manifestation of will or conduct of a private person within the framework of international reclamation.

As to the first point, the Commissions answer in the affirmative. The Commissions pose the question whether there exists any rule of international law forbidding such a waiver by an alien. What must be established, according to the Commissions, is not that the Calvo clause is universally accepted, but that "there exists a generally accepted rule of international law condemning the Calvo clause" (Dredging Co. case).⁶ For this purpose, it must be clarified what is the direct aim of the Calvo clause and its intended material scope of application.

In the Dredging Co. case, the Commission construes the Calvo clause—article 18 of the contract—as embracing "all matters connected with the execution of the work covered by the contract and the fulfilment of its contract obligations and the enforcement of its contract rights."⁷ In the Union Railway case, the Calvo clause—article 11 of the concession—apparently includes "all matters whose cause and right of action shall arise within the territory of the Republic, everything relating to the said company and all titles and business connected with the company." Nevertheless, the Commission holds that "article 11 of the concession is not invalidated because the words, in which it is

⁶ To pose a question in such a manner—it is affirmed—"gives the respondent State a decided advantage in litigation when it pleads the Calvo clause." See O'Connell, *International Law*, Vol. II, 1970, p. 1060.

⁷ Article 18 of the contract is formulated 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." According to the construction given by the Commission, the closing words "in any matter connected with this contract" must be read in connection with the preceding phrase "in everything connected with the execution of such work and the fulfilment of this contract" and also in connection with the phrase "regarding the interests or business connected with this contract." *Report of I.A.A.* Vol. IV, p. 30.

expressed, comprise more than in the other case.”⁸ According to somewhat strained construction of the Commission, there does not exist any essential divergence between “the words *business connected with the contract* in the first case and the words *titles and the business connected with the company* in the second.”⁹ Without entering into the merits of this finding,¹⁰ if the aim of the Calvo clause is limited to foreclose an alien “to conduct itself as if not subjected to Mexican jurisdiction and as possessing no other remedies” in connection with the contractual issues, there does not seem to exist a positive rule of international law which still frustrates such an aim.

On the other hand, when it is said that the Calvo clause does not “go further than the legitimate protection of the rights of the country” (Union Railway case), it becomes a matter of prime importance to put on the brakes in the sense that an alien cannot deprive the State of his nationality of its “undoubted right of applying international remedies to violations of international law committed to his damage,” especially in case of a denial or undue delay of justice (Dredging Co. case). Should the Calvo clause purport to cover unlawfully such a great deal, it must be considered as void *ab initio*. However, the Calvo clause as properly construed does not go to that extent.

The rationale of the Calvo clause 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” (Dredging Co. case).¹¹ The host States must not be deprived of the advantages accruing from the investment of foreign capital, and at yetthe same time “see to it that the presence of huge foreign interests within their boundaries does not increase their international vulnerability” (Union Railway case).¹²

If these direct and ultimate objects of the Calvo clause are not per se repugnant to the requirement of international law, it should be presumed not to be tainted with unlawfulness and nullity.

3. If the exercise of diplomatic protection by a State is restricted by virtue of the waiver of a private person, it may be argued that a rule of international law conceding him such a potency should be established to exist. In the absence of the said positive international

⁸ Article 11 of the concession is written as follows: “The Company shall always be a Mexican Company even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may consequently not intervene in any matter whatsoever.”

⁹ *Report of I.A.A.*, Vol. V, p. 118.

¹⁰ The British Commissioner stated in his dissenting opinion: “It appears to me impossible to doubt, from the terms of article 11 of the contract, that it was the intention of the Mexican Government to prevent the claimant’s Government from intervening diplomatically or otherwise in any case in which the Company might have suffered loss in relation to its existence, business or property, even though such loss had arisen through a breach of the rules and principles of international law.” For this reason, it should be treated as void *ab initio*. *Report of I.A.A.*, Vol. V, p. 126.

¹¹ *Report of I.A.A.*, Vol. IV, p. 29.

¹² *Report of I.A.A.*, Vol. V, p. 119.

rule, relinquishment of the benefit of protection by a private person would not produce any encumbrance to his own State.¹³

Without going deep into the matter here, it should be recalled in this connection that there exists a well-settled international rule requiring the exhaustion of the remedies offered by municipal law. This rule envisages the reparation of damage caused to a private person, not the damage directly suffered by a State. However, it applies to all such cases, irrespective of the alleged cause of international responsibility doing damage to a private person.

As indicated by the Commission of Arbitration in the *Ambatielos Claim*, the rule means that "the State against which an international action is brought for injuries by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State."¹⁴

In the same vein and *a fortiori* the Calvo clause demands that full advantage shall be taken of all the local remedies within the system of municipal law. In order to answer the criticism directed in the above sense, it will suffice for the moment to point out that a generally accepted rule of international law contemplates positive actions of a private person as relevant juridical fact for the purpose of international reclamation concerning the reparation of his suffered damage.

Notwithstanding, it may be contended that a State is bound by the international rule of local redress, not by the Calvo clause as such.¹⁵ The question still remains to be open whether the manifested will or conduct of a private person is deprived of any pertinency on the international level let alone its supplemental or overcoming effect.

It may be asserted also that the Calvo clause constitutes a negation of international proceedings, while the local remedies rule lays down a precondition to institute the same proceedings.¹⁶ According to the orthodox view, however, the Calvo clause does not purportedly go to such extremes in case a State adopts the cause of its nationals on the ground of a denial of justice or other international delinquency. In that event, the Calvo clause does not operate to debar the institution of international proceedings.

In spite of these remarks, it is propounded that the Calvo clause is nothing more than an otiose appendage, inasmuch as the local remedies rule will absorb completely the would-be function of the Calvo clause on the international level.¹⁷ This statement involves a very fine point. It will be dealt with later.

4. Now proceeding to the second point, it must be inquired how the Calvo clause will operate in conjunction with the local remedies rule and compromissory clause of the convention. In the above cases, this question represented a legal tension, for the conventions which organized the Claims Commissions and conferred jurisdiction on them, provided explicitly the non-application of local remedies rule to the claims brought up under these conventions.

¹³ Cf. Dissenting opinion of American Commissioner in the *International Fisheries Co. case*, *Report of I.A.A.*, Vol. IV, pp. 710-171.

¹⁴ *Report of I.A.A.*, Vol. XII, pp. 118-119.

¹⁵ Cf. Hyde, *Concerning Attempts by Contract to Restrict Interposition*, in *American Journal of International Law*, 1927, p. 301.

¹⁶ Ténékidès, *Considérations*, cit., p. 275.

¹⁷ Cf. Lipstein, *The Place of the Calvo Clause in International Law*, in *British Yearbook of International Law*, 1945, p. 145.

Thus article 5 of the General Claims Convention of 1925 between the United States and Mexico provided that "no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the local remedies must be exhausted as a condition precedent to the validity or allowance of any claim." The Convention between Great Britain and Mexico of 1928 contained the similar provision (article 6).

The rule of local remedies is a *jus dispositum* which is applied in the interests of a local State, being susceptible to contracting out in virtue of specific agreement between the parties.¹⁸ Especially, it should be noted that a *considérant* of the above provisions stated that "the High Contracting Parties, being desirous of effecting an equitable settlement of the claims of their respective citizens thereby affording the just and adequate compensation for their losses or damages"

It apparently follows that the claims should not be rejected on the score of non-exhaustion of local remedies prior to the presentation of claims before the Commissions. Nevertheless, the contrary solution of the issue was adopted by the Commissions. It was simply because the proper application of the above negative provisions was limited to claims "rightfully" presented by the claimant to its own Government.

Thus in the *Dredging Co.* case, the Commission held that "if under the terms of Article 1 the private claimant cannot rightfully present its claim to its Government and the claim therefore cannot become cognizable here, Article V does not apply to it."¹⁹ In the *Union Railway* case, the Commission shared this view on the same basis.²⁰

However, it would seem that from the more basic angle, criticism may be directed against the above conclusion and propositions concomitantly formulated.

In the first place, it is stated that the non-application of local remedies rule provided in the Convention does not per se "entitle either Government to set aside an express valid contract between one of its citizens and the other Government" (*Dredging Co.* case).²¹

But as a preliminary point, it may be argued that even an express valid contract constitutes *res inter alios acta* to the claimant's Government, and as such, is not obligatory upon it. Whether the contract may be set aside or not, the common rule between the Governments is first and foremost afforded by the Convention to which they are the parties.²²

Secondly, it is asserted that "the Convention does not override the Calvo clause" (*Union Railway* case).²³

Article 1 of the Convention does not contain any explicit reference to the Calvo clause.

¹⁸ Cf. Cavaré, *Le droit international public positif*, t. 11, 1962, p. 368.

¹⁹ *Report of I.A.A.*, Vol. IV, p. 32.

²⁰ *Report of I.A.A.*, Vol. V, p. 121. In this case, the majority considered that one or more of the acts or omissions which might in themselves constitute a breach of international law would not justify the ignoring of article 11 (the Calvo clause)—exactly on the ground that "the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question" (*Ibid.*, p. 122). British Commissioner strongly objected to this view (*Ibid.*, p. 127). The writer is also of the opinion that according to the majority view, though the local remedies rule is *ex professo* dispensed with, the Calvo clause appears as a questionable substitute even in case where a claim is based on an alleged violation of international legal rule. Thus the non-application of local remedies rule is rendered almost redundant and simultaneously the scope of the Calvo clause is unlawfully enlarged.

²¹ *Report of I.A.A.*, Vol. IV, p. 32.

²² The umpire held in the *Martini* case that "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." *Report of I.A.A.*, Vol. X, p. 663.

²³ *Report of I.A.A.*, Vol. V, p. 123.

Accordingly, it may be held that the Calvo clause cannot prevail over the convention between the Governments, unless the tacit interpolation of the Calvo clause into article 1 of the convention warrants its application in the above sense. For, as previously declared by the Permanent Court, "should a proper application of the Convention be in conflict with some local law, the latter would not prevail as against the Convention."²⁴

Thirdly, it is submitted that through a stipulation in a contract between the Government and a private individual could be overruled by an agreement between the Governments, it would have to be done in express terms (Opinion of British Commissioner in the Union Railway case).²⁵

But this opinion may be refuted on the ground that such express additions are not necessary in virtue of *lex posterior* principle correlated with the global terms of the convention ("no claim shall be disallowed or rejected by the Commission . . .").²⁶

Viewed in this light, it may be said without exaggeration that "the Commission bounded over the hurdle with admirable nonchalance."²⁷ In any case, given the Commission's finding, it follows that the Calvo clause is not "merely a superfluous restatement of the local remedies rule."²⁸ Put it another way, "it serves to overcome a general waiver of the requirement to exhaust local remedies contained in the compromis."²⁹ At this point, however, we are not confronted with *cadit quaestio*. It should be further pursued on what ground such an overcoming effect of the Calvo clause may be justified as a matter of conventional or customary international law.

5. The writer shall now turn to the third point whether the manifested will or conduct of a private person may be endowed with any international pertinency in the conventional system which is established for the settlement of particular claims.

Having answered the question in the affirmative, the Commission made the following statements:

First, it is axiomatic that "the Commission is bound to consider the object for which it was created, the task it has to fulfil and the treaty upon which its existence is based" (Union Railway case).³⁰

Secondly, it is procedurally required that a private person should be able to "rightfully" present the claims to its own Government for espousal on the international level (Dredging Co. case).³¹

Thirdly, the above claim is essentially or predominantly of a private character. "The award is claimed *on behalf* of a person or a corporation and in accordance therewith, the Rules of Procedure prescribe that the Memorial shall be signed by the claimant or his attorney

²⁴ Greco-Bulgarian Communities case. *P.C.I.J., Series B*, No. 17, p. 32.

²⁵ *Report of I.A.A.*, Vol. V, p. 124.

²⁶ Ténékidès makes a point that "... la jurisprudence internationale se prononce résolument en faveur de la primauté de la clause compromissoire du traité, susceptible de prévaloir sur la clause arbitrale antérieure du contrat." *Considérations*, cit., p. 282.

²⁷ Feller, *Some Observations on the Calvo Clause*, in *American Journal of International Law*, 1933, p. 463.

²⁸ Jiménez de Aréchaga, op. cit., p. 592.

²⁹ Shea, *The Calvo Clause*, 1955, p. 260.

³⁰ *Report of I.A.A.*, Vol. V, p. 120.

³¹ *Report of I.A.A.*, Vol. IV, p. 32.

or otherwise clearly show that the alien who suffered the damage agrees to his Government's acting in his behalf. For this reason the action of the Government cannot be regarded as an action taken independently of the wishes or the interests of the claimant. It is an action the initiative of which rests with the claimant" (Union Railway case).³²

Fourthly, the obligation incumbent upon a private person in virtue of the Calvo clause is "the *conditio sine qua non* of the contract, which the Mexican Government would otherwise not have signed." Hence, "if the Commission were to act as if article 11 had never been written, the consequence would be that one stipulation, now perhaps onerous to the claimant would cease to exist and all the other provisions of the contract, including those from which claimant has derived or may still derive profit, would remain in force" (Union Railway case).³³

Lastly, the claimant would seem to have behaved in bad faith. "The claimant, after having solemnly promised in writing that it would not ignore the local laws, remedies, and authorities, behaved from the very beginning as if article 18 of the contract had no existence in fact. It used the article to procure the contract, but this was the extent of its use. It never sought any redress by application to the local authorities and remedies which article 18 liberally granted it and which, according to Mexican law, are available to it, even against the Government, without restrictions, both in matter of civil and public law. It has gone so far as to declare itself freed from its contract obligations by its *ipse dixit* instead of having resort to the local tribunals to construe its contract and its rights thereunder . . ." (Dredging Co. case).³⁴

One view summarizes the statement of law given by the Commission upon the crux of the matter in the following terms: "The Commission held that the Clause was binding on the individual in that it precluded him from presenting to his government any claim connected with the contract, but not binding on his state in that it would not prevent his government from espousing a claim on the violation of international law."³⁵

However, doubt is cast on this summarized statement: "How does a government come to make a claim unless the individual has first complained to it? And if the private contractor does present a claim and thereby breaks the contract what relevance has this to the validity of the claim which the government then takes up? Apparently none."³⁶

Though doubt is expressed so as to turn the issue back to the starting point, the Commission, as seen above, in having discharged its attributed function within the framework of the convention, recognized that the manifested will or conduct of a private person had a decisive effect to preclude the Government's espousal of the claim. Certainly, the question still remains to be open why the Calvo clause not only binds a private person, but has a reflexive effect on the inter-governmental plane.

To recapitulate the Commission's reasoning as the writer sees it, it is composed of the

³² *Report of I.A.A.*, Vol. V, p. 120.

³³ *Ibid.*, pp. 119, 120.

³⁴ *Report of I.A.A.*, Vol. IV, p. 31.

³⁵ Shea, *op. cit.*, pp. 217-218. Another version is given as follows: "the individual can renounce the right to invoke diplomatic protection in so far as he himself is concerned (except in the case of a denial of justice) but this renunciation will not have any effect on his government which will always have the right to intervene if it deems it to its best interests to do so." Summers, *The Calvo Clause*, in *Virginia Law Review*, Vol. 19 (1932-33), pp. 472-473.

³⁶ O'Connell, *op. cit.*, p. 1065.

propositions: (1) it concerns a claim which is essentially of a private character; (2) the principle of good faith should be respected by any court of law; and (3) the non-application of local remedies rule does not automatically heal the *vitium* adherent to a private claim. Now the problem is how to articulate these propositions to frame ad hoc rule operating in the special domain of diplomatic protection.

6. Rules of general international law create rights and obligations belonging to States as subjects of law, but they contain the rules which have been formed in the interests of private individuals. The international rules concerning the treatment of foreign nationals represent this category of rules. These international rules do not protect private individuals as such, but as individuals bearing a certain relationship (that is, a bond of nationality) with a State. The institution of diplomatic protection is the operational scheme to ensure the mutual respect of these rules.

In considering the status of the Calvo clause from the angle of general international law, it is necessary to touch upon some "general rules of diplomatic protection."³⁷

It is first of all emphasized that "a State asserts its own rights" in the exercise of diplomatic protection. It is not the interests of private individuals, but only those of States which are protected as legal rights in international law. In order to support this position, the classical dictum of the Permanent Court in the *Mavrommatis* case is invariably cited: "By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights—its rights to ensure, in the person of its subjects, respect for the rules of international law."³⁸ Thus, a private individual must count on his State's invocation of its own right for the enjoyment of interests to be derived from the diplomatic protection. In its turn, the invocation of State right stands on the assumption that the interests of a private individual are assimilated to those of a State, and a State is injured through the damage caused to its nationals.

It is equally urged that a State is entirely unfettered in the exercise of diplomatic protection. A State is free not to exercise diplomatic protection even if its national requests it. Conversely, a State is free to exercise diplomatic protection even if its national does not request it. The International Court stated in the *Barcelona Traction* case: "The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease. It retains in this respect a discretionary power the exercise of which may be determined by considerations of a political or other nature, unrelated to the particular case. Since the claim of the State is not identical with that of the individual or corporate person whose cause is espoused, the State enjoys complete freedom of action."³⁹

As a corollary of these general rules, it is affirmed that the undivided whole of interests to be derived from the exercise of diplomatic protection in the form of a State's asserting its own right, is placed under the sovereign control of that State, which extends to govern the actions of its nationals. Hence a private person is not free to dispose of the benefit of diplomatic protection which may be liberally bestowed by the State of his nationality. Viewed in this light, a private individual is posited merely as a *de facto* beneficiary within

³⁷ *Barcelona Traction* case, *I.C.J. Reports* 1970, p. 33.

³⁸ *P.C.I.J., Series A*, No. 2, p. 12.

³⁹ *I.C.J. Reports* 1970, p. 44.

the operational scheme of diplomatic protection.⁴⁰

The absorption of private interests in those of a State, subordinating the former to the latter, the absolute discretion of a State in the exercise of diplomatic protection and the sovereign control of protective interests of its nationals, all of these would seem to represent a vestige of the historical period when the individual-national was deemed as mere "appurtenance" of a State. However, having developed a pronounced tendency of "humanization" of international law, it is clearly stated that the actual conduct of diplomatic protection has been increasingly influenced by that tendency, thought no attended with the transformation of normative contents, more and more weight having been attached to the protection of private interests as such.⁴¹

It would be useful to make some additional observations on a viable matrix of the contemporary practice sustaining the "individualization" of diplomatic protection to eliminate out-of-date elements therefrom.

In the first place, it is necessary to discard any preconceived idea that the interests of States are solely taken into account for the purpose of international protection. The international rules for the protection of human rights strikingly illustrate this point. As stated above, the international rules concerning the treatment of foreign nationals have been constituted also in the interests of private individuals. Diplomatic protection is an international proceeding to ensure mutual respect of these international rules. A State, as formal subject of law, acts on behalf of its national and asserts its own right "to ensure, in the person of its subjects, respect for the rules of international law." Within the machinery a private individual may be regarded as "material subject" of these rules in the sense that he is a holder of material interests which are protected by the international rules.⁴² Such a characterization may be objected as problematical in that it does not match with a discretionary power of a State. But in the opinion of the writer, the theory that a State has been injured through injury to its national is more problematical.⁴³ The theory may be balefully invoked so as to warrant a swelled right of intervention being enforced on the part of a creditor State vis-à-vis a debtor State on the mere ground that it has been injured independent of the concrete position of a private claimant. This is the very situation which the Calvo clause intends to forestall.

Secondly, given a discretionary power of a State in the exercise of diplomatic protection, it does not necessarily mean that the manifested will or conduct of a private person has not any international relevancy on the plane of diplomatic protection.

For instance, when a private individual was wronged by another State, a State of his nationality would have the right to claim reparation at that moment. But if the individual

⁴⁰ Cf. Quadri, *Diritto internazionale pubblico*, 1968, p. 403.

⁴¹ See Cassese, *Individuo (diritto internazionale)*, in *Enciclopedia del diritto*, XXI, p. 190.

⁴² On the concept of "soggetti in sensu materiale", i.e., in the sense that international law can consider and considers the individuals as centres of interests susceptible and deserving of international protection, see Sperduti, *Sulla soggettività internazionale*, in *Rivista di diritto internazionale*, 1972, pp. 273-274.

⁴³ Cf. Separate opinion of Judge Gros in the Barcelona Traction case, *I.C.J. Reports 1970*, p. 269. The Judge points out that in the present state of economic affairs where "the separation of the interests of the individual from that of the State no longer corresponds to reality", the formula that in defending its nationals a State is asserting its own rights at the international level "has acquired a reality which goes further than the procedural justification of its origin." The reality may be so, but the separation of private interests from those of a State will be the major premise to lessen something odious associated with the intervention on the part of a sponsoring Government, which is possibly coloured by its neo-colonialism.

altered his nationality thereafter, the right to claim reparation of the State would cease to exist. Setting aside the question on what basis a private individual is capable to deprive his former State of the right to pursue the international responsibility, it is certain that the actually injured person can relinquish the benefit of protection attached to his nationality, bringing about such an international result.⁴⁴

Another example may be adduced. According to the authoritative interpretation, the non-utilisation of certain means of procedure can be accepted as constituting a gap in the exhaustion of local remedies if the use of these means of procedure were essential to establish the claimant's case before the municipal courts.⁴⁵ Now if he does not take these essential means of procedure at his own risk and entails a hopeless result even appealing to a higher court, a State of his nationality will be precluded to sponsor a diplomatic claim on the score of a denial of justice.

Lastly, it should be recalled that the International Court gave due weight in the well-known case to the lack of genuineness in the act of naturalization of a person whose cause was taken up on the plane of international jurisdiction. The Court stated that "naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Lichtenstein, as it was to enable him to substitute for his status as a national of a belligerent State that of a national of a neutral State, in the sole aim of thus coming within the protection of Lichtenstein."⁴⁶

Hence a discretionary power of a State in the exercise of diplomatic protection does not exclude the possibility that waiver, laches or lack of sincerity on the part of a private individual may be taken into consideration as an internationally relevant fact.

Thirdly, it is contended that a private individual cannot relinquish the benefit of diplomatic protection *ad libitum*. For that matter, it is necessary to examine how the international rules concerning the treatment of foreign nationals contemplate the interests of a private individual as the object of legal protection.

Certainly, there are the international rules which directly specify the private interests to be protected, regardless of the attitude of the municipal legal order. These rules concern the fundamental interests such as those in life or liberty. But the case is different with "purely economic interests." As to economic interests, it must be first determined what kind of interests and in what manner these interests should be legally protected. International law refers this matter to the attitude of the municipal legal order to be liberally taken. However, international law requires the municipal order to provide and afford the judicial protection within its province, once the economic interests of a foreigner have been constituted as legal rights in that order.⁴⁷ Therefore, if a local State does not afford the adequate judicial protection to the rights of a foreign national, a State of his nationality may diplomatically or otherwise intervene, irrespective of the intention of the injured person. On the other hand, if a foreign national wishes to seek the legal protection for his rights within the province of local order and to that extent, not to appeal to his Government for diplomatic interposition or to dispose of his own rights concerning economic interests,

⁴⁴ Cf. Balladore Pallieri, *La determinazione internazionale della cittadinanza ai fini dell'esercizio della protezione diplomatica*, in *Scritti di diritto internazionale in onore di Tomaso Perassi*, Vol. 1, 1957, p. 124.

⁴⁵ Ambatielos claims, *Reports of I.A.A.*, Vol. XII, p. 120.

⁴⁶ *I.C.J. Reports 1955*, p. 26.

⁴⁷ See Judge Morelli's analytical remarks in the Barcelona Traction case, *I.C.J. Reports 1910*, p. 231.

it would not affect the position of each State qua custodian of international law. It is a matter of individual choice.

7. The writer shall turn again to the question of international validity of the Calvo clause. As already seen, the Claims Commission admitted that the Calvo clause operated to restrict the diplomatic espousal of a private claim falling within its scope, having declared that the claim as presented was not within its jurisdiction. The writer is of the opinion that the above conclusion should be sustained for the following reasons.

In the first place, the preclusive reservation embodied in the Calvo clause is limited *ratione materiae* to disputes concerning the matters pertaining to contracts. As indicated by the Permanent Court in the Panevezys-Saldutiskis Railway case, "in principle, the property rights and the contractual rights of individuals depend in every State on municipal law and fall therefore more particularly within the jurisdiction of municipal tribunals."⁴⁸ Consequently, it stands to reason that the dispute concerning the contractual rights should be referred to the settlement of municipal tribunals, in so far as it does not concern "the right of the State to have its nationals enjoy a certain treatment guaranteed by general international law."⁴⁹ For all that, it may be asserted that the dispute is transformed to fall within the international jurisdiction simply because the Government sponsors the claim of a private person, exercising diplomatic protection in his behalf. But this begs the question, since it implicitly takes for granted that the exercise of diplomatic protection is justified in such a case.⁵⁰

Secondly, the claim as contemplated by the Calvo clause, one of the constituent elements of the dispute, is not by its nature that of a State. It is the claim of a private person which is destined for adjustment within the province of local law and tribunals. Even if the Government sponsors such a claim and presents it before the international forum, it does not follow that the claim in question ceases to be of a private nature. The sponsoring Government is not a party to the contract, nor a party of the dispute arising therefrom. In such a case, therefore, it is very doubtful whether the Government can act independently of the manifested will of a private person as a holder of its own "*Verfügungsrecht*."⁵¹ Will the international position be affected that a State may exercise diplomatic protection even if its national does not request it? Not only it begs the point, but the renunciation of a private individual with regard to the specified category of claims does not conflict with the major principle of local redress, let alone with the norm of *jus cogens*.

Lastly, it remains for consideration whether the agreed non-application of local remedies rule can have the effect to make the act of espousal by the Government disregard the free choice of an individual entertainable at the international level. The writer is of the opinion that the real point at issue consists in this. As mentioned above, the Commission answered the question in the negative.

According to the view of the Commission, the non-application of local redress rule

⁴⁸ *P.C.I.J., Series A / B*, No. 76, p. 16.

⁴⁹ *I.C.J. Reports 1970*, p. 46.

⁵⁰ Cf. Separate opinion of Judge Badawi in the Norwegian Loans case, *I.C.J. Reports 1957*, p. 32.

⁵¹ Cf. Verdross, *Völkerrecht*, 1959, p. 330; Salvioli, *L'individuo in diritto internazionale*, in *Rivista di diritto internazionale*, 1956, pp. 10-11.

becomes valid only in case the claim is rightfully presented by a private individual to his Government. If the term "rightfully" ostensibly signifies that a private individual ought to have resorted to the municipal court in any case, the statement of the Commission is reduced to absurdity. The non-application of local remedies rule applies only to the case where a private individual has exhausted the local remedies.

According to one opinion, it is suggested that "the word 'rightfully' is here used with a moral rather than a legal connotation." And it is further submitted that "a moral argument may have considerable force in view of the provision that the decision is to be 'in accordance with the principle of international law, justice and equity', though the Commission does not clearly place its holding on such moral grounds."⁵²

The present writer shares this view. In reality, the Commission indicated that "the record before the Commission strongly suggests that the claimant used article 18 to procure this contract without any intention of even observing its provisions."⁵³ In the circumstances, it should be seriously questioned whether the non-application of local remedies rule purports to condone such an evasive attempt, releasing a private claimant from obligation of conduct in good faith. As declared by the International Court, "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."⁵⁴ Furthermore, "whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable."⁵⁵ Accordingly, even if the contract is *res inter alios acta* to the claimant Government, the tribunal would be entitled to apply the principle of good faith as the general principle of law restraining the Government's conduct qua protector of its nationals. What matters here is the actual demeanour of a private claimant rather than the contract itself.

On the other hand, is the sponsoring Government in a position to plead that the superiority of a treaty stipulation manifests an automatic effect to remove the defects adherent to the private claim, thus virtually dispelling the relevance of "rightfulness"? In this connection, it should be observed that the Calvo clause, of which effect international tribunal can take cognizance, is a special application of the general rule of local redress. It applies specifically to issues arising out of the contract, being addressed to a private party. Moreover, the objection raised on the non-exhaustion of local remedies in international litigation usually takes the form of "*fin de non-recevoir*," assuming that the responsible State has committed an international wrong to a foreign national, whereas the Calvo clause may be invoked to bring forth the objection of incompetence, because it concerns essentially a domestic issue which should be submitted to the local courts.⁵⁶ Since the Calvo clause, at least in the eyes of international tribunal, is a special rule vis-à-vis a general principle, it may be interpreted that the non-application of the latter principle does not necessarily oust the former anterior rule: *lex posterior generalis non derogant priori speciali*.

Further, the local remedies rule stands in favour of the State which responsibility for damage suffered by a foreign national is sought to be established. It follows that the

⁵² Feller, *Some Observations*, cit. n. 9. at p. 463.

⁵³ *Report of I.A.A.*, Vol. IV, p. 32.

⁵⁴ Nuclear Tests case, *I.C.J. Reports 1973*, p. 268.

⁵⁵ North Sea Continental Shelf cases, *I.C.J. Report 1969*, p. 48.

⁵⁶ *Per contra*, it may be reasonably doubted whether the clause can cover an international issue, e. g., concerning the obligation of a restored government for the acts or contracts of a usurping government. Cf. Tinoco Arbitration, *American Journal of International Law*, 1924, p. 159.

non-application of local remedies rule entails abandonment of sovereign rights to the disadvantage of the said State. On that score, abandonment cannot be presumed and the effect of non-application should be interpreted restrictively. As cogently remarked, "when one of the parties to an agreement is a Government, responsible to a whole body politic, and the other party is a private association operating within the territorial domain of such Government, the 'sovereignty,' that is, the comprehensive responsibility, of the one party is but an additional factor, and a factor from the beginning with the expectation of the parties suggesting restraint upon the inference of unexpressed obligations."⁵⁷ The sovereignty is a qualified factor in this sense functioning externally as well as internally. If such should be the case with the Calvo clause, the same is true of its external aspect with reference to the non-application of local remedies rule. When the responsible Government agreed to dispense with the local remedies rule "being desirous of effecting an equitable settlement of the claims," it cannot be inferred that the Government was going so far as to yield to any fraudulent utilization of the Calvo clause as a means of unilateral gains. Accordingly, it should be concluded that the express consent of that Government is required for international tribunal to set aside the Calvo clause.

*

While the present writer concurs in the conclusion reached by the Commissions, a few remarks are called for as a matter of general law.

When the parties agree to clothe international tribunal with jurisdiction to adjudicate upon the private claims, international validity of the Calvo clause is raised as a question of jurisdiction. International tribunal is entitled to take notice of the Calvo clause as a specific application of the local remedies rule which reflects a legitimate caution of a local State. The manifested will and conduct of a private person may be reckoned with in a particular case, which should not be condoned, if patently tainted with bad faith, by any court of law. That being the case, even the agreed non-application of general rule cannot be automatically invoked to neutralize a special machinery of settling the private claims on the inferred consent of the defendant Government, thus soliciting international tribunal to connive the fraudulent purpose to be sponsored through the medium of diplomatic interposition. The other side of the shield is that the plaintiff Government in its turn may raise another aspect of the jurisdictional issue, if there is every appearance that the plea of jurisdiction will prove to be a form of manipulating the Calvo clause as a means of de facto spoliation. This might be perhaps the case "when it had solid reason to believe that the courts of the grantor were corrupt, or exposed to political interference likely to be exercised, or possessed of insufficient jurisdiction."⁵⁸ Accordingly, ad hoc application of the Calvo clause can be in no wise mechanical regardless of the actual circumstances: it is the question to be decided in each particular case.

⁵⁷ Sultan, *The Special Function of the Principle of Restrictive Interpretation*, in *Mélanges offerts à Juraj Andrassy*, 1968, p. 299.

⁵⁸ Hyde, *Concerning Attempts*, cit., p. 301.

8. It should be further inquired whether the Calvo clause may be invoked to preclude totally the diplomatic interposition of the Government with regard to the contractual issues. If answered in the affirmative, the Calvo clause, of which construction in that case will need a substantive basis to be given by the interpretation of the international rules on the treatment of foreign nationals, will manifest far-reaching effects, not merely supplemental to the local remedies rule.

In fact, it is urged that under these rules, a local State is only required to treat its nationals and foreigners on a footing of equality. The principle of equal treatment between nationals and foreigners is asserted to be the inspirational basis of the Calvo clause. The Commission stated that "by inserting in the concession an article by which the foreign concern put itself on the same footing as national corporations, by which it undertook to consider itself as Mexican, to submit to the Mexican courts, and not to appeal to diplomatic intervention," the proviso having been added that "the claimant has not, by subscribing to it, waived its undoubted right as a British corporation to apply to its Government for protection against international delinquency" (Union Railway case).⁵⁹ If the interpretation is adopted that a local State is entitled to behave as the sole and final judge on the treatment to be attributed to foreign nationals so as to nullify the above proviso in effect, the matters as contemplated by the Calvo clause will come wholly within the domestic jurisdiction of a local State.⁶⁰ According to the orthodox view, if a foreign national is prevented to bring the case before the municipal court to defend the rights attributed to him, the State must be responsible for a denial of justice in international law. Nonetheless, it may be asserted that the Government cannot diplomatically intervene, in so far as a foreigner is assimilated to its national for the purpose of application of the Calvo clause. A State cannot be internationally guilty of a denial of justice vis-à-vis its national.

In the International Law Commission of the United Nations, the Special Rapporteur (Amador) submitted the following view: "It is thus explicitly admitted that if the waiver of diplomatic protection is absolute, no international claim can be entertained in the case of denial of justice, that connected with the interpretation, application or execution of the contract From the strictly juridical standpoint, the Calvo Clause does not even constitute an exception to the principle establishing international responsibility in cases of denial of justice. An alien who agrees not to seek the diplomatic protection of the State of his nationality and to rely on local remedies in seeking satisfaction of any claim he may have against the host State places himself, in fact and in law, on exactly the same footing as a national. Thus the clause creates a juridical situation in which, technically, there can be no problem of denial of justice of interest to international law."⁶¹

⁵⁹ *Report of I.A.A.*, Vol. V, pp. 119, 121.

⁶⁰ Freeman points out: "What he (Calvo) deplored was their practice of seeking special privileges and favors for foreign subjects which the local law did not even provide for citizens. The plea, in other words, was for recognition of the general principle of submission of foreign subjects to the local law—a thoroughly reasonable demand. But it did not go to the extent of maintaining that equality with nationals under that law was in itself a bar to any international inquiry." *Recent Aspects of the Calvo Clause and the Challenge to International Law*, in *American Journal of International Law*, 1946, pp. 132-133. On the other hand, Sir Fitzmaurice, referring to the recent claim that the right of diplomatic protection and of interposition in respect of the persons and interests of their nationals abroad should be abrogated—the "new Calvo-ism"—indicates that it is "essentially an attempt to generalize into a universally applicable doctrine the principle of the 'Calvo clause'" *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, in *Livre du Centenaire 1873-1973*, 1973, p. 246.

⁶¹ *Yearbook of the International Law Commission*, 1958, Vol. 11, p. 59.

For a number of reasons such a statement of law is open to doubt.

First, it is patent that the creation of such a juridical situation is not compatible with the autonomous right of interference undoubtedly attributed to States on the basis of international law. The contrary view does not seem to reflect the *opinio juris communis* of the various Governments such as evidenced by their replies to a committee of the League of Nations in the conference for codification of international law (1930). For instance, while the British Government replied to accept as "good law" the decision of the *Dredging Co.* case, it non the less stressed on the dictum of cardinal significance contained in the decision 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 in the event of any violation of the rules or principles of international law is void."⁶² On the other hand, the contemporary position is confirmed by the International Court as it was before that "within the limits prescribed by international law, a State may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, for it is its own right that the State is asserting."⁶³

Secondly, just "within the limits prescribed by international law" a State may place a foreigner on the same footing with its national. But it does not follow that a juridical situation in which a denial of justice or other international delinquency committed to his damage is out of question, may be brought about one-sidedly. A declaration of a local State to treat a foreigner as its national for the purpose of the Calvo clause cannot destroy the subsistent genuine link of his foreign nationality. Consequently, the pretended situation is not entitled to be respected by a State of nationality.

Thirdly, a denial of justice is the act infringing international obligation incumbent upon a local State to provide the judicial protection to the rights of foreign nationals.⁶⁴ The Calvo clause may be invoked to foreclose any unrighteous circumvention on the part of a private claimant and its diplomatic support by the Government. Conversely, a local State must be estopped to use it as a pretext to evade international obligations. The International Court observed in the *Barcelona Traction* case: "It has been argued on one side that unlawful acts had been committed by the Spanish judicial and administrative authorities (i.e., the alleged denial of justice), and that as a result of those acts Spain has incurred international responsibility. On the other side, it has been argued that the activities of *Barcelona Traction* and its subsidiaries were conducted in violation of Spanish law and caused damage to the Spanish economy. If both contentions were substantiated, that of the latter would in no way provide justification in respect of the former."⁶⁵

Fourthly, it is contended that "a further implication of this rule of law on the Calvo clause might well be that international tribunals, in the face of a Calvo clause commitment,

⁶² The replies of the Governments are succinctly reproduced in *Report of I.A.A.*, Vol. IV, pp. 736-740 (Dissenting opinion of Nielsen in *International Fisheries Co.* case).

⁶³ *I.C.J. Report 1970*, p. 44.

⁶⁴ The expression of a denial of justice is ordinarily understood as any interposed hindrance to an alien who intends to assert his rights in the judicial form admitted by the local law. A State commits an international wrong in cases where it, through the medium of its organs, prevents an alien from access to the court, protracts artificially the development of proceedings so as not to reach any decision or pronounces the sentence inspired with evident hostility against an alien. See Balladore Pallieri, *Diritto internazionale pubblico*, 1962, p. 393.

⁶⁵ *I.C.J. Reports 1970*, p. 51.

will require such a denial of justice to be more patent and flagrant than is normally the case.”⁶⁶ On what basis “greater evidence” of a denial or undue delay of justice can be required by dint of the Calvo clause? There is no gainsaying that any alleged denial or delay of justice should be established on a sufficient and convincing evidence, since it must be presumed that a local system of judicial protection is to function in a normal manner. The point of the matter is not here. As a matter of principle, if a local State cannot use the Calvo clause as a defence to the charge that it has violated international law, it should be equally rejected that it can be used as a means of procuring the mitigation of international obligation concerning the judicial protection.

Finally, it must be borne in mind that a denial of justice is a matter of grave consequence for a human being. The Judge of the Permanent Court (Huber) as Reporter, declared in the British Claims in the Spanish Zone of Morocco: “This right of intervention has been claimed by all States: only its limits are open to discussion. Its denial would lead to inadmissible consequences: international law would be helpless in the face of injustices amounting to the negation of human personality; for every denial of justice is traceable to that.”⁶⁷ The International Court also affirmed that “with regard more particularly to human rights . . . it should be noted that these also include protection against denial of justice.”⁶⁸ Human rights are rights universally guaranteed to human beings irrespective of a bond of nationality. If the Calvo clause purports to go to extremes denying the international protection against denial of justice, it should be regarded as null and void. It is not a pertinent consideration that the clause is limited to a specific category of matters, for it conflicts with the prevailing “*ordre public international*.”⁶⁹

⁶⁶ Shea, *op. cit.*, p. 265.

⁶⁷ *Report of I.A.A.*, Vol. II, p. 641; Briggs, *The Law of Nations: Cases, Documents, and Notes*, 1952, p. 604.

⁶⁸ *I.C.J. Reports 1970*, p. 47.

⁶⁹ The body of peremptory norms which invalidate any conflicting norm, customary or conventional, may be called as “*ordre public international*” in the sense of public international law. Cf. Quadri, *Diritto internazionale pubblico*, p. 109.

p. s. Reference shall be made to the view of the former President of the International Court that “a Calvo clause must be observed on the basis of the principle of good faith.” Jiménez de Aréchaga, *State Responsibility for the Nationalization of Foreign Owned Property*, in the New York University: *Journal of International Law and Politics*, Vol. 11, 1978, which the writer could see at the stage of proofreading of this article.