REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

The Interoceanic Railway of Mexico (Acapulco to Veracruz) (Ltd.), and the Mexican Eastern Railway Company (Ltd.), and the Mexican Southern Railway (Ltd.) (Great Britain) v. United Mexican States

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NATIONS UNIES - UNITED NATIONS

THE INTEROCEANIC RAILWAY OF MEXICO (Acapulco to Veracruz) (LIMITED), AND THE MEXICAN EASTERN RAILWAY COMPANY (LIMITED), AND THE MEXICAN SOUTHERN RAILWAY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 53, June 18, 1931, dissenting opinion (dissenting in part) by British Commissioner, June 18, 1931. Pages 118-135. See also decision No. 22.)

CORPORATION, PROOF OF NATIONALITY.—ALLOTMENT. *Compromis* does not require that, in order to claim, British corporation must show that British subjects have or have had an interest exceeding fifty per cent of the total capital, or that an allotment be produced.

DENIAL OF JUSTICE. Acts of non-judicial authorities, as well as judicial, may result in a denial of justice at international law.

CALVO CLAUSE. When a denial of justice is established the tribunal will have jurisdiction over the claim despite that claimant may have agreed to a Calvo Clause. Circumstances of case examined and *held* not to establish that claimants exhausted all local remedies in vain or that a denial, or undue delay, of justice existed.

Cross-references: Annual Digest, 1931-1932, pp. 199, 265.

Comments: Clyde Eagleton, "*L'épuisement de recours internes et le déni de justice, d'après certaines décisions récentes*", Rev. de Droit Int. L. C., 3d ser., Vol. 16, 1935, p. 504 at 520; Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions", Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98 at 103; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 237; Lionel Summers, "*La clause Calvo: tendances nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 231.

1. According to the Memorial filed in claim No. 79, the Interoceanic Railway of Mexico (Acapulco to Veracruz) is a British Corporation, registered with limited liability on the 30th day of April, 1888, under the British Companies Acts, for the purpose of *(inter alia)* constructing or acquiring, equipping, maintaining and working railways in Mexico, and its registered office is situated in England.

In the year 1903 the Interoceanic Company entered into an arrangement with the Mexican Eastern Railway Company, Limited, whereby the Interoceanic Company agreed to take the Mexican Eastern Railway and undertaking on lease from that Company, for a period which has not yet expired.

The Mexican Eastern Railway Company, Limited, is also a British Corporation, and was registered with limited liability on the 5th day of December, 1901, under the British Companies Acts, for the purpose *(inter alia)* of constructing or acquiring, equipping, maintaining and working railways in Mexico. Its registered office is situated in England.

All the shares of the Mexican Eastern Railway Company, Limited, are owned by the Interoceanic Company.

In the year 1909 the Interoceanic Company, at the request of the Mexican Government, entered into an arrangement with the Mexican Southern Railway, Limited, whereby the Interoceanic Company agreed to take the Mexican

Southern Railway on lease from that Company for a period which has not yet expired.

The Mexican Southern Railway, Limited, is also a British Corporation, and was registered with limited liability on the 9th May, 1889, under the British Companies Acts for the purpose *(inter alia)* of constructing or acquiring and equipping, maintaining and working railways in Mexico. Its registered office is situated in England.

In the month of November 1903 an agreement was entered into between the Interoceanic Company and the National Railroad Company of Mexico (since merged in the National Railways of Mexico) under which the National Company undertook the management of the operation of the system of railway lines of the Interoceanic Company. Such agreement was subsequently amended on the 17th day of December, 1903.

It was part of the terms of the Management Agreement that:

(a) The National Company in undertaking such operation should act solely as the agent and manager of the Interoceanic Company.

(b) The earnings of the operated lines of the Interoceanic Company should be kept separate from other earnings; that all available net earnings of such lines should be paid by the National Company to the Interoceanic Company in London, and that all moneys spent either in Mexico or in England should be allocated as between capital and revenue as might be determined by the Interoceanic Company.

(c) The powers of the Interoceanic Company were to continue as theretofore to be exercised by its own Board of Directors.

(d) The Management Agreement should continue for one year from the 1st January, 1904, and thereafter until six months' notice in writing to terminate should be given by either party, but terminable forthwith in certain events.

2. The claims are for—

(1) Indemnification for loss of earnings of the Claimants for the period from the 15th August, 1914, to the 31st May, 1920, inclusive, due to the acts of General Venustiano Carranza and his forces, which resulted in depriving the Claimants of their railway undertakings and material and the earnings in respect thereof during that period.

(2) Compensation for losses of and damages to rolling-stock and other property of the Claimants, caused during such period by reason of such acts.

(3) Compensation for cash stores and other assets of the Claimants, requisitioned during such period as the results of those acts.

(4) Compensation for damage caused by the destruction in April 1914 of the San Francisco Bridge, near Veracruz, and the railway track between that bridge and Veracruz, belonging to the Claimants' railway undertakings, due to the acts of the forces of General Victoriano Huerta.

(5) Compensation for loss of earnings during the period from April 1914 to the 14th day of August, 1914, by reason of the destruction of the said San Francisco Bridge and track, and due to the acts of the forces of General Victoriano Huerta.

(6) Compensation for other losses and damages caused to the Claimants by revolutionary forces and the Mexican Government between the 20th November, 1910, and the 31st May, 1920.

(7) Interest at the rate of 6 per cent per annum, compounded half-yearly upon the amounts so payable by way of indemnification and compensation from the 31st May, 1920, down to the date of actual payment of such indemnification and compensation.

3. The Memorial further sets out that the claimants have for years endeavoured, through the intermediary of the Interoceanic Company, but without any success whatever, to obtain a settlement by the Mexican Government of their claims against the Government arising out of such seizure and occupation.

A negotiation has gone on from the end of 1921 until the end of 1927. The claimants consider the conditions imposed by the Mexican Minister of Finance as unacceptable and they conclude that it is impossible to come to an arrangement upon an equitable basis.

The British Government claim on behalf of the Interoceanic Railway of Mexico (Acapulco to Veracruz), Limited, the Mexican Eastern Railway Company, Limited, and the Mexican Southern Railway, Limited, the sum of 44,624,035 pesos Mexican gold, together with interest at the rate of 6 per cent per annum on this sum, compounded half-yearly from the 31st May, 1920, until the date of actual payment.

4. The claim No. 85, presented by the same Companies, is in respect of the following items:

(1) Indemnification for loss of earnings of the Claimants for the period from the 1st June, 1920, down to the 31st December, 1925.

(2) Compensation for losses of and damages to rolling-stock and other property of the Claimants and other losses and damages suffered during such period.

(3) Interest at the rate of 6 per cent per annum compounded half-yearly upon the amounts so payable by way of indemnification and compensation from the 31st December, 1925, down to the date of actual payment of such indemnification and compensation.

The amount of this claim is $33,924,176 pesos Mexican gold together with interest as aforesaid.

5. The cases are before the Commission on a Motion of the Mexican Agent to Dismiss, based on the three following grounds:

(a) The British nationality of the Claimant Companies has not been established.

(b) It has not been proved that British subjects are holders of more than fifty per cent of the total capital of the said Companies, nor that the allotment to which Article 3 of the Convention refers was made.

(c) In the concessions granted to the claimant Companies, a so-called Calvo clause is inserted, reading—

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

[1] *English translation from the original report.*—"The Company shall always be a Mexican Company, even though any or all its members shall 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

6. The Mexican Agent pointed out that in this case the Calvo Clause was in tenor and wording exactly similar to article 11 of the concession of the Mexican Union Railway, with which Decision No. 21 of the Commission had dealt. In his submission the Commission should declare themselves incompetent, for the same reasons as in the other case.

7. The British Agent declared that he did not intend to argue against a decision taken by the Commission in a previous session, but that he did see a marked difference between the two cases. His contention was that the Commission were not only at liberty to come to another conclusion in the claim now under consideration, but he even found in the decision quoted a strong argument in favour of overruling the motion filed by his Mexican colleague.

To this end he relied more particularly upon No. 12 of Decision No. 21, reading—

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

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

"This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon which the claim is based occurred in 1920 and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims, similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

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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."

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

8. It was, in the eyes of the British Agent, clear that the Commission had, in the claim of the Mexican Union Railway, accepted the Calvo Clause *inter alia* because the claimant, so long as he had not had recourse to the Mexican Courts, could not be said to have been a victim of internationally illegal acts or breaches of international law, such as a denial of justice or an undue delay of justice. But the position of the Interoceanic Railway and of the two other Companies was quite different. They had not acted as if they had not signed a Calvo Clause. They had not disregarded local means of redress and they had not omitted to follow the course agreed upon in the concession.

In order to prove this, the Agent quoted article 14 of the Ley de Reclamaciones (30th August, 1919), reading—

"Art. 14. Las indemnizaciones debidas a empresas ferrocarrileras o de otros servicios públicos que hubieren sido ocupados o expropiados por el Gobierno con motivo de operaciones militares o a causa de las condiciones anormales que han prevalecido en el país, no tendrá necesariamente que sujetarse al conocimiento de la Comisión de Reclamaciones, sino que la indemnización que deba pagárseles podrá ser estipulada por medio de convenios celebrados por conducto de las Secretarías respectivas." [1]

And article 145, section X and section XI of the Ley sobre Ferrocarriles (29th April, 1899), reading—

"X. La autoridad federal tiene el derecho de requerir, en caso de que a su juicio lo exija la defensa del país, los ferrocarriles, su personal y todo su material de explotación y de disponer de ellos como lo juzgue conveniente.

"En este caso la Nación indemnizará a las compañías de camino de fierro. Si no hubiere avenimiento sobre el monto de la indemnización se tomará como base el término medio de los productos brutos en los últimos cinco años, aumentado en un diez por ciento y siendo por cuenta de la empresa todos los gastos.

"Si sólo requiriere una parte del material, se observará lo dispuesto en el párrafo IV de este artículo.

"XI. En caso de guerra o de circunstancias extraordinarias, el Ejecutivo podrá dictar las medidas necesarias, a fin de poner, en todo o en parte, fuera de estado de servicio, la vía, así como los puentes, líneas telegráficas y señales que formen parte de ella.

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[1] *English translation from the original report.*—"Article 14. Compensation due to railway companies or other public utilities occupied or expropriated by the Government in connexion with military operations, or by reason of abnormal conditions prevailing in the country, will not necessarily have to be dealt with by the Claims Commission, but such compensation as may be due to them may be the subject of stipulation under agreements to be entered into by the respective Departments."

"Lo que haya sido destruído será restablecido a costa de la Nación, luego que lo permita el interés de ésta." [1]

The claimants have done everything in their power to have justice done, and had followed the course prescribed by a Mexican law. They had, in strict accordance with article 14 of the Law on Claims, addressed themselves to the Minister of Finance in order to arrive at a settlement of the compensation due to them. They had earnestly tried by correspondence, and orally, to obtain an equitable arrangement. It had all been in vain. After six years of patient and arduous negotiations, they were confronted by conditions, which they considered as unjust, unacceptable and unfit to constitute the basis of an agreement. In 1927 they had found themselves compelled to realize that they could not along these lines obtain justice. Since then they had received no further communication from the Department of Finance, and it was obvious that they could no longer expect that anything would be done towards awarding them the compensation to which the Railway Act entitled them.

In these circumstances, they had sought redress by applying to the Comisión Ajustadora de la Deuda Pública Interior, but although they had filed their claims with this Institution in November 1929, they had not, until now, been made acquainted with the results of their action.

The Agent's conclusion was that there could be no doubt as to the claimants having exhausted all the local means of redress open to them. These local means of redress had, however, proved insufficient. By taking the course indicated by the Mexican laws, the claimants had not been able to pursue their right. For this reason a denial of justice or undue delay of justice must be assumed to exist, in other words, that international delinquency which, according to the opinion laid down in Decision No. 21 of the Commission, entitled a claimant to apply to his own Government, in spite of having subscribed to a Calvo clause.

9. The Mexican Agent argued that, according to the opinion of many authorities on international law, only those acts or omissions could constitute a denial or an undue delay of justice, for which judicial powers were responsible. What the claimants complained of was that their negotiations with the Minister of Finance had not resulted in an agreement, because of the attitude taken by this official, but the Agent failed to understand how the attitude of this civil authority could ever be regarded as a denial of justice or as an undue delay of justice. It was only the courts that could be guilty of this kind of international delinquency, not an official, however highly placed, whose function was not that of administering justice, but that of directing one of the Departments of the Public Service.

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[1] *English translation from the original report.*—"X. The Federal authorities have the right, should it in their judgment be required by the defence of the country, to call upon the railways, their personnel and all their operating equipment, and to dispose of same as they may think fit.

"The Nation shall in that event compensate the railway companies. Should they fail to reach an agreement as to the amount of such compensation, the average gross earnings for the preceding five years, plus ten per cent shall be taken as a basis, all expenses to be borne by the Company.

"If only a part of such equipment should be requisitioned, the provisions of paragraph IV hereof shall be observed.

"XI. The Executive may, in case of war or of circumstances of an extraordinary nature, order such measures to be taken as may be necessary for putting out of service, either wholly or in part, any tracks, and also any bridges, telegraph lines and signals forming part thereof.

"Anything so destroyed shall be replaced at the expense of the Nation, as soon as the interests of the latter shall allow of its doing so."

The Agent went on to set out that article 14 of the Ley de Reclamaciones had no other purpose than that of suggesting to Railway Companies an easier, and perhaps a quicker way of obtaining compensation, than by filing an action with the National Claims Commission. But the law did not intend to preclude them from taking the latter course, in case they preferred it or in case they could not arrive at an agreement with the respective Departments. This was what the Law meant by declaring that it was not necessary for the corporations in question to go to the Comisión de Reclamaciones. By entering into negotiations with a civil authority, they had not therefore waived their right to resort to the Special Court, which the same law had created to adjudicate upon revolutionary claims.

The claimants had themselves interpreted the law in identically the same way, because they had, in November 1929, applied to the Conisión Ajustadora de la Deuda Publica Interior, to which Institution the functions of the National Claims Commission had subsequently been transferred. This proved that the claimants also understood that, when the negotiations with the Minister of Finance did not lead to an issue, they still possessed other means of redress.

The fact that the Comisión Ajustadora had not rendered a decision, could not—in the Agent's submission—be construed as a denial nor as an undue delay of justice. The magnitude of these claims was such that no court could be blamed for not having administered justice within the period that had elapsed since they were filed. The same claims had been presented more than two years previously to the Commission, before which the Agent was then speaking, but no one would, having regard to the volume of the work incumbent upon the Commission, accuse this tribunal of having deferred the judgment any longer than was reasonable.

Moreover, the Agent did not deem it unlikely that the National Institution, having received the claims at a time when they were already before the International Commission, preferred to postpone the taking of them into consideration, until they knew whether the latter would declare themselves competent or not.

The Agent thought the question as to whether the Minister of Finance had really stipulated unacceptable conditions, immaterial to the issue now before the Commission, because the claimants had the right to resort to the Comisión Ajustadora, a right of which they had availed themselves. But he felt bound to observe that in his opinion the conditions were fair and reasonable, and he still believed that an arrangement might be arrived at—just as had been done in the case of other Railway companies—if both parties approached each other animated by an earnest desire to settle their differences in an amicable way.

The Agent's conclusion was that nothing had been shown that could induce the Commission not to accept the Calvo Clause, on the same grounds as they had done in the claim of the Mexican Union Railway.

10. The Commission declare themselves satisfied as to the British nationality of the claimant companies. They have, in more than one of their decisions, accepted incorporation in England and domicile in England as sufficient evidence of such nationality. They do so in this case as well.

The Convention does not require that British Companies should, in order to have standing before the Commission, show that British subjects have or have had an interest exceeding fifty per cent. of their total capital; neither is it necessary, in case the Company is British, that any allotment be produced.

The Commission cannot admit as justified the Motion to Dismiss in so far as it is based upon the grounds set out under *(a)* and *(b)* of No. 4.

11. As regards the third group upon which the motion rests, set out under *(c)* of No. 4, the Commission, by a majority, adhere to their decision taken in the case of the Mexican Union Railway, and as it so happens that in the claims now under consideration, the Calvo Clause has exactly the same wording as in the former case, the question before them is whether the said clause must in this case be disregarded because the three claimant companies have been the victims of internationally illegal acts or breaches of international law, such as a denial of justice or undue delay of justice.

Before answering this question, the Commission deem it necessary to lay down their opinion as to the character of the authorities who can become guilty of a denial or undue delay of justice.

They do not concur in the view that the judicial authorities can only be the ones, in other words, that only the courts can be made responsible for international delinquency of this description. They are undoubtedly aware that denial of justice or its undue delay will, in a majority of cases, be an act or an omission of a tribunal, but cases in which administrative, or rather non-judicial authorities, can be blamed for such acts or omissions are equally existent.

If an alien is arrested by the police on a false charge, his strongest desire will be to be put upon his trial without delay, in order to prove his innocence. But if the authorities in whose power he happens to be prevent him from being led before a court, if they bar him access to a tribunal, this must certainly be characterized as a denial of justice or as an undue delay of justice, the responsibility for which does not rest with the courts or with any judicial authority, but with the non-judicial officials, who deprived the alien of his liberty.

If an alien, having won a lawsuit and being desirous of seeing the judgment executed, addresses himself to those non-judicial authorities upon whom, in most countries, execution of the judgments of civil courts is incumbent, and they either refuse to assist him, or postpone their action indefinitely, the alien in question is certainly entitled to complain of denial or undue delay of justice, although the responsibility cannot be laid at the door of the tribunal that sustained his action.

If a foreigner, in the pursuit of his private interests, needs a document, which can only be delivered by one of the administrative authorities in the country where he transacts his affairs, and if this document is improperly withheld or delivered too late to be of any use, this will again constitute the same breach of international law, without any judicial authority being blamable.

The Commission deem that these examples, which could be supplemented by many others, show that non-judicial authorities also can be guilty of a denial or undue delay of justice, and if it could, in the case now before them, be shown that such authorities had been guilty of that international delinquency, they would not hesitate to declare themselves competent in spite of the claimants having agreed to a Calvo clause.

12. They have, however, been unable to find any such omission or act in the case they now have to decide. As they read it, article 14 of the Ley de Reclamaciones does not contain this alternative, that the Corporations mentioned therein must exercise the right, either of submitting their claims to the National Commission, or of endeavouring to come to an extra-judicial settlement with one of the Departments. The wording of the article does not admit of the conclusion that the Companies, having once made the election between the two means of redress, precluded themselves once for all from seeking that remedy which they had not chosen.

The meaning of article 14 seems clear. The number of the enterprises to which it refers could not be so great as to render it impossible for the Public

Administration to deal with them. This must have been one of the reasons why the law made available a seemingly less complicated mode of settlement, to railway companies and other similar concerns, than could be offered to the many thousands of other claimants. A second ground may have been that as occupation and taking over of public services must in most cases have been carried out by organs of the Government, with certain formalities and the execution of several documents, it was logical that an effort should, before resorting to the Courts, be made to come to some arrangement with the same Government by whose orders confiscation had taken place, and in whose archives much evidence was sure to exist. And a third argument may be found in the Railway Act, which already provided for the compensation of Railway Companies, whose buildings, rolling-stock and equipment had been taken over for purposes of safety and defence. It seems probable that those who drafted article 14 held the view that the rights granted by the Railway Law made a settlement of claims of this nature an easier matter than adjudication upon claims which had their origin in revolutionary acts not provided for by any law. It does not seem too bold an inference that an agreement out of court was recommended for this reason also.

But this recommendation cannot be construed as going any further than its object of facilitating an understanding. The Mexican Agent gave the correct interpretation of the provision, when he stressed the fact that the Companies had lost nothing by applying to the Department of Finance, and that they continued to be fully entitled to have recourse to the National Claims Commission (later the Comisión Ajustadora de la Deuda Pública Interior).

13. Another remedy remained open to them, another means of redress existed, to which they could resort. And it was to this means of redress that the claimant had recourse in November 1929, thus showing themselves that their resources were far from being exhausted.

The Commission cannot, that being the case, admit that justice has been denied to the claimants because their negotiations with the Minister of Finance have not led to an agreement. The Commission see no reason why they should enter upon an appreciation of the conditions stipulated by the Government. These are for the present an issue of no importance, because the claimants could resort to a Special Tribunal in case no settlement proved attainable.

Just as little as they can admit a denial of justice, can the Commission hold that the claimants are the victims of an undue delay of justice. The time that has elapsed since they went to the Comisión Ajustadora is not so considerable as to justify the charge that this Institution has deferred rendering justice longer than a court of law is allowed to do. The claims amount to over 77 million pesos Mexican gold, with interest compounded at the rate of 6 per cent, and no one would criticize a tribunal for taking a substantial time for examining actions in which such huge interests are involved, quite apart from the fact that the Comisión Ajustadora may have kept the claims pending so long as the International Tribunal, with which they knew that the motion had previously been filed, had not pronounced judgment as to their competence.

14. The preceding considerations have led the Commission to the conclusion that it cannot be held that the claimants have exhausted all local remedies in vain, that in this case a denial of justice or undue delay of justice are not rightly alleged, that there is consequently no evidence of internationally illegal acts or omissions, and that no appeal can, for that reason, be made to the arguments used by the Commission in Decision No. 21 when stating under what circumstances a Calvo clause should, even when signed, be disregarded.

15. The motion to dismiss is allowed.

Dissenting opinion of British Commissioner

1. I agree with the other members of the Commission in their finding that denial or delay of justice has not been established in this case. But whilst recognizing that the decision of the Commission in the case of the Mexican Union Railway (Limited), Decision No. 21, covers the present case in so far as such decision finds that the Anglo-Mexican Claims Convention does not overrule the Calvo Clause contained in the Concession then under consideration (which is identical with the Calvo Clause in this case), and that it fettered the Commission in this case, yet my opinion is so strong that their decision in the case of the Mexican Union Railway case was wrong on the important point of the relevance and applicability of the decision in the American case, to which I shall refer presently, that I must in the present case offer a dissenting opinion, so far as concerns the applicability of the Calvo Clause.

2. For convenience of reference, the Calvo Clause (translation) in the Mexican Union Railway case, which is the same in the present case, was 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 manner whatsoever."

3. I would begin my observations by noting that, in my opinion, having carefully studied the majority decision in the Mexican Union Railway case, the Commission gave undue and misconceived weight as regards the applicability thereto of the decision of the United States and Mexico Claims Commission in the case of the North American Dredging Company of Texas, quoted in the Commission's decision in the Mexican Union Railway case. They compared the terms of the Concession in the American case with those of the Concession in the Mexican Union Railway case, and found them practically similar. But in my opinion this factor was far from settling the matter. Other considerations of much greater importance entered into the question.

4.—(1) The subject matter of the claim in the North American Dredging Company of Texas was breaches of a contract made between that Company and the Government of Mexico, which contract contained the Calvo Clause. It related purely to questions arising out of such contract and was confined to these.

(2) The Claim came before the United States and Mexico General Claims Commission under the Convention of the 8th September, 1923, and not under the Special Convention of the 10th September, 1923, for dealing with losses or damages suffered by American citizens through revolutionary acts.

(3) The Convention of the 8th September, 1923, setting up the American General Claims Commission, differs widely in its terms from the Anglo-Mexican Convention, as it also does from the terms of the American Mexican Special Claims Convention of the 10th September, 1923, in the respect shown in subparagraphs (4), (5) and (6) hereof.

(4) The Convention under which the North American Dredging Company of Texas case came before the General Claims Commission was one for settling claims by the citizens of each country against the other (excluding claims for losses or damages growing out of revolutionary disturbances in Mexico, which formed the basis of another and separate Convention). They were submitted to a Commission (i.e., the General Claims Commission) for decision in accordance with the principles "of international law, justice and equity" (see Articles I and II), though both parties (in Article V) agreed that no claim should be disallowed or rejected by the application of the general principle of international law that legal remedies must be exhausted first.

(5) The terms of the Anglo-Mexican Special Convention had (and still have) as a foundation, the desire to adjust definitely and amicably all pecuniary claims "*arising from losses or damages suffered by British subjects on account of revolutionary acts occurring during the period named*". In Article 2 is set out that the Commission shall "examine with care, and judge with impartiality, in accordance with the principles of justice and equity, all claims presented, since it is the desire of Mexico *ex gratia* fully to compensate the injured parties, and not that her responsibility shall be established in conformity with the general principles of international law; and it is sufficient therefore that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 of this Convention for Mexico to feel moved *ex gratia* to afford such compensation". It will be seen therefore that the Commission was to deal, not with questions of the construction, performance or breach *of contracts*, but solely and purely with damages and losses on account of, and due to, revolutionary causes.

(6) The claim coming before the Commission in the Mexican Union Railway case was not, as it was in the case of the American Dredging Company of Texas, in respect of breaches of contract or arising thereout, but was one for losses or damages owing to revolutionary causes.

5. It is in my opinion clear from a perusal of the judgment in the North American Texas Dredging case, that the American Commission was dealing with a case arising under the contract containing the Calvo Clause. It based its decision therein on the fact that the Company had procured and entered into a contract stipulating that the contractor, etc., "should be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work, and the fulfilment of the contract. They should not claim nor should they have, with regard to the interests and the business connected with this contract, any other rights or measures to enforce the same than those granted by the laws of the Republic to Mexicans, nor should they enjoy any other rights than those established in favour of Mexicans. They were consequently deprived of any rights as aliens, and under no conditions should the intervention of foreign Diplomatic agents be permitted *in any matter related to the contract*". The Judgment stated that what Mexico asked of the Company as a condition of awarding it the contract which it sought was: "If all the means of enforcing your rights *under this contract* afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not call directly upon your own Government to intervene in your behalf in any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection." And the claimant, by subscribing to this contract and seeking the profits which were to accrue to him thereunder, had answered "I promise". (See paragraph 10 of American judgment.)

6. The judgment of the *North American Dredging Company of Texas* case added (see paragraph 14) that "this provision did not, and would not, deprive the Claimant of his American citizenship and all that that implied. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated, but that he had been denied justice. The basis of his appeal would be not a construction of his contract save perchance in an incidental way, but rather an internationally illegal act".

7. As I read the judgment of the present Commission in the Mexican Union Railway case, they approve of this principle (which no doubt applies to all cases coming within the Calvo Clause), but they apply it, in my opinion unnecessarily and irrelevantly, to the Mexican Union Railway case as if that case were a case of alleged breaches of contract and not, as it was, a claim entirely distinct from the contract, and one arising on revolutionary acts. The Mexican Union Railway case had nothing to do with the position of the Mexican Union Railway as contractors and *qua contract*. On the contrary, it was merely incidental that they were contractors. They happened, unfortunately for them, to be a target for Revolutionaries, just as were any other British subjects carrying on business in Mexico. There was no question of contract, or interpretation thereof, or of breaches thereof, and the Mexican Union Railway were not seeking to enforce a contract.

8. To emphasize this further, the claim of the Mexican Union Railway was brought by them not as contractors nor as seeking any rights under their contract, but as British subjects carrying on business in Mexico who had suffered loss and damage, through revolutionary causes, losses or damages which the Government of Mexico, by virtue of a laudable wish, as expressed in the Convention, were moved to compensate for, not because she might be liable under international law, but because it should be "sufficient therefore that it be established that the alleged damage actually took place". This is entirely outside any contract, whether it contained or did not contain a Calvo Clause.

9. I may here perhaps usefully refer to some general observations on the subject of Calvo Clauses as contained in Borchard's *Diplomatic Protection of Citizens Abroad* (see page 795). "Since 1886 many of these States (Latin-American) have incorporated into their constitutions and laws a provision that every contract concluded between the Government and an alien shall bear the clause that the foreigner 'renounces all right to prefer a diplomatic claim in regard to rights and obligations derived from the contract, or else that all doubts and disputes "arising under it" shall be submitted to the local courts without right to claim diplomatic interposition of the alien's Government'. " And (at page 797) Mr. Gresham, Secretary of State, interpreted the clause of the Venezuelan constitution to the effect that "in every contract of public interest the clause that doubts and controversies which may arise regarding its meaning and execution shall be decided by the Venezuelan tribunals and according to the laws of the Republic, and, in no case, can such contracts be a cause for international claims", to mean that the party claiming under the contract "agrees to invoke for the protection of his rights only the authorities, judicial or otherwise, of the country where the contract is made. Until he has done this, and unless having done this, justice is plainly denied him, he cannot invoke the diplomatic intervention of his own country for redress".

10. In all instances referred to in the authorities, the discussion has ranged round and was confined to claims involving the interpretation of contracts or arising thereout. And the *Mexican Union Railway* case is the first case in which there has been any extension of it to other matters. Further, according to the quotation contained at page 168 of Sir John Percival's dissenting opinion in the *Mexican Union Railway* case, His Majesty's Government in Great Britain, in its answer to the question put by the League of Nations on the subject of codification of international law, while accepting as good law the decision of the General Claims Commission between the United States of America and Mexico in the case of the *North American Dredging Company of Texas*, yet in recapitulating what was laid down in that case, was careful to limit it as applying "*in all matters pertaining to the contract*", and also to "*a claim arising out of the contract in which the stipulation was inserted*". The claim in the *Mexican Union Railway* case did not, in my opinion, fall within this category, but was entirely outside it.

The Calvo Clause in the Mexican Union Railway Company's contract had reference only and was confined to questions arising between the Railway Company *qua contractor* and the Government, and did not extend to claims independently thereof, and *a fortiori* does not cover revolutionary claims arising out of the provisions of a Special Convention such as was concluded between the two Governments of Great Britain and Mexico. Reading the Calvo Clause, in the Mexican Union Railway's concession or contract, it is in my opinion clear that it is confined to the position of the Company *as Contractors* and to questions connected with that position, which were subject to the jurisdiction of the Courts of the Republic of Mexico and to be settled by them, and not made the object of diplomatic intervention. To my mind it is impossible to carry the stipulation further, or to make it override the plain terms of the Convention subsequently concluded between the Governments of Great Britain and Mexico. To do so would be to recognize the rights of a subject to sign away in anticipation and limit *in futuro* the rights of his Government to make a Convention on a subject never contemplated by, nor within the terms of, the contract signed by him.

11. Coming to the case of the *Interoceanic Company*, the subject of the present claim, it is common ground that the Calvo Clause in that case is identical with that in the *Mexican Union Railway* case, but I recognize that there are some differences in the character of some of the items of the claim; in particular as regards those arising on the action of the Carranza revolutionaries under the Mexican Railway Law, which to some extent, it may be argued, remove those items from the more general category of revolutionary claims. But whatever may have been the legal foundation or validity under the Mexican Railway Law for some of General Carranza's acts at the time, then (as a revolutionary) purporting to invoke the provisions of the Railway Law, the confiscation of, and damage to, the claimant's properties were nevertheless revolutionary acts and, as such, within the purview of the Anglo-Mexican Convention, and were, under its terms, made the subject of compensation before this Commission. Therefore, the same considerations and arguments as expressed above on the Mexican Union Railway Company's claim are applicable even to those portions of the Claim.

12. For the above reasons, in my opinion, the Calvo Clause in this case is not a bar to maintenance of the claim of the Interoceanic Company and its co-claimants, and the decision of the majority of the Commission to allow the Motion to Dismiss is wrong. And the Motion should be dismissed, and the case heard on its merits.