possible that the Mexican Government may be relieved of some of its diplomatic embarrassments through judicial interpretations of the laws in controversy. In the meantime, the suggestion of arbitration advanced by the United States Senate would hardly seem either opportune or exactly fitted to the situation. The proposal would seem inopportune in view of the right of the United States to insist on the fulfillment of positive promises of the nature of international engagements, or "gentlemen's agreements." Such matters normally are not even discussed, much less submitted to arbitration. Furthermore, the proposal for arbitration merely opens the door for indefinitely prolonged diplomatic negotiations to determine the bases for arbitration. A question of the right of a nation to legislate concerning such matters as land ownership has generally been held to be primarily a question of strictly domestic concern. Even if Mexico were sincerely willing to submit such a matter to the arbitrament of a third party, it would hardly constitute a wise precedent for the United States to accept. In view of the nature of the controversy and the technical legal arguments involved, this question, if submitted at all to further discussion, would seem better suited for a joint commission of Mexican and American jurists of tried capacity. Such a procedure would have the merit, at least, of removing from the plane of diplomatic correspondence a matter which might better have been handled by properly designated jurists from the start. The conduct of foreign relations should hardly be permitted at any time to take on the form of a litigation at long range. If the controversy is susceptible of some such disposition, there still remains the obligation to see that American rights are not impaired or destroyed in the meantime. And in any event, steps must be taken of a most definite and formal nature to make certain that there shall be no confiscation of American property in Mexico without "actual, fair, and full compensation."

PHILIP MARSHALL BROWN.

CONCERNING ATTEMPTS BY CONTRACT TO RESTRICT INTERPOSITION

A state may prescribe the terms on which it grants a concession. Those terms may in fact purport to restrict the freedom of the grantee to invoke the aid of his own state with respect to matters relating to the contract, or even to restrict the freedom of that state to interpose in his behalf.[1] Even though

[1] The restriction of governmental action may assume a variety of forms. It may, for example, proscribe "international reclamation" (Martini Case, Ralston's Report, Venezuelan Arbitrations of 1903, 819), or may contain the stipulation that "under no condition shall the intervention of foreign diplomatic agents be permitted" (North American Dredging Company *v.* The United Mexican States, General Claims Commission, United States and Mexico, Docket No. 1223, this JOURNAL, Vol. XX, p. 800). It may declare that "all diplomatic intervention is formally prohibited" (contract of the *Banque Nationale d'Haiti* referred to in For. Rel. 1915, 496–516). It may provide that "any questions or controversies" arising out of the contract shall be decided in conformity with the laws of the grantor and "by the

they are designed to restrain the grantee from the exercise of rights which he ought not to be called upon to give up, or to deter the state of which he is a national from interposing under circumstances when interposition is justifiable, action by the grantee in contempt of these conditions should at least confer upon the grantor the right to rescind the contract. Its privilege in this regard is derived from its right to fix the terms on which it makes any yielding.

The provisions of a contract restrictive of interposition or reclamation and of efforts by the grantee to effect either may be deemed by the state of the grantee or by an international tribunal as subversive of the law of nations and hence entitled to no respect. Nevertheless, the inability of the grantor to gain respect for the restrictive clause does not compel it to keep alive the contractual relationship on a different and less objectionable basis. In response to the contention that such a conclusion serves to enable the grantor to terminate the contract at will through its own tortious conduct possibly designed to effect interposition and in turn to excuse rescission, it may be said that on principle the grantor is always responsible to the grantee for such conduct, and that he obtains complete justice when he obtains damages which compensate him for the loss sustained thereby.[2] He never acquires, however, in consequence of that conduct, a right to continued enjoyment of his contract with the grantor on terms other or more favorable to himself than those fixed by his concession.

When the grantee, contemptuous of the terms prescribed by the grantor, proceeds to invoke the aid of his government, which in fact espouses his cause and interposes in his behalf, an interesting situation arises. It suggests the preliminary inquiry whether the grantee may, under any circumstances, divest himself of the right to invoke the aid of his own state while he remains its national.[3] It has been judicially declared that he can not validly give up

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competent tribunals of the Republic" (Turnbull Case, Ralston's Report, Venezuelan Arbitrations of 1903, 200).

It may be doubted whether grantor states have in fact employed particular phrases with a nice sense of distinction with respect to the nature or scope of the action which it has been sought to thwart.

See in this connection documents in Moore, Digest, VI, 293–309; excellent discussion in E. M. Borchard, Diplomatic Protection of Citizens Abroad, 800–810; "Decisions of the Claims Commissions, United States and Mexico," by same author, this JOURNAL, Vol. XX, 536; J. H. Ralston, Law and Procedure of International Tribunals, revised ed., 58–72.

[2] It is believed that the damages should be assessed on a delictual rather than a contractual basis.

[3] Declared Mr. Bayard, Secretary of State, to Mr. Buck, Minister to Peru, February 15, 1888: "This government can not admit that its citizens can, merely by making contracts with foreign powers, or by other methods not amounting to an act of expatriation or a deliberate abandonment of American citizenship, destroy their dependence upon it or its obligations to protect them in case of a denial of justice." (MS. Inst. Peru, XVII, 323, Moore, Digest, VI, 294.)

See also Mr. Bayard, Secretary of State, to Mr. Hall, Minister to Central America,

the right to turn to it to protect him against the consequence of internationally illegal acts committed by the grantor, but that he may divest himself of the right to call upon that state to interpose in other situations where, in the circumstances, interposition would lack justification under the rules of international law.[4] It may be unnecessary to attempt to determine from the available evidence of the law whether the alien grantee is to be deemed to possess no rights in the matter. Whatever be the correct conclusion, he may clearly subject himself to the operation of a penalty in case he does invoke the aid of his own state, as by impliedly authorizing the grantor in such event to rescind the contract. The fact of rescission for such a reason would not constitute the breach of an obligation by the grantor; and if rescission were in itself productive of interposition by the state of the grantee, it would not be productive also of a solid claim for reparation. The grantor would simply be asserting its right not to permit the continued enjoyment of a concession on terms other than those which it had prescribed.

It is not believed that the grantee may through his contract with the grantor deprive his own state of any right that belongs to it, such as that to interpose for cause in behalf of a national.[5] It may be that in the particular case,

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March 27, 1888, For. Rel. 1888, I, 134–137, Moore, Digest, VI, 295; same to Mr. Straus, Minister to Turkey, No. 115, June 28, 1888, For. Rel. 1888, II, 1599, Moore, Digest, VI, 296.

See also Aide-memoire, handed by the American Ambassador to the Mexican Minister for Foreign Affairs by instruction from the Secretary of State on November 27, 1925, Senate Doc. No. 96, 69th Cong., 1 Sess., pp. 5, 6.

[4] North American Dredging Company *v.* The United Mexican States, General Claims Commission, United States and Mexico, Docket No. 1223, this JOURNAL, Vol. XX, 800.

[5] "Under the rules of international law the claimant (as well as the Government of Mexico) was without power to agree, and did not in fact agree, that the claimant would not request the Government of the United States, of which it was a citizen, to intervene in its behalf in the event of internationally illegal acts done to the claimant by the Mexican authorities." (North American Dredging Company *v.* The United Mexican States, General Claims Commission, United States and Mexico, Docket No. 1223, this JOURNAL, Vol. XX, 800, 808–809. See also concurring opinion of Parker, Commissioner, *Id.*, 810.)

"Certainly a contract between a sovereign and a citizen of a foreign country can never impede the right of the Government of that citizen to make international reclamat on, wherever according to international law it has the right or even the duty to do so, as its rights and obligations can not be affected by any precedent agreement to which it is not a party; . . .

"This does not interfere with the right of a citizen to pledge to any other party that he, the contractor, in disputes upon certain matters will never appeal to other judges than to those designated by the agreement, nor with his obligation to keep this promise when pledged, leaving untouched the rights of his Government, to make his case an object of international claim whenever it thinks proper to do so and not impeaching his own right to look to his Government for protection of his rights in case of denial or unjust delay of justice by the contractually designated judges." (Barge, Umpire in Woodruff Case, Ralston's Report, Venezuelan Arbitrations of 1903, 151, 160.)

"I desire particularly to direct attention to the provision requiring foreigners to waive their nationality and to agree not to invoke the protection of their respective governments, so far as their property rights are concerned, under penalty of forfeiture. In this connection

respect for the terms of the contract does not involve the deprivation of that state of the exercise of any actual right; for both the existence and the known sufficiency of local remedies available to the grantee may serve to render interposition improper and unreasonable. It is important to observe, however, that what causes interposition to be unjustifiable in such a situation is the rule of international law rather than the contract between the parties. An arrangement purporting by its terms to restrict interposition including the steps leading up to it, merely in situations where that law clearly forbade interposition, would be unobjectionable.

The grantor may, however, be quite unwilling that the contract be merely declaratory of the requirement of international law and contain no deterrent additional thereto. Oftentimes contracts appear to give expression to a broader design. Thus they may purport to deprive the state of the grantee of the right, among others, to exercise its best judgment respecting the question whether in fact local remedies technically available to the grantee are really valuable, or serve rather as a cloak to conceal the effort of the grantor to evade an impartial adjudication before a tribunal empowered to scrutinize its conduct and to award damages against it. Respect for provisions of such a character would prevent the state of the grantee from interposing 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, and consequently, impotent or indisposed to mete out justice to an alien claimant such as the grantee. It may be doubted whether as yet any rule of international law serves to deprive a claimant state of the right to act on its best judgment as to the existence and sufficiency of ostensible remedies held out to its nationals by a foreign state or which denies to the former the right to ignore them for cause. This right, whatever be its content, can not be impaired by a contract between the grantor and the grantee.[6]

In a word, it must be apparent that both the grantor state and the state of

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it is my duty to point out that my government, in accordance with principles generally if not universally accepted, has always consistently declined to concede that such a waiver can annul the relation of a citizen to his own government or that it can operate to extinguish the obligation of his government by diplomatic intervention to protect him in the event of a denial of justice within the recognized principles of international law." (Aide-memoire, handed by the American Ambassador to the Mexican Minister for Foreign Affairs by Instruction from the Secretary of State on November 27, 1925, Senate Doc. No. 96, 69th Cong., 1 Sess., p. 5, 6.)

[6] Whether the restrictive provisions of a particular contract serve to impair the right of the state of the grantee must depend upon all the surrounding circumstances. Officers of foreign offices are aware of the great difficulty in determining even in the most judicial spirit whether those circumstances establish such an impairment. The frequency and extent of the difficulty suffice at the present time to raise doubt as to the wisdom of attempting to gain recognition of a fresh rule imposing greater restrictions upon claimant states than are now acknowledged to exist.

the grantee possess rights which the individual grantee through his contract with the former does not impair. He can not deprive the grantor of the right to withhold from him the continued enjoyment of the concession on terms other than those embodied in the contract. Regardless of whether he may divest himself under any circumstances of the right to appeal to his country, he may at least subject himself to the penalty of loss of continued enjoyment of his concession in case he does so. He can not deprive his own state of any right of interposition or reclamation which in the circumstances the law of nations permits it to exercise.

The problem confronting the foreign office of the state of the grantee is first, to determine whether on the facts before it the restrictive clauses of the contract would serve, if respected, not only to injure the grantee himself, but also to impair the right of his state to interpose for cause; and secondly, to consider the probable effect of interposition upon the rights of the grantee in relation to any claim by him to continued enjoyment of his contract. The problem confronting an international tribunal arising from a controversy concerning the effect of the provisions of the contract restrictive of interposition and of steps leading up to it is quite a different one.[7] It is primarily to determine the design of the contracting parties as manifested by the convention establishing the tribunal.

The question for judicial determination is, broadly, whether the convention registers the consent of those parties to clothe the tribunal with jurisdiction to pass on the particular claim. There is involved herein the more precise inquiry as to the scope of any jurisdiction that may have been yielded. Thus, if jurisdiction is found to have been conferred, the question arises whether the grantor state has agreed to substitute an international for a national forum for the adjustment of the entire controversy regardless of the presence of any restrictive clause in the contract, or whether that state has agreed to confer upon the tribunal authority merely to consider the effect of the contractual restriction upon the rights of the parties. The tribunal may in fact conclude on the evidence before it that the convention expressed the design of the contracting parties to confer upon it jurisdiction sufficient for a comprehensive adjudication, and that the comprehensiveness of that jurisdiction was manifested by a waiver of the right to demand respect for the restrictive clauses in the contract either as a complete obstacle to jurisdiction, or as a limitation upon that conferred.

The point to be observed is that the correct interpretation of the particular convention ought not to baffle the tribunal burdened with the task. As in other kindred problems there is involved an inquiry as to the sense in which the particular terms are used. Inasmuch as the contracting parties are free to attach any significance to those which they see fit to employ, the search for evidence of the fact must be thorough and broad. There is no restric-

[7] The writer has been encouraged by his colleague, Mr. Philip C. Jessup, to emphasize this distinction.

tion with respect to the nature of what is probative thereof. The true light may come from what is extrinsic to the document.

CHARLES CHENEY HYDE.

LIMITATIONS ON COERCIVE PROTECTION

There are numerous doctrines of international law which serve to put off indefinitely the day when permanent peace may reign among the nations. Among these are the institution of conquest, the refusal to admit the doctrine that duress makes treaties voidable, the belief in the existence of the *rebus sic stantibus* clause in treaties, the supposed doctrine that private property may be charged with a lien or taken for the payment of governmental debts—a revival of confiscation—and the doctrine that citizens abroad may be protected by force of arms for alleged violations of international law practised against them. I shall address myself only to the latter institution, and shall venture to suggest what seems to me a necessary limitation and a practical reform. The protection of citizens in immediate danger of life in areas given over to anarchy will not be discussed.

Protection by the nation of a citizen abroad reflects one of the most primitive institutions of man—the theory that an injury to a member is an injury to his entire clan. It seems questionable whether in the highly integrated organization of the world today this practice is either necessary or desirable to secure for the citizen abroad the assurance of international due process of law.

A cursory examination of the existing practice will demonstrate the inefficiency, if not, indeed, the unfairness of the system. When the citizen abroad is injured he is expected first to exhaust his local remedies, except in cases where, the injury resting upon legislation, the law is not reviewable or reversible by the local courts, as in the case of prize courts operating under municipal statutes which violate international law. Assuming that the local remedy is ineffective, the citizen may invoke the diplomatic protection of his own government. That government may act as it sees fit in the matter, either extend good offices, make diplomatic claim, or institute coercive measures of protection in the event that diplomacy fails. Coercive measures invite the danger of war, involving all the people of the claimant's state.

Under this system all three parties to the issue, the individual, the defendant nation, and the claimant nation, are in a precarious and unhappy condition. Politics rather than law governs the outcome of the case. If the individual is a member of a strong clan (state), he may be able to obtain the aid of his nation; if not, he is in this respect helpless. Thus his relief, which should be governed by legal rule, depends on the accident of his nationality. It will also depend on the momentary political relations between the plaintiff and the defendant states, the political strength of the defendant state, and on other non-legal factors. The defendant state is in the position of