Subsequently the court set March 16, 1927, as the date for China's first reply, and June 17 for her second reply, and the President of the court, by virtue of Article 41 of the Statute, ordered provisional measures for the protection of Belgian subjects, property and rights, based more or less upon certain articles of the treaty of 1865. Subsequently, negotiations were reopened between the two countries with reference to the conclusion of a new treaty, and Belgium asked for a continuance of the case and the withdrawal of the protective measures ordered by the court for the safeguarding of Belgian interests in China. It is understood that the court has acted accordingly.

This case is interesting as showing the method of procedure of an aggrieved state in bringing a case before the International Court by a unilateral petition and without the preparation of a *compromis*. Would the court render a decision on the *ex-parte* presentation of the Belgian Government should China decline to reply to the Belgian memorial? A more interesting question, however, is the relation of the composition of the court to the parties in interest and to the questions at issue. It should be observed that all except two of the members of the court who would pass upon this case are nationals of countries who have similar interests in China, which would be best maintained by upholding the Belgian contention in this case. In other words, the case would be decided by judges whose governments would be interested in continuing in force the Belgian Treaty of 1865.

L. H. WOOLSEY.

MEXICAN LAND LAWS

It was observed in an editorial comment in this JOURNAL (July, 1926, p. 526) on the subject of Mexican legislation concerning titles to land and to subsoil products that: "The situation would seem to have called for a good deal of justification and forbearance on both sides of this lamentable diplomatic controversy." Subsequent correspondence given out by the Department of State on November 24, 1926, indicates that this forbearance had been subjected to an excessive strain, and that a deadlock had been reached. The Department of State, having exhausted every resource of legal argument and friendly diplomatic warning, was left in the uncomfortable position of awaiting concrete cases of injury to American rights which might warrant formal protests and specific claims for redress. Secretary Kellogg, in a note to the Mexican Minister for Foreign Affairs, dated July 31, 1926, thus summarized the general principles upheld by the American Government in this controversy:

> First. Lawfully vested rights of property of every description are to be respected and preserved in conformity with the recognized principles of international law and equity.
>
> Second. The general understanding reached by the Commissioners of the two countries in 1923, and approved by both Governments at the

time of resumption of diplomatic relations between them, stands unmodified and its binding force is recognized.

Third. The principle of international law that it is both the right and the duty of a government to protect its citizens against any invasion of their rights of person or property by a foreign government, and that this right may not be contracted away by the individual is conceded.

Fourth. The principle that vested rights may not be impaired by legislation retroactive in character or confiscatory in effect is not disputed.

On the subject of the specific assurances given by the Mexican Commissioners in 1923 (see this JOURNAL, July, 1926, p. 523), Secretary Kellogg further added that without these assurances the recognition of the Obregon Government would not have been accorded. The reply of the Mexican Minister for Foreign Affairs, under date of October 7, 1926, stated with reference to the first and fourth of the principles asserted by Secretary Kellogg:

> With respect to this last I must remark that the mere retroactive character of a law, taken by itself and until it does produce confiscatory effects or is harmful in any other way when applied, cannot give rise to any objection whatsoever, nor be the cause of diplomatic representation. Taking into account this exception, my Government agrees with the two principles noted.

With respect to the second principle concerning the binding effect of the assurances given by the Mexican Commissioners in 1923, Minister Saenz observed:

> The Mexican Government . . . feels constrained to reiterate . . . that these conferences did not result in a formal agreement, outside of the Claims Conventions which were signed by the Executives of both countries and which were submitted for the approval of the Senates of Mexico and of the United States; and that the declarations of the Mexican Commissioners merely constitute a statement of the purposes of President Obregon to adopt a policy which, altogether approved and followed in its main points by the present President, cannot constitute a promise with the binding force of a treaty that the future Presidents must observe in all its details, and much less that it might bind the legislative power and the Supreme Court of Justice.

Minister Saenz expressly denied in this connection that the recognition of the government of General Obregon had been conditioned on the outcome of the conferences of 1923 and subject to the assurances given by the Mexican Commissioners.

With respect to the third principle enunciated by Secretary Kellogg concerning the right of a government to protect its citizens against invasions of their rights, Minister Saenz observed that:

> The right of States to protect their citizens or subjects abroad is recognized; that right is unassailable. But the foreign private persons are also given the right to apply to their governments for protection; the exercise of this right is subject to the will of the parties in interest and

> therefore they may forego its exercise without thereby affecting the right of the state concerned.
>
> The Mexican Government, therefore, does not deny that the American Government is at liberty to intervene for its nationals; but that does not stand in the way of carrying out an agreement under which the alien agrees not to be the party asking for the diplomatic protection of his Government. In case of infringement of any international duty, such as a denial of justice would be, the right of the American Government to take with the Mexican Government appropriate action to seek atonement for injustice or injury which may have been done to its nationals would stand unimpaired.

Reduced to its simplest terms, the above argument, which is typical of the entire correspondence on the part of Mexico, amounts to a denial of the right of a government to intervene in behalf of a national who has contracted away this right, though it is conceded that in case of a denial of justice of a limited kind, "appropriate action" may be taken "to seek atonement for injustice or injury which may have been done to its nationals." Minister Saenz furthermore took the position that, not only must a government await an actual concrete instance of injustice and injury, before making any representations, but "to offer remarks concerning possible injustice that might be committed in connection with the prospective enactment of certain laws is tantamount to a government meddling in the legislation of another." This denial of the propriety of friendly comments and representations by one government concerning impending legislation by another which might have the unforeseen result of widespread injustice accompanied by corresponding claims for reparations, would hardly seem borne out by international practice (see Borchard, "The Diplomatic Protection of Citizens Abroad," p. 401). A typical example of this kind of diplomatic representation is to be found in the comments of the British Government in 1912 concerning the proposal then before Congress to discriminate in favor of American vessels using the Panama Canal (see Supplement to this JOURNAL, Vol. VII, p. 46).

This correspondence further discloses a fundamental difference of opinion concerning the nature of a vested right, or acquired right, to use the phrase employed by Mexico (*derecho adquirido*). Secretary Kellogg contended that a vested right was an absolute right which was not "subject to curtailment or destruction through the enforcement of laws enacted subsequent to its acquisition." Minister Saenz, on the other hand, contended that: "There cannot be acquired rights properly so-called unless there be an act of appropriation, a possessory will (*voluntad posesoria*); neither is it necessary that the law should give its protection to mere rights than those the conquest of which has cost an effort, be it physical, intellectual or financial. To claim that the Mexican Government must protect and safeguard not only the acquired but also the potential rights is to impart to the idea of retroactivity of the laws an unjustified breadth." While this argument has particular

application to petroleum concessions where oil may not yet have been discovered, its general purport is clearly to "whittle away" foreign property rights in Mexico. This intention is plainly seen in the statement: "Whenever a law is enacted which brings a change in the ownership system, the main problem consists in laying down the temporary measures of a provisional character which make it possible to pass from one system to the other. The difficulty of these measures consists in the fact that two tendencies are met,—that of the created interests which would prefer and demand that the same system of law be continued and that of the general interests of the nation which require that the old rights adjust themselves to the new principles." *Mutatis mutandis*, a similar argument might well be advanced by the Soviet Government of Russia in its revolutionary reforms for the nationalization of the ownership of land and the abolition of the right of private property. It may be true that the general interests of a nation may require that old rights should adjust themselves to new principles. It is equally true, nevertheless, that international intercourse could never be carried on with any certainty of justice and peace if rights secured by hard labor, high intelligence, bold courage, and fine vision were liable to arbitrary annulment or serious lesion. International law in its solicitude for the protection of national interests would have to be thrown overboard under this conception of acquired rights. It is not strange that the Soviet Government in Moscow should show very slight respect for the principles of international law. It is most disquieting, however, that the present Mexican Government should give unmistakable evidence of a similar tendency. With all due regard for the serious national problems concerning the ownership of land in Mexico, it can hardly be conceded that foreigners will ever accept without the most serious and solemn protests the impairment of property rights acquired in good faith or the confiscation of these rights without what Secretary Hughes called "actual, fair, and full compensation."

The diplomatic deadlock reached in this correspondence was virtually acknowledged by Secretary Kellogg in a brief note to Minister Saenz, dated October 30, 1926, and by a still briefer reply from the latter dated November 17, 1926. Mexico took the position that it would only discuss "concrete cases in which recognized principles of international law may have been violated or may be violated in disregard of legitimate interests of American citizens since in such cases it will be disposed to repair such violations." The petroleum law went into effect on December 31, 1926, and the alien land law on January 21, 1927. Failure to comply with the provisions of these laws entailed the penalty of general confiscation. Some of the larger petroleum companies, including British and Dutch, as well as American companies, failed to comply with these provisions and resorted to judicial proceedings by way of injunction (*amparo*) to protect their interests. Certain of these were granted for various reasons, not exactly of a juristic kind, notably in one instance to prevent unemployment and discontent in the oilfields! It is

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