

Class 16 Diplomatic Protection

- What is it?
 - **ILC Draft Articles on Diplomatic Protection (2006) ('DADP') Commentary to article 1**
 - Under international law, a State is responsible for injury to an alien caused by its wrongful act or omission.
 - Diplomatic protection is the procedure taken by a state, in its discretion, in respect of the mistreatment of its nationals or expropriation of the property of its nationals by another state in breach of PIL
 - **It is a RIGHT of state**
 - **[Mavrommatis Palestine Concessions case]**
 - A State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law
 - Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.
 - **But not a DUTY of state.**
 - **[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 claim.
 - **[Abbasi v. Secretary of State for Foreign and Commonwealth Affairs]**
 - A UK national wants to compel UK government to make a claim on behalf over him, but court held government has NO DUTY TO DO SO.
 - **ILC commentary to DADP art. 2:**
 - (2) A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so
 - So, individual has no rights. Dispute is between states, and individuals cannot force its own state to bring claims against the wrongful state.
 - This is not satisfactory. Especially in international investment
 - ◆ So, new law in this area. Not covered in this course.
 - ◇ Treaty. No need to bother your government. Sue directly in arbitral process.
 - ◇ Far better protection
 - Is this changing?
 - **[Hicks v Ruddock 2007]**
 - ◆ It is not an enforceable duty, but has legal consequences for decisions by government
 - ◇ i.e. individuals can challenge government's decision not to exercise diplomatic protection
 - **ILC commentary to DADP art. 2, para. 3**
 - Today there is support in domestic legislation and judicial decisions for the view that **there is some obligation, however limited**, either under national law or international law, on the State to protect its nationals abroad when they have been subjected to serious violation of their human rights
 - **DADP art. 19, 'Recommended practice':**
 - A State entitled to exercise diplomatic protection according to the present draft articles, should:
 - (a) **Give due consideration to the possibility of exercising diplomatic protection, especially when a significant injury has occurred**
 - Relationship between state responsibility and diplomatic protection
 - State responsibility covers all kinds of illegal or wrongful acts
 - **Diplomatic protection is about one specific wrongful act**
 - Governed by general law in state responsibility
 - **Action causing injury must be attributable to state and is a breach of international obligation.**
 - Jurisdiction of international courts
 - In order for AU to sue Vietnam, international court must have jurisdiction over the case
 - Whether offending state has consented to court jurisdiction
 - Admissibility of claim
 - **ILC Articles on State Responsibility Art44**
 - The responsibility of a State may not be invoked if:

- (a) the claim is not brought in accordance with any applicable rule relating to the **nationality of claims**;
- (b) the claim is one to which the rule of exhaustion of local remedies applies and **any available and effective local remedy has not been exhausted**.

A. Nationality of claims

a. Natural person

- Only the state of nationality is entitled to bring claim - **ILC DADP art. 3**

◆ [Panevezys-Saldutiskis]

- ◇ Diplomatic protection is necessarily limited to intervention on behalf of its own national because, in the absence of a special agreement, it is the bond of nationality between the state and the individual which alone confers upon the state the right of diplomatic protection.

- Nationality is determined by domestic law eg birth, descent, naturalisation, succession of states - **DADP art. 4**

- ◆ But must not be inconsistent with international law

- Is there a requirement of effective or genuine link between state and its national?

◆ YES

◇ [Nottebohm (Liechtenstein v Guatemala) ICJ 1955] - yes there must be a genuine link

▶ Facts

- Nottebohm born in Germany, so German nationality by birth. Live in Guatemala for 34 years. Later apply and granted nationality of Liechtenstein by neutralization (i.e. loss of German nationality) but still continue his business and living in Guatemala.
- N wrongfully removed from Guatemala and denied entry.
- Liechtenstein say N is their nationality, so want to bring a claim against Guatemala. Want restitution of property and compensation.

▶ Issue:

- Can Lie bring a claim? Is Nottebohm a national of Lie?

▶ Held:

- Claim inadmissible.

– Genuine link between state and its national:

- ◆ There must be a genuine connection between the state and its national. This link means **strong factual ties**, such as habitual residence, centre of interests, family ties, participation in public life, attachment to the country etc.
- ◆ The individual must be more connected to that state than any other states.
- ◆ **Nationality is a legal bond having as its basis a social fact of attachment a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.**
- ◆ A state cannot claim that the rules it has thus laid down are entitled to recognition by another state unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the state which assumes the defence of its citizens by means of protection as against other states.

▶ Limitation of case

- Limited by its facts to cases where the national had a tenuous relationship with the state offering protection against a state with which the individual had an extremely close link

◆ NO

◇ ILC Draft Articles on Diplomatic Protection Art 4 - no such requirement

- ▶ For the purposes of the diplomatic protection of a natural person, a state of nationality means a state whose nationality that person has acquired, in accordance with the law of that state ***Need to check ML of those states to determine whether individual has nationality of that state***, by birth, descent, naturalization, succession of states, or in any other manner, not inconsistent with international law ***cannot make law that all people with blonde hair is our national***.

◇ [Salem] [Diallo] - no such requirement

- ▶ D lived in DRC for 30 years, but not a national of it

- Dual or multiple nationality

◆ As against a third state - all nationality state can sue

- ◇ Any State of which a dual or multiple national is a national may exercise diplomatic protection