

Topic 11: Diplomatic Protection

Master Summary

1. Diplomatic Protection is a subtopic of State Responsibility. it must be invoked by establishment of a primary breach of international obligation.
2. note: *DDP reflects CIL*
3. Rationale of Diplomatic Protection:
 - a. Theory of responsibility – mistreatment of foreign nationals is an injury to the national state, as a protector of its nationals. Thus, the state can assert its own right to have diplomatic protection of its nationals (**Panevezys-Saldutiskis Railway Case**).
 - b. Last avenue of remedy (John Dugard) – practically, diplomatic protection is often a last possible avenue for mistreated nationals to seek remedy that cannot otherwise be sought, especially in human rights violations.
4. Discretionary nature of diplomatic protection
 - a. Since the claim of state is not identical to claim of an individual, states viewed as the sole judge to determine whether diplomatic protection will be extended (**Barcelona Traction**)
 - b. **[internal law: UK, (Aus)]** Under UK administrative law, executive government is under a legitimate expectation to at least consider the extension of diplomatic protection (**Abbasi** (UK); issue not decided in **Ruddock** (Aus))
5. Two main Standards of Mistreatment
 - a. **Internationally minimum standard** – states have duty to treat foreign nationals with at least minimum international standard, regardless of municipal law
 - i. preferred by developed states, relatively more dominant – held to be the authoritative standard (**Neer v Mexico**)
 - ii. Example of breaches of int. minimum standard:
 1. State acting in outrage; bad faith; wilful neglect of duty; or Insufficiency of gov action so far short of int. standard that every reasonable person and impartial person readily recognises insufficiency (high bar) (**Neer v Mexico**)
 2. Death in Custody: Failure of due diligence to take reasonable steps to ensure safety of foreign national in custody (**Quintanilla**)
 3. Mistreatment by justice system: Clearly biased, unfair and improper court trial with adverse verdict against foreign national/company (**Loewen Group v US**)
 4. Treatment not in accordance with ‘ordinary standards of civilisation’ (**Roberts v Mexico**) [re: very poor prison conditions in Mexico]
 - b. **National treatment** – foreign nationals treated alike to states’ nationals
 - i. (preferred by developing states)
6. Nationality of Claims Requirement (**ASR 44(a): Admissibility requirement**)
 - a. Natural Persons
 - i. States may only exercise right of diplomatic protection in relation to their nationals (**DADP 2**)
 1. non-citizen residents usually not considered as nationals (**Ad Rawi (2006)**) – UK’s refusal to diplomatic protection for non-citizen resident.
 - ii. ‘nationality’

1. Nationality as acquired under the relevant states' laws (**DADP 4**)
 2. Refugees/stateless: state may exercise diplomatic protection if individual lawfully and habitually a resident in that state (**DADP 8**)
- iii. Dual/Multi Nationality
1. For claims against a third state, all national states can exercise diplomatic protection (**DADP 6**)
 2. For claims against a state of nationality, (**DADP 7**)
 - a. Generally: other national states cannot diplomatic protection
 - b. Exception: if can prove one national state is **dominant** (both at date of injury and claim), then it can diplomatic protection
 - i. Nottebohm special principle
 1. WHEN there is competing claims of nationality by different states on individual who has multi-nationality (**ILC Commentary to DADP 7**)
 2. *Principle*: Look at extent of genuine connection between 'national' and the state to determine which state is more predominant, since nationality is a legal bond with social fact of attachment (**Nottebohm (ICJ, 1995)**)
- b. Corporations
- i. Generally: nationality of corporation is state under whose laws corporation was incorporated (**DADP 9**)
 - ii. Exception: substance test (**DADP 9**)
 - nationality of corporation is another state if:
 1. Corporation controlled by nationals of another state; and
 2. Corporation has no substantial business in state of incorporation; and
 3. Seat of management and financial control of corporation both located in the other state.
- c. national state can take diplomatic action for direct injury to shareholders (**DADP 12**)
- d. Corporation vs Shareholders
- i. For a limited liability company, the legal distinction between shareholder and company meant that injury to the company not allow national state to diplomatic protection shareholder nationals (**Barcelona Traction**)
 1. Rationale: allowing direct injury to company to enable diplomatic protection would enable too many competing diplomatic claims (esp in complex shareholding company), and create atmosphere of confusion and insecurity in international economic relations. (**Barcelona Traction**)
 - ii. Direct injuries to company distinguished from direct injury to shareholder.
 1. Injury to company: e.g. company defaulting, breach of contract with company
 2. Injury to shareholders: e.g. state banning shareholders from receiving dividends
 - iii. Exceptional Circumstances – for lifting corporate veil (allow shareholder state to act)
 1. Company ceased to exist (**DADP 11; Barcelona Traction**)