

ARTICLES ON DIPLOMATIC PROTECTION 2006



Articles on Diplomatic Protection 2006

Historical Context

Codification is a difficult task when there is little jurisprudence on the subject in question. This was not the case with diplomatic protection as when the International Law Commission embarked on its codification of this subject there was already a rich history of case law, backed by treaties, previous attempts at codification and the writings of jurists. Indeed, on the basis of sources available for the codification process, this was probably the subject most ripe for codification ever addressed by the International Law Commission.

In 1758 the Swiss jurist Emmerich Vattel expounded the fundamental principle of diplomatic protection when he wrote that “Whoever ill-treats a citizen indirectly injures the State, which must protect that citizen” (E. Vattel, *The Law of Nations, or the Principles of Natural Law, Classics of International Law, Book II, Chapter VI* at 136 (ed. C. Fenwick transl. 1916)).

The principle that a State was entitled to protect a national injured abroad became a central feature of relations between Western European States and the United States on the one hand and Latin American States on the other during the latter part of the nineteenth century and the early part of the twentieth century. Nationals of the Western Powers who flocked to Latin America to exploit its natural resources and to participate in its industrial development frequently found themselves in disputes with the unstable and volatile governments of the region over their personal rights or property rights.

They then turned to their national States for protection which sometimes took the form of arbitration and sometimes the use of force. Inevitably, the bullying approach adopted by the Western Powers to Latin American States in protecting their nationals’ interests gave diplomatic protection a bad reputation among developing nations. The arbitration tribunals, which sometimes comprised mixed claims commissions, did, however, contribute substantially to the development of this branch of the law by their jurisprudence. In the inter-war years attempts were made to codify aspects of the law governing the treatment of aliens and the principles governing diplomatic protection, particularly at a codification conference in the Hague in 1930. During the same period a number of important treatises were written, notably Edwin Borchard’s monumental *The Diplomatic Protection of Citizens Abroad* (1919).

Diplomatic protection is therefore today not the only instrument of international law that may be used by an individual whose personal or property rights have been unlawfully violated abroad by a foreign government. BITs provide protection for the investments of foreigners and human rights treaties offer remedies for the violation of personal human rights. But diplomatic protection remains a mechanism of international law that is still employed by States to secure just treatment for their nationals abroad. Moreover it has largely lost its reputation as a procedure used by rich, developed nations to interfere in the domestic affairs of developing nations. This is evidenced by the manner in which developing nations have not hesitated to invoke international law's oldest mechanism for the protection of aliens abroad.

An Injury to a National is an Injury to the State

Traditionally diplomatic protection has been viewed as a right vested in the State because an injury to a national is seen to be an injury to the State itself. This fiction, which was proclaimed by Vattel in 1758 (cited above), was endorsed by the Permanent Court of International Justice in 1924 in the *Mavrommatis Palestine Concessions* case when it declared that "by taking up the case of one of its subjects and by resorting to diplomatic protection or international judicial proceedings on his behalf, 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" (*Mavrommatis Palestine Concessions* (Greece v. U.K.), Judgments, P.C.I.J. Reports 1924, Series A, No 2, p. 12).

This explanation for diplomatic protection was premised on the assumption that under early international law the individual had no rights under international law. Subsequent developments in respect of human rights cast doubt on the continued validity of this explanation for diplomatic protection. Today the individual is the subject of many rules of international law which protect him or her against his or her own government and abroad against foreign governments. The ILC therefore was in doubt as to whether it was still necessary to justify diplomatic protection on the fiction that an injury to a national is an injury to the State. Consequently article 1 of the draft articles, which defines diplomatic protection, leaves this matter open and simply defines diplomatic protection as the invocation of responsibility by a State for an injury caused by an internationally wrongful act to a national of that State.

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