

RESOLUTION No. 5/2006

DIPLOMATIC PROTECTION OF PERSONS AND PROPERTY

The 72nd Conference of the International Law Association, held in Toronto, Canada, 4-8 June 2006:

HAVING CONSIDERED the Report of the International Committee on Diplomatic Protection of Persons and Property;

RECALLING the continued importance of diplomatic protection of persons and property as a means to ensure and protect the interest of the injured individual not withstanding the growing possibility of individuals to institute direct international proceedings against foreign states in the context of a changing legal framework and the contribution the International Law Association can make to the study, clarification and adaptation of the topic;

THANKS the Chairmen, the Co-Rapporteurs, and the members of the Committee for the work they have done in developing the understanding of the topic and its role in the contemporary setting, particularly in consideration of the increasing direct right of action of individuals and companies under international law;

ADOPTS the Committee's Report and **COMMENDS** it to governments and international organizations, and all other bodies concerned with the development and implementation of diplomatic protection of persons and property;

REQUESTS the Secretary-General of the Association to transmit this Resolution and the Committee's Report to the Secretary-General of the United Nations and other entities concerned with the subject, notably the International Law Commission, for wide circulation among its members;

APPROVES the conclusions contained in the Final Report, summarized as follows:

Exhaustion of local remedies.

1. Under general principles of international law the exhaustion of local remedies is a procedural precondition for the exercise of diplomatic protection.
2. Local remedies means the remedies which are open to natural or juridical persons under the internal law of the state against which diplomatic protection is sought.
 - 2.1. The term local refers to the internal legal order of the host state,
 - 2.2. The term remedy normally encompasses both administrative and judicial procedures, as well as other adequate and effective procedural devices.
3. Exhaustion presupposes that the alleged victim:
 - 3.1. pursues the claim through the instances which the domestic legal order of the host state provides,
 - 3.2. presents the claim at least in substance before those instances, and
 - 3.3. resorts to those means of procedure which in the same court are essential to establish the claim.

4. As a general rule, the claimant is exempt from exhaustion of local remedies if under general principles governing the observance of the rule of law the process does not meet the necessary conditions to ensure this requirement in the wrongdoing state, in particular where:
 - 4.1. for whatever reason, there is no effective remedy capable of redressing the violation available to him,
 - 4.2. the claimant is factually prevented from access to existing remedies,
 - 4.3. a firmly established jurisprudence offers ex ante no chance of a change in the matter concerned,
 - 4.4. the respondent Government waived the exhaustion of local remedies,
 - 4.5. the respondent Government forfeited its right to the exhaustion of local remedies.
5. The exhaustion of local remedies rule can be waived expressly or tacitly. Tacit waiver requires a clear demonstration of intent.
6. The host state is stopped from invoking the non-exhaustion of local remedies, if:
 - 6.1. a time-limit set for invoking the plea has passed without the plea having been made,
 - 6.2. in the light of the words and conduct or for any other reason the raising of the plea does not meet essential requirements of good faith.
7. In respect of the burden of proof:
 - 7.1. The claimant has the burden of proving that local remedies were exhausted, or that he was exempted from so doing.
 - 7.2. The host state has to prove that further remedies existed which were not exhausted.

Nationality of claims.

1. The right of the individual affected by a wrong should be asserted and enforced by means of diplomatic protection as the prevalent interest. A parallel right of the state of nationality can also be asserted and enforced in this context but it should not be substituted for the individual's own right.
2. The discretion exercised by a government in refusing to espouse a claim on behalf of the individual should be subject to judicial review in the context of due process and the prevention of arbitrariness, subject to constitutional requirements of the state of nationality.
 - 2.1. The obligation of the government in undertaking such a review is not necessarily to enforce the taking of diplomatic representations but to ensure that the government of nationality considers the position of the particular individual and the extent to which such action might be taken.
 - 2.2. Judicial review may consider the question of eventual compensation of the individual by the state refusing to espouse the claim in the light of constitutional or administrative rights.
3. Direct access by the individual to international claims settlement arrangements and dispute settlement procedures is to be encouraged as giving expression to the assertion of his own rights.
4. In the context of such arrangements, the submission of claims by the state of nationality may be dispensed with.
5. When direct access by the individual to international claim procedures is not available, diplomatic protection should be exercised in a residual manner. The

availability of such procedures excludes diplomatic protection, except for the enforcement of decisions or parallel violation of due process by the host state.

6. The link of nationality to the claimant state must be genuine and effective, and in case of concurrent nationalities, predominant. Stateless persons and refugees are entitled to diplomatic protection by the state of residence.

7. In exceptional circumstances, claims may be brought on behalf of non-nationals, of nationals of the defendant state or under trusteeship arrangements.

7.1. Such exceptional circumstances are particularly related to humanitarian concerns or where the individual would have no other alternative to claim for his rights.

7.2. Where a claimant has the dual nationality of the defendant state and of the state in whose national court a plea of immunity is raised by the defendant state, the raising of such a plea in the absence of local remedies to exhaust shall be treated as such exceptional circumstances, particularly in situations of humanitarian concern.

8. Continuance of nationality may be dispensed with in the context of global financial and service markets and operations related thereto or other special circumstances. In such context the wrong follows the individual in spite of changes of nationality and so does his entitlement to claim. Continuous nationality may still be required in situations involving potential claimant misconduct.

9. Transferability of claims should be facilitated so as to comply with the standard set out under 8 above.

10. Only the state of the latest nationality should be able to bring a claim under the rule set out in 8 above. This claim shall not be made against the former state of nationality. It is a requirement that changes of nationality and transferability of claims be made *bona fide*.

11. In cases of dual nationality the effectiveness or predominance of the link should prevail over other considerations, allowing if justified for claims against the state of which the individual is also a national. This is without prejudice to the question of claims on behalf of non-nationals or claims against nationals of the defendant state explained above.

12. Shareholders of a foreign company may be protected by the state of their nationality if their rights have been directly infringed, as well as in other special circumstances where they would otherwise be deprived of protection.

13. Shareholders of a foreign company may also be protected by the state of their nationality for wrongs affecting such company if the state of nationality of the company is unable or unwilling to exercise such protection or is the defendant state.

14. Control of a foreign company by shareholders of a different nationality, may entitle the state of nationality of such shareholders to exercise diplomatic protection on their behalf or otherwise to consider the company as having its nationality.

15. If a company or partnership is prevented from claiming because of its nationality, shareholders or partners not so affected may claim in proportion to their interest in such company, including indirect or minority interest, or otherwise be entitled to diplomatic protection by the state of their nationality, particularly if incorporation in the host state has been required by that state as a condition of conducting business there.

RECOMMENDS to the Executive Council that the Committee on Diplomatic Protection of Persons and Property, having achieved its mandate, be dissolved, without prejudice to whatever other arrangements the Executive Council sees fit to make in

order to follow, and contribute to, the continuing work of the International Law Commission on Diplomatic Protection.