

Katerina Perrou

Taxpayer Participation in Tax Treaty Dispute Resolution

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28

Taxpayer Participation in Tax Treaty Dispute Resolution

Why this book?

When taxpayers go global, can disputes and dispute resolution remain local? Unilateral administrative measures and domestic judicial systems will continue to be used for the resolution of international tax disputes, but the inherent limits of one-sided solutions to multi-sided problems are bound to lead us to unsatisfactory results. Closer international cooperation becomes a sine qua non for the establishment of an international dispute resolution system that will possess all the fair trial guarantees of domestic judicial systems, but also cure its limited effectiveness, which does not extend beyond the geographical borders of one state.

The striking discrepancy between domestic judicial systems and the international one (MAP and arbitration) is the phenomenon of the absent taxpayer. This may be explained, but at the current level of development of international (economic) law and human rights law it can no longer be justified. This analysis develops on two axes: (i) the access of private parties to international law remedies from the perspective of public international law; and (ii) the access of private parties to international law remedies from a human rights law perspective.

A comparative analysis reveals that MAP as a form of diplomatic protection is not appropriate for international tax disputes. On the other hand, traditional public international law doctrine prohibiting the participation of private parties in international dispute resolution mechanisms has progressively shrunk. At the same time, prohibiting taxpayers direct access to MAP and arbitration procedures renders the tax treaty dispute resolution mechanism not compatible with the fair trial guarantees.

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As pointed out in section 1.1., this analysis deals only with the “individual v. state” type of disputes and not with the “state v. state” type of disputes, in which the participation of the taxpayer is not permitted and should not be allowed. The answer to the question of whether the participation of the taxpayer in international double taxation dispute resolution mechanisms is appropriate requires first an understanding of the particular characteristics of individual international double taxation disputes. Only after the international tax disputes have been identified and properly classified will it become clear whether they are suitable or not to being resolved by a system to which private parties have direct access.

The fact that different dispute resolution mechanisms exist is not without reason: different kinds of disputes require different kinds of resolution mechanisms. Even international tax disputes can have various forms, therefore even international tax disputes may require different international tax dispute resolution mechanisms or a varying degree of private party participation. The aim of this part is to shed light on the participation of private parties in international law mechanisms from an international law point of view, which forms the general framework in which international double taxation treaties exist.

Double taxation treaties are international treaties and the dispute resolution mechanism they adopted, the mutual agreement procedure, is a form of diplomatic protection. The discussion in this part starts therefore with the development of the concept of disputes in international law and the concept and nature of diplomatic protection. After these general remarks that show the origins of the concepts included in double taxation treaties, the analysis focuses on the particular case of international tax disputes.¹¹⁷ The thesis adopted here is that international double taxation disputes are closer to the concept of tax disputes that arise under domestic law rather than they are to international law disputes.

This part would not be complete without an analysis of the way that disputes of a nature similar to that of international tax disputes are dealt with in other areas of international law.¹¹⁸ The comparative analysis reveals that it is not unusual that private parties are granted rights of direct access to international law dispute resolution mechanisms. Furthermore, although various

117. See chapter 2.

118. See chapter 3.

exceptions exist in relation to how tax matters are dealt in the context of other areas of law (such as foreign investment for example) it does happen that some tax cases are the subject of a dispute that is referred by a private party to an arbitration body in order for it to be resolved, without the intervention of another state (that would be the state of the nationality of the investor). These types of international tax disputes are also comparable to the international tax disputes that arise from international double taxation treaties and they offer a kind of preview of how granting private rights of access to an international double taxation dispute resolution system would look.

Chapter 2

Diplomatic Protection and International Tax Disputes: An Awkward Cohabitation of Two Strangers

2.1. Introductory remarks

The mutual agreement procedure, only recently complemented by an arbitration procedure, is provided as the exclusive international law mechanism for the resolution of disputes that arise from an international double taxation convention. The origins of the mutual agreement procedure lie with the theory of diplomatic protection, which is one of the ways for the resolution of international law disputes. Diplomatic protection, however, was developed and applied in a rather different context than that of international taxation: it developed in the context of traditional international law disputes that differ significantly from international tax disputes. Consequently, it appears that, despite the efforts made to adapt the nature and mechanics of diplomatic protection to the needs of international tax dispute resolution, this combination works rather unsatisfactorily.

In the following paragraphs the discussion focuses first on the general international law framework. The concept of “international dispute” under traditional international law is presented and a comparison with the concept of “international taxation dispute” is discussed.¹¹⁹ Secondly, after these concepts are clarified, the discussion moves to the concept of “diplomatic protection” as a means of dispute resolution under international law.¹²⁰ Thirdly, the relation of diplomatic protection mechanisms with the protection of taxpayers in international tax disputes is explored.¹²¹ This chapter closes with the conclusion¹²² that the theory of diplomatic protection adopted by double taxation conventions, as the exclusive dispute resolution method, is not compatible with the nature of international tax disputes.

119. See section 2.2.

120. See section 2.3.

121. See section 2.4.

122. See section 2.5.

2.2. The general framework: International law disputes and diplomatic protection

International tax disputes form a subcategory of international law disputes. It is required therefore that this analysis starts with the general setting: the environment of international law disputes in which the particular type of “international tax disputes” grew and developed. The dispute resolution mechanisms that were developed by international law were of course aimed at the particularities of international law disputes, as international law and international dispute resolution mechanisms were developing gradually and in parallel. The concept of international law disputes comprises two other concepts: “disputes” and “international” that will be examined separately in the following paragraphs.¹²³

2.2.1. The concept of “dispute”: When does a dispute exist?

In traditional public international law, the definition of the concept of a dispute is to be found in the case law of the International Court of Justice and its predecessor, the Permanent Court of International Justice. According to the definition given in 1924 by the then Permanent Court of International Justice “a dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”.¹²⁴ In order to establish whether a dispute exists or not, the characteristics contained in the definition must be present.

Disputes must be distinguished from conflicts.¹²⁵ The term “conflict” is used to signify a general state of hostility between parties, whereas the term “dispute” is used to signify a specific disagreement relating to the question of rights or interests in which the parties proceed by way of claims, counter-claims, denials, and so on. Conflicts are often unfocused whereas a

123. On the nature of international disputes, see N.L. Wallace-Bruce, *The settlement of international disputes – The contribution of Australia and New Zealand* (Martinus Nijhoff Publishers 1998), p. 3ff; on the more general issue of international tax as international law (from an Asia/Pacific perspective), see N.C. Sharkey, *International Tax as International Law and the impact of China*, British Tax Review (2012), p. 269.

124. *The Mavrommatis Palestine Concessions*, Judgment, PCIJ, Series A, No. 2, 30 Aug. 1924.

125. For the distinction between conflicts and disputes, see J. Collier & V. Lowe, *The settlement of disputes in international law, institutions and procedures* (OUP 1999), p. 1.

dispute must be specific and focused on a particular point of law or fact. The resolution of (specific) disputes does not necessarily result in the resolution of (wider) conflicts.

Whether an international dispute exists is a matter for objective determination.¹²⁶ It is not sufficient for one party to a contentious case to assert that a dispute exists with the other party.¹²⁷ The existence of a dispute is something that the Court itself has to decide, taking into account all the characteristics of the particular case that is brought before it. This criterion is thus separated from the subjective position a party may have as to the existence of a dispute. On the one hand, the assertion of a party that a dispute exists should not be reason enough to cause the involvement of another party. On the other hand, the mere denial by a party of the existence of a dispute does not mean that the dispute does not exist. Nor is the silence of a party enough to lead to the conclusion that a dispute exists.¹²⁸ Furthermore, the mere existence of conflicting views or a simple disagreement is also not enough reason for the existence of a dispute to be established. It must be shown that the claim of one party is positively opposed by the other.¹²⁹ This criterion is also an objective criterion that is to be examined independently, irrespective of the subjective positions of the parties. The satisfaction of this criterion presupposes that the opposing parties have a disagreement on the same point of law or fact.

The existence of a dispute may be affected by a number of factors. The ICJ has acknowledged, on several occasions, that events subsequent to the filing of an application may render an application without object.¹³⁰ It is accepted,

126. *Interpretation of peace treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, ICJ reports 1950, p. 74; *East Timor (Portugal v. Australia)*, ICJ reports 1995, 100; *Case concerning questions of interpretation and application of the 1971 Montreal convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary objections, Judgment of 27 February 1998, para. 22.

127. "A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence"; *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports 1962, p. 319.

128. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988, 12, para. 38.

129. *South West Africa cases, Preliminary Objections*, Judgment, ICJ Reports 1962, 328; *East Timor (Portugal v. Australia)*; *Case concerning questions of interpretation and application of the 1971 Montreal convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary objections, Judgment of 27 February 1998, para. 22.

130. *Case concerning questions of interpretation and application of the 1971 Montreal convention arising from the aerial incident at Lockerbie (Libyan Arab Jamahiriya v.*

however, that the attempt of the parties to find a solution by other means, or the existence of a parallel political dispute, does not seem to interfere with the question of the existence of a dispute. As the ICJ held in the *Aegean Sea Continental Shelf* case,¹³¹ “the fact that negotiations are being actively pursued during the present proceedings is not, legally, any obstacle to the exercise by the Court of its judicial function”. This view was repeated a few years later in the *United States Diplomatic and Consular Staff in Tehran* judgment,¹³² where the establishment of a fact-finding commission with the agreement of the two states was not considered in itself to be in any way incompatible with the continuance of parallel proceedings before the ICJ.¹³³

The existence of a dispute does presuppose a claim arising out of the behaviour of, or a decision by, one of the parties; it in no way requires that any contested decision must already have been carried out in effect. What is more, a dispute may arise even if the party in question gives an assurance that no measure of execution will be taken until ordered by a decision of the domestic courts.¹³⁴

The constituting elements and the definition of the dispute were developed through the jurisprudence of the International Court of Justice and have their origins in highly contentious cases where politics were involved and the alternative of armed conflict was often present. The case is not the same in the field of international taxation, where international cooperation is the principal objective and the whole network of bilateral international tax treaties is based on widely accepted models.

It appears that the particularities of international tax cases may not always be properly taken into account if we use the international law definition to identify international tax law disputes. It is therefore required that the

United Kingdom), Preliminary objections, Judgment of 27 February 1998, paragraph 46 with further reference to the case *Border and transborder armed actions (Nicaragua v. Honduras)* Jurisdiction and admissibility, Judgment, ICJ Reports 1988 95, paragraph 66.

131. ICJ Reports 1978 12, para. 29.

132. ICJ Reports 1980 3.

133. The case, of course, can be different if the parties to an international treaty have agreed otherwise and make the existence of a dispute that may be brought before the ICJ dependant on previous attempts at negotiation or arbitration; see for example the judgment of 3 February 2009 on *Case Concerning Maritime Delimitation in the Black Sea (Romania v. Ukraine)* paragraphs 17-19. This issue, however, is not related so much to the existence of a dispute as to the establishment of a certain (judicial or administrative) body's jurisdiction over a certain dispute.

134. *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988 12, para. 42.

definition of the dispute is somewhat adapted in order to fit the particularities of international tax law. The notion of “dispute” as it has been developed by the case law of the ICJ and the traditional international law theory needs to be completed by one more element, a subjective one: there must be recognition by at least one of the disagreeing parties that the issue has crystallized to a point that it needs to be solved but cannot be settled by the actions taken or the procedures engaged so far.¹³⁵ This “lack” of the traditional PCIJ definition of a subjective element is of course understandable in the context of the rules of jurisdiction of international tribunals and the preference for objective criteria based on facts only. It seems though that this additional element is necessary in the context of a dispute resolution discussion, as we cannot refer to “dispute resolution” when there is a dispute but no intention to resolve it. For the purposes of this analysis, therefore, we will use the definition in a way that it is adapted to economic relations, proposed by F D Berman:

a disagreement on a defined issue of law or fact, or law and fact combined, which has brought the interests of two or more States into conflict and which they (or at least one amongst them) require to have solved.¹³⁶

2.2.2. The concept of “international”: When does a dispute become international?

The international character of a dispute depends primarily on the persons that are involved in the dispute and secondarily on the applicable law. As far as the “persons involved” criterion is concerned, two further main categories can be distinguished: direct and indirect international disputes.

Direct international disputes are the disputes that arise at the outset between parties all of which possess international personality.¹³⁷ International personality is reserved for states and international organizations. However, individuals can also enjoy international personality on a limited scale. In direct international disputes, international law applies throughout the duration of

135. F.D. Berman, *Legal theories on international dispute prevention and dispute settlement: Lessons for the transatlantic partnership*, in E.-U. Petersmann & M.A. Pollack eds., *Transatlantic economic disputes* (OUP 2003) 451, p. 455.

136. Id.

137. On the classification of international disputes and the distinction between “direct” and “indirect” disputes, see N.L. Wallace-Bruce, *The settlement of international disputes*, *supra* n. 123, p. 7ff.

the dispute: from the moment it arises until the moment it is resolved. The vast majority of direct international disputes arise between states whereas a few have also arisen between a state and an international organization.¹³⁸

Indirect international disputes are those that initially do not have an international character but that are transformed into international disputes upon the fulfilment of certain conditions. Two further categories may be distinguished: international disputes between an individual and a foreign (usually a host) state and international disputes between an individual and its own state.

2.2.2.1. International disputes between an individual and a foreign state

In the case of the *Mavrommatis Palestine Concessions* the dispute was at first between a private person and a state – i.e. between M. Mavrommatis and Great Britain. Subsequently the Greek government took up the case. The dispute then (and only then) entered the domain of international law and became a dispute between two states.¹³⁹

The action of a state, by which it takes up the case of one of its subjects, is based on an elementary principle of international law, according to which a state is entitled to protect its subjects when they have been injured by acts contrary to international law, committed by another state from whom they have been unable to obtain satisfaction through the ordinary channels. It is important for the characterization of a dispute as international that a violation of international law has taken place. Consequently, by taking up the case of one of its subjects and by using diplomatic means or international judicial procedures on his behalf, the state is actually asserting its own rights: its

138. See, for example, the case *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, ICJ Reports 1988 12 where an advisory opinion from the ICJ was requested by the United Nations with regard to a dispute that existed between the United Nations and the United States as a host country, concerning the interpretation or application of the Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, dated 26 June 1947. See also *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ Reports 1999 62 where an advisory opinion was requested by Malaysia from the United Nations regarding the application of the United Nations' Convention on Privileges and Immunities.

139. *Mavrommatis Palestine Concessions*, *supra* n. 124.

right to ensure, for its subjects, respect for the rules of international law.¹⁴⁰ In those cases it is no longer important that the dispute concerned an injury to a private person; once the state has taken up the case, it has become a dispute between two states and therefore an international law dispute. However, this does not mean that the state substitutes itself for its subject; as already pointed out, it merely asserts its own rights under international law.¹⁴¹

This transition from the municipal level to the international level is not without consequences. One such consequence, identified in 1924 in the *Mavrommatis Palestine Concessions* case, is the fact that when the dispute enters the international plane, normally the states have an obligation to at least negotiate first. This observation is of particular importance for international tax disputes. At the point the state takes up the case, factors unknown in the previous discussions between the individual and the competent authorities may enter into the diplomatic negotiations. However, it is possible that if the diplomatic negotiations between the two states start at the point where the previous discussions left off, the nature of those earlier discussions renders renewed discussion of the opposing contentions, in which the dispute originated, superfluous. Of course this is no general and absolute rule but rather this is an issue to be examined on a case-by-case basis. In general, if the negotiations between the private party and the foreign state have already reached a deadlock, it is rather difficult that a new round of negotiations between two states at the international level will render any different result. In international tax disputes where the primary (if not the only) obligation the contracting states have undertaken is to negotiate, the sooner the deadlock is established the better for all parties involved.

Another possibility, however, also exists. There are cases in which the violation by a state of its international legal obligations constitutes both an infringement upon the other state's rights as well as an infringement on the individual's rights. In that case the second state that takes up the case on behalf of its own national does so in a dual capacity: in its own right and in the exercise of its right of diplomatic protection of its nationals. The ICJ has accepted that Mexico acted both in its own right and in exercising its diplomatic protection of its nationals in the case of *Avena and other*

140. The general international rule that applies is that in inter-state relations, whether claims are made on behalf of a state's national or on behalf of the state itself, the claims are always of the state; cf. *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) second phase, Judgment, ICJ Reports 1970, p. 3, paragraph 85.

141. *Mavrommatis Palestine Concessions*, *supra* n. 124, pp. 12-13; see also *Nottebohm*, Second Phase, Judgment, ICJ Reports 1955 24.

Mexican nationals,¹⁴² in a dispute that arose from an infringement by the United States of the Vienna Convention on Consular Relations of 24 April 1963. The issue of the capacity under which a state acts in the international plane (in its own right, in the right of diplomatic protection to its nationals or both) can have consequences as far as the application of the rule of exhaustion of local remedies is concerned.

It is true that, as the ICJ has observed,¹⁴³ the individual rights of a state's nationals, under an international treaty, are rights which are to be asserted, at any rate in the first place, within the domestic legal system of the other state. Only when that process is completed and local remedies have been exhausted would the first state be entitled to espouse the individual claims of its nationals through the procedure of diplomatic protection. In some cases, however, the violation of the rights of the individual under an international treaty may entail a violation of the rights of the state of which the individual is a national and violations of the rights of the state may entail a violation of the rights of the individual. In such special circumstances of interdependence of the rights of the state and of individuals, a state may, in submitting a claim in its own name, request the court to rule on the violation of rights which it claims to have suffered both directly and through the violation of individual rights conferred on its nationals under the international treaty. The duty to exhaust local remedies does not apply to such a request. Furthermore, if that is the case, it becomes unnecessary to deal with the state's claims of violation separately under a distinct heading of diplomatic protection.¹⁴⁴

142. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, ICJ Reports 2004, p. 12.

143. *Id.*, para. 40.

144. This was the conclusion of the ICJ in the *Avena and other Mexican nationals* case, *supra* n. 142, in which it did not uphold the United States' argument that the claims of Mexico should not be admissible, since the Mexican nationals, whose rights were violated by the United States, had not exhausted all domestic remedies. The ICJ in this case made reference to its previous case law, namely the judgment in the *La Grand* case, in which it had also rejected an objection put forward by the United States related to the ICJ's jurisdiction over Germany's claim founded on diplomatic protection; see *La Grand (Germany v. United States of America)*, Judgment, ICJ Reports 2001, p. 466; see in particular paragraph 42 of the *La Grand* judgment where the ICJ states that

(...) this fact does not prevent a State party to a treaty, which creates individual rights, from taking up the case of one of its nationals and instituting international judicial proceedings on behalf of that national, on the basis of a general jurisdictional clause in such a treaty.

2.2.2.2. International disputes between an individual and his own state

The development of international law in recent years has permitted individuals, under certain circumstances, to be able to pursue their own rights under international law directly against states, whether the violating state is their own state of nationality or a foreign state.¹⁴⁵

The fact that a state may be involved in an international dispute with its own national was unthinkable a few decades ago, while now it is not strange at all. A great example is offered by the development in the area of human rights. Certain bodies within the United Nations system are competent to receive and consider “communications” from individuals for alleged violations of their human rights by their own state: the Human Rights Committee,¹⁴⁶ the Committee Against Torture,¹⁴⁷ and the Committee on the

145. An analysis of the relationship between the concept of national sovereignty and the possibility given to individuals to turn against their own state of nationality in international *fora* is provided by N.L. Wallace-Bruce, *The settlement of international disputes*, *supra* n. 123, 9ff. Wallace-Bruce points out that granting international law status to individuals is evidence of the shrinking process that state sovereignty is undergoing, notwithstanding the fact that in any case the consent of the state is required.

146. The Committee was set up by part IV of the International Covenant on Civil and Political Rights. In order to achieve the purposes of the International Covenant on Civil and Political Rights and the implementation of its provisions, the states decided that it would be appropriate to enable the Human Rights Committee, set up in part IV of the Covenant, to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant. Accordingly, article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights provides that

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

The provisions of the Covenant and its impact on taxation as well as the tax-related case law of the Human Rights Committee are the subject of separate analysis, in chapter 4.

147. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, which entered into force on 26 June 1987. According to article 22(1) of this Convention

A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

Elimination of Racial Discrimination.¹⁴⁸ In all these cases the possibility for individuals to present their case before an international law body following international law rules depends on their respective state having granted such a right. However, these examples show that sometimes, for the protection of rights conferred upon individuals by international treaties, the protection may be more effective if the individuals concerned have a procedural right of their own to claim their international law rights at the international level.

In the initial stages of an indirect international dispute, in the vast majority of cases individuals and corporations are involved, as this kind of dispute usually arises in the investment law area. As the ICJ has pointed out,¹⁴⁹ in principle when a state admits into its territory foreign investments or foreign nationals, whether natural or legal persons, that state is bound to extend to them the protection of the law and assumes certain obligations regarding the treatment to be afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a state towards the international community, as a whole, and those arising vis-à-vis another state in the area of diplomatic protection.

By their very nature, the obligations of a state towards the international community are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.¹⁵⁰ On the other hand, obligations, the performance of which is the subject of diplomatic protection, are not of the same category. It cannot be held that all states have a legal interest in

148. See in particular article 14(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly resolution 2106 of 21 December 1965 (which entered into force on 4 January 1969, in accordance with article 19), according to which

A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

149. *Barcelona Traction*, *supra* n. 140, para. 33.

150. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law whereas others are conferred by international instruments of a universal or quasi-universal character; see *Barcelona Traction*, *supra* n. 140, paragraph 34 and *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 23.

their observance, when one such obligation is in question in a specific case. In those cases, in order to bring a claim in respect of the breach of such an obligation, a state must first establish its right to do so. The rules to establish such a right rest on two suppositions:

- (1) the host state has broken an obligation towards the national state in respect of its nationals; and
- (2) only the party to whom an international obligation is due can bring a claim in respect of its breach.¹⁵¹

2.3. The concept and nature of diplomatic protection

Diplomatic protection is from its origin closely linked with international commerce. Considering that with diplomatic protection a state is asserting its own right, it is recognized that it may exercise diplomatic protection by whatever means and to whatever extent it thinks fit, within the limits prescribed by international law. Should the natural or legal persons on whose behalf the state is acting consider that their rights are not adequately protected, they have no remedy in international law. All they can do is to resort to municipal law, if means are available, with a view to furthering their cause or obtaining redress.

The municipal legislator is free to impose upon the state an obligation to protect its citizens abroad and may also confer upon the nationals of the state a right to demand the performance of that obligation and even provide for sanctions, so that the right does not remain *lex imperfecta*. However, all these questions remain within the realm of municipal law and do not affect the position of the state or the national internationally. The state is viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when the protection 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 case or category of cases. Since the nature of the claim of the state and the nature of the claim of the private person (individual or corporate), whose cause is espoused by the state, are not identical, the state enjoys complete freedom of action.¹⁵² Consequently, even after the espousal of a claim by the state,

151. See *Barcelona Traction*, *supra* n. 140, para. 35 and *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, pp. 181-182.

152. Cf. *Barcelona Traction*, *supra* n. 140, paras. 78-79. See also the work of the UN in the clarification of the nature and definition of diplomatic protection United Nations Document A/CN.4/L.537 of 3 July 1997, International Law Commission, Forty-ninth session, Geneva 12 May-18 July 1997, Report of the Working Group.

Notes

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