International Law

Discussion Questions

Gleider Hernández, *International Law* (Oxford University Press, 2019)

Chapter 11, Diplomatic Protection and issues of standing

Question 1. *'"An injury to a national is an injury to a State" remains the only basis on which a State may exercise diplomatic protection'. Discuss.*

It is true that as a general principle, only the party to which an obligation is due may claim for its breach. This means that the injured party is the only one that has the right to claim. Because in international law, it is primarily States that may assert and enforce their claims, the 'Vattelian' fiction in the quote entails that injuries of nationals are considered to be injuries of the State of nationality for the purposes of asserting a claim.

The general rule has evolved, however, in situations where there is a breach of an obligation *erga omnes*, all States may have a legal interest in their enforcement (*Barcelona Traction*). Certain treaties (such as the conventions against torture and against genocide) expressly permit all States parties to bring actions in respect of a breach, irrespecitve of the nationality of the victim. In *Obligation to Extradite or Prosecute*, the Court upheld the customary law status of Article 48 ARSIWA, which establishes this principle. In the *Whaling* judgment, the Court once again applied this principle in relation to the Whaling Convention—where the injury was to the whaling population covered under the Convention and not to any national of any State.

The best answers will acknowledge, however, that as yet the ICJ and other international courts have not yet allowed for standing to be upheld in relation to obligations *erga omnes* where there was no applicable treaty provision.

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Question 2. *'Many States can extend diplomatic protection over a corporation.' Is this true? Analyse this statement critically.*

Foremost, students would need to distinguish the rules on diplomatic protection between individuals and corporations. They would have to recall that the protection of individuals generally depends on their legal nationality, but that in some cases that nationality is not considered to be opposable internationally (*Nottebohm*). You also have situations of dual nationality in which an individual's 'effective nationality' might have to be determined. The rules for corporations are different. In *Barcelona Traction* the ICJ was clear that this principle did not apply to corporations, and that the only State of nationality is the State of incorporation. The reason for this was the very existence of the 'corporate veil' (a device to endow a corporation with its own legal personality). Recall that a corporation has officers and directors (who can come from any State), as well as shareholders (which as an aggregate body could be composed of nationals from all States!); as such, the Court decided on a relatively formal approach. In *Diallo*, when the State of incorporation was the State that had purportedly violated the rights of the corporation, a 'doctrine of substitution' whereby a shareholder could claim on behalf of the corporation (and that had been proposed by the ILC in Art 11(2) of the ADP) was rejected by the ICJ.

A detailed answer might also point out that if the direct rights of shareholders under corporate law (e.g. a right to vote, a right to a dividend) are violated, then a shareholder's national State may exercise diplomatic protection (*Diallo*, *ELSI*), but these are different situations than in respect of the actual corporation and its own rights.

Question 3. *What occurs when a State and its nationals have suffered injuries from the same act? Must both the State and its nationals exhaust local remedies?*

First, it is important to recall that the exhaustion of local remedies only applies to the nationals of a State and not to a State itself, which may go straight to international fora to uphold its 'direct' claims, such as an injury to State property or

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assets, or an injury to an official or agent of the State when in the exercise of their official functions.

As such, the question is referring to the situation of 'mixed claims' in which the same breach or set of breaches have caused injury to both a State and its nationals. In such cases, it is presumed that the State's interest and those of its nationals are fully intertwined, and cannot be addressed separately.

The general rule in such cases is that the State's interest cannot just be ancillary or secondary: in *Interhandel,* the ICJ stated that when the injury to the national is clearly 'preponderant', then the matter remains one where local remedies must be exhausted (see also *ELSI*). The ILC would impose a higher test, perhaps out of deference to States, that the claim must be 'overwhelmingly' connected to the national instead of to the State in order for the requirement to exhaust local remedies to be triggered. The latter test is such that it would only exclude situations where the essence of a State's interest is purely ancillary or its injury is so negligible as to be general in nature.

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