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The Key Role of Nationality as General Condition of Diplomatic Protection

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Abstract

The general conditions of diplomatic protection of citizens abroad are the existence of the international wrongful act or omission attributed to a state, act which caused injury to an alien, the exhaustion of local remedies and the nationality/citizenship. Upon all of these, legal writers are discussing about the faculty of the state of nationality to espouse the claim of its national or to refrain from assuming it.

As basic elements of this legal institution, in the literature there were mentioned the territoriality of law, the nationality (with its four principles legal attachment, exclusiveness of nationality, mutability and continuity) and the protective function of the state (protection abroad). Therefore, an analysis of the subject request a preliminary study of three distinct relations: between the state and its own national, then, between the state and aliens who reside within it and, lastly, relations of states among themselves with respect to their rights over and their international responsibility for delinquencies toward aliens (Borchard E.M., 1927: p.497).

Nationality/citizenship represents the core condition for diplomatic protection. Without its fulfillment, the State of alien's nationality neither can show its legitimate interest, nor its intention or quality to start the procedure and espouse the claim of its national. Presently, the society is characterized by dual or multiple nationalities.

The general rule in this field is that a person, natural or juridical, must have the nationality of the state claiming injury at the time at which the injury is inflicted, in order that there may be an actual violation of the substantive rules of international law relating to injuries to aliens. The nationality principle has a series of ramifications depending on what is the situation occuring in practice. A state's right to exercise diplomatic protection is based on the link of nationality between the injured individual and the acting state. Thus, the general rule is that a state may not extend its protection to or to espouse claims of non-nationals. (Amerasinghe C.F., 2007: p.91).

Key words: Nationality/citizenship, relevance of nationality for natural persons and juridical persons, determination of nationality, continuous nationality, dual and multiple nationalities, the effective link theory

Introduction

The fundamental condition for diplomatic protection to be admissible is that the state of nationality to legitimate his capacity by undertaking such an action in order to prove that the natural person posesses its citizenship or the juridical person its nationality.

The link of citizenship or nationality represent the condition *sine qua non* for the legal institution of diplomatic protection (*Anghel I.M., 2011: p.196*).

When there are no treaty or special agreements concerning the demarche, there is only the link of citizenship that give the right to diplomatic protection (*the Mavrommatis Palestine Concessions Case*).

The citizenship is of utmost significance, without its fullfilment the protective state would not be able to legitimate its interest and its capacity to undertake the demarche.

Some scholars notes that the only legal basis which can authorise the state to request from another state the fullfilment of a conduct prescribed by the international law in regards with persons is the link of nationality (*Schwarzenberg G., 1957: p.591*).

The natural person or the juridical one has to have the citizenship, respectively, the nationality of the state which exerts its protection starting from the moment when he/she became the object of the international wrongful act until the moment when the diplomatic protection will be exerted.

2. The theory of effective nationality

The current legal practice of diplomatic protection is complicated by the fact that while diplomatic protection represent an issue of international law, the nationality falls under national law. In order to conciliate this divergence of citizenship as national act which produce the international effect of diplomatic protection, the International Court of Justice (ICJ) aplied the theory of effective nationality. It has been said that the link of nationality must be real and effective.

Through its decision on the 6th of April, 1955, the ICJ in *the Nottebohm Case* rejected the claim of Lichtenstein by stating that the simple fact of granting the nationality of the state to its citizen is unsufficient for that person to obtain the protection of that state in front of the Court.

However, a general statement made by the ICJ in *the Nottebohm Case (Second Phase)* on the nature of nationality was to the effect that „*according to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is the legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said that it constitutes the juridical expression of the fact that the individual upon whom it is conffered, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conffering nationality than with that of any other State*" (*ICJ Reports, 1955: p.25*).

This would seem to indicate that there was a general rule requiring an effective link for the conferment of nationality. However, the court, in fact, did not purport to pronounce on the status of Nottebohm's Lichtenstein nationality in the abstract, but confined its views to the status of his nationality vis-à-vis Guatemala (*Amerasinghe C.F., 2007: p.94*).

But the principle of effective citizenship was criticised by pointing out that if the condition of effective link of citizenship represent a means of limitation of the exert of diplomatic protection by the national state, it would come in practice to the destruction of the institution.

The rule of citizenship has a general application to the effect that it represents an essential condition of diplomatic protection in which regards the natural and juridical persons. Also, the above-mentioned rule applies in the case of entities, such as ships and airplanes. In the same time, it has a mandatory application because a subject of the international law cannot exert diplomatic protection on behalf of the citizen belonging to another state or on behalf of a stateless person.

As exceptions, there could be mentioned couple of cases as follows:

✓ The case of protected persons, those persons who do not posess a citizenship based on a national law, but posess a nationality based on international law. Such situation can result from a protectorate or from a right of international representation of the inhabitants of a territory. In international practice, it is known also the exceptional case when at the base of the action of granting diplomatic protection was accepted a conventional link of protecting powers in stead of citizenship. It has to be noted that the hypothesis of diplomatic protection in the case of the European Union difers from the aforementioned aspects, because it is based on a citizenship and it is not infered from a case of representation. It is based on a supranational citizenship which is added to the national citizenship. More than that it is not the European Union which is granting diplomatic protection, but a member state.

✓ The case of members of the armed forces and crews of ships (the exclusive jurisdiction of a state upon the members of the armed forces while being abroad on peace time, determined the state to accept the right of protection of the sending state in regards with members of such forces, regardless of nationality or citizenship. It is doubtful, if this rule can be extended to the foreign members of the crew of the ship being under the flag of that state.

✓ The situations stipulated in treaties, the rule of citizenship could be modified or repealed on a conventional way. In this category it is included the case of functional protection. In *the Reparation for Injuries Case (1949)* the ICJ afirmed the right of the United Nations Organisation to present international claims for the injury caused to the Organisation itself, as a result of injuries suffered by anyone of its members, as agent of the Organisation and of injuries caused to the victim or to entitled persons.

In regards with natural persons it applies a certain set of rules. A state cannot interfer in favor of a person which has not its citizenship according to the national law of the respective state. It must be noted that the citizenship could be opposable to the state against which the claim was raised and the opposibility exists when the respondent state has recognized this citizenship or when the citizenship is effective – any citizenship granted according to the national law is presumed as being effective.

In case of dual citizenship or changing the citizenship, it must be put to the test the effectivity in order to determine the admisibility of diplomatic protection.

If the person in question has dual citizenship and one of them is the citizenship of the respondent state, the jurisprudence is severe and has not always permitted that person to be protected.

In regards with juridical persons, the *siège social*, the place of registration or incorporation and the place where the economic control or the management point of the company is situated are chriteria which determine the nationality and provide a sufficiently real link in order to form the so-called effective nationality (*Anghel I.M., 2011: p.198*).

The rule of nationality of juridical persons is simple. A corporation does not necesarily have the nationality of the majority of its shareholders. It will ordinarily have the nationality of the state in which it is incorporated and has its seat of management.

In *the Barcelona Traction Co Case (1970)* it was said that international law „*attributes the right of diplomatic protection of a corporate entity to the state under the laws of which it is incorporated and in whose territory it has its registered office*" (*ICJ Reports, 1970: pp.42-43*).

In this case the court applied this principle to find that the nationality of the corporation was Canadian so that only Canada could espouse a claim in respect of the corporation, while Belgium, the state of nationality of the shareholders, had no standing to do so. The Court rejected through

its decision on the 5th of February, 1970 the Belgian claim against Spain as a respondent state for the caused injury to the belgian citizens by the resolution of spanish authorities, by proceeding acts and other subsequent decisions on the declaration on bankruptcy which had been abusive. The Court admitted, through that decision, the exception of lack of capacity the Spain has been raised during process. Having in account that Barcelona corporation was formed in Toronto, Canada, Belgium could not grant and exert diplomatic protection for the shareholders of the canadian company.

3. Continuous Nationality

From the case-law it has been affirmed that the citizenship link must exist at the moment when the injury occured, but also at the moment when the international claim has been presented. This link must cover without interruption the period from the date of injury until the date of compensation. Any other rule like the one of *ex post facto* would open the door for abuses.

In practice, the test of citizenship raises some dificulties, considering the uncertainty that exists in what concerns the period in which the citizenship of a claim must be continuous. The test should consider the beginning of period (*dies a quo*) and the end of the period (*dies ad quem*).

The test of citizenship and of nationality can be realised through all means. Not only that the regime of the test is more liberal then the system of the state of which citizenship is claimed, but it has to assume the right of control of the acts of national authorities as means of evidence. This evidence is easy to be done when the person in question is posessing a passeport issued by the organs of the state of citizenship, because in this document is mentioned in clear his citizenship.

The diplomatic-envoy of the state has the right to grant protection to a person who posesses a passeport issued by the state, because it is presumed that, through the issuing of this document, the state has assumed the obligation to grant protection when his citizen is abroad and the diplomatic-envoy is acting on behalf of his government.

4. Conclusions

Sometimes a state is entitled to exert diplomatic protection in relation with aliens, citizens of states of whose diplomatic representation the state in question assumes, either by virtue of a special bond or relation (like Switzerland for Lichtenstein) or in case of war or of severance of diplomatic protection, when the diplomatic mission of a neutral state is charged to keep watch and ward the interest of the belligerent state or of the state who broke up the diplomatic relations.

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