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The stand of diplomatic protection of legal person in the international judicial precedent

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Abstract: This article's purpose is to study the diplomatic protection of legal person in the international judicial precedent. The legal person is a bunch of people who have common interests or some property which have been allocated for a specific purpose and the law recognizes them as those who are in the side of right and grants them an independent character, such as government, city hall, university, business corporations, forums and endowments. Diplomatic protection is a new seeking in order to be chosen. This situation is due to changes and transformations in the interests which constitute infrastructure of diplomatic protection establishment. These transformations are due to promotion of person's position in international law, changes in traditional interpretation and reduction of state's authority in the field of domestic affairs which accompany with creating the right for injured person and mutually it will cause some obligations foe specified injured person's respective government. Accordingly: First, with regard to the kind of strengthened rights in some cases, the diplomatic protection right belongs to person and in some cases where the public and national interest put on the table, it is belonged to both of them (Injured person and respective government). Second, respective government of injured person is obliged to apply diplomatic protection from injured person and it is also a legal obligation and not a political one. Although these transformations in some cases lead to identifying the right of going directly to the international legal body's foe injured person without passing through mite diplomatic channels, but some actions take place in this regard and some treaties which set in this case, confirm itself the diplomatic protection. The presence of person whether he resorts to diplomatic protection of respective government or the case in which the person going directly to the international authority for realization of his strengthened rights, it has secondary aspect. Because, initially diplomatic protection has taken place and then some treaties have been set in this regard with two governments' will.

Key words: Legal person; Diplomatic protection; International judicial precedent; International responsibility

1. Introduction

Diplomatic protection is a right for government which has been recognized by some institutions such as International Court of Justice. International law commission in 2006 approved the article of some laws in defining diplomatic protection which determined the limits of competence and the method of its implementation. The history of this concept backs to the 18th century and this idea that the governments can support their people and nationals who are in out of their countries, was mentioned firstly by Amrish Watell in a work called "laws of nations. Because according to this doctrine, diplomatic protection is possible in any form and any way, in most cases, this issue has been changed to a way for Western countries' misusing to interfere in other countries., therefore, this theory has been criticized very much and some countries predict a doctrine entitled "Kallo Doctrine" to counter with this strategy which it is inserted in contracts with foreign countries as a condition. This condition means that foreign party announces its withdrawal of diplomatic protection of its respective government in the case of dispute occurrence. This condition has been named as "Karlose Kalo" which was a Argentine lawyer. But this doctrine has an important objection and it is that it should be noted that diplomatic protection right is a right for governments, and it is not for citizens! This means that the governments can use this right and support their citizens' interests in foreign countries or they may overlook their rights because of political, economical, etc. interests. Therefore the citizen is not justified to deprive that right from him by accepting the condition of Kallo. For exercising this right, there are some legal obligations which in the absence of them, the diplomatic protection is not realizable. One of these obligations is that the citizen whose rights have been violated in foreign country and he pursued his rights in that country's domestic court, but he was not obtained any result, and that, injured party has effective and continuous nationality of the country which want to support him diplomatically. Effective and continuous nationality means the injured person should own supporter country's nationality at least from the time of damage up to

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diplomatic protection. Therefore if person's nationality changes also after the damage, his former respective country will not have the possibility to protect from him diplomatically. The other important point which it should be noted is that diplomatic protection is realizable both for real citizens and also legal ones. Therefore the condition of diplomatic protection from persons such as corporations is those two conditions during domestic courts and the relationship is between person and supporter government. But the point which sometimes causes some differences is the discussion regarding determining nationality of legal person. The dominant view in this regard is that wherever the main center of corporation and the place of its registration is, it owns that country's nationality and sometimes companies' nationality is mentioned in its article of association. The subject of this dissertation is diplomatic protection from legal persons according to international judicial precedent which can be design in international right arena and they have tried to give an appropriate answer to existing ambiguities in this area (Skini, 1375). International judicial precedent can be evaluated from different viewpoints with this description that the purpose of judicial precedent from one viewpoint is the rules and method of settling the claims, from another viewpoint, it aims to issue the verdict of precedent's unity which is as a law and from third viewpoint, it is regarding issued votes which regarding topic of discussion, means international judicial precedent, it is related to issuing the votes which international court of justice and international arbitration authorities have issued in order to settle the mentioned claims (Bigdeli, 1373). First clause of article 34 of article of association of this court has prescribed regarding the competence of international court of justice in order to settle the claims that: (Just the government can go to international court of justice) and according to first clause of article 36 of this article of association: international court of justice has the competence regarding all the affairs which parties of dispute resort to it and also regarding special cases which due to United Nations' charter or due to current treaties or agreement have been predicted. Arbitration authorities will receive that competence in case of agreement of parties of dispute to settle that dispute. Now according to mentioned subjects who have been offered as introduction for expressing the issue, the issue is that draft of article 24 of the plan of governments 'responsibility expresses that: One government will not be proofed if:

A. The legal proceeding has not been initiated according to applicable rules related to complainant's nationality. B. The dispute is related to some cases which the rule put on trial during some preparations and no effective and accessible civil court has not been fulfilled. Therefore according this article, one government can initiates legal proceeding against other country when the complainant has been one of one of its citizen and effective and accessible civil court have been fulfilled. So two principle of complainant's nationality and preparation of civil court are considered as the condition of claim's acceptation (Sharifi, 1386). Court's judicial precedent in this regard is as follows:

2. The first point

this issue that the property and possessions of an stranger can be considered as a enemy or impartial country and consequently according to trading rule with enemy, they should be impounded and seized, is a subject with must be determined based on principles and obligations of international law (Inter Handel, 1959). Because some countries have some special rules regarding trading with enemy and if it is cleared that some business practices have taken place against it, the related property will be seized. In court' viewpoint , although the countries act according to domestic rule, but this operations should be in the light of international law .In the other words, it accept domestic rule to the extent that it is not opposed to international law.

3. The second point

The court states that international law is changing related to diplomatic protection and it recognizes domestic institutions such as defining corporation and separating them from their shareholders. But this is the court to determine whether violated claimed rights belong to company or shareholders? (Barselona Trakshen, 1970).

The third point: The court states that international law must resort to some rules regarding this conclusion that the shareholders' rights have been damaged because company's rights have been damaged, which generally it has been accepted by international law systems and that negative answer is for discussed topic and initiating legal proceedings of a country in protecting from its citizen is not adequate and it rejected Belgium court of dispute against Spanish. It means that it cannot be said that the shareholders' rights have been damaged when company's rights have been damaged. This is a principle whose root is in domestic rights.

In the other hand, diplomatic protection is a right which has been placed in the arena of international customary law and belongs to the government and the acceptation of this right has actually been an evolution in the concept of absolute sovereignty of the governments. Therefore the citizen cannot overlook a right which does not belong him, because the respective government protects from its interests through exercising this right (Jafari Langeroudi, 1380).

Diplomatic protection is a mechanism which comes into force following inflicted damage on person in the case of commission of a crime which is attributable to one of the nationals of international law under current conditions .Accordingly,

mentioned precedent will be applicable when the different citizens refuse to dispensation of justice and realization of lost rights of injured person, and he do not takes no action in order to compensate or restore the damage (Hasani, 1380).

So, the dispute between two governments or one government with an international organization or two international organization together, have been considered as international dispute, while the dispute between one government or an international organization with a person (whether legal or natural person) has not been considered an international dispute according to the majority of right's scholars and international judicial precedent. When the respective government of injured person takes responsibility of dispensation of justice officially regarding its injured citizen from the diplomatic protection channels against different nationals, the dispute transferred from domestic level to international level, and person's claim change to respective government's claim and the dispute finds international aspect.

In fact, international dispute occurs when injured person resort to diplomatic protection of his respective government and respective government of injured person takes action to protect him diplomatically (Skini, 1375).

Therefore diplomatic protection must not precedent to break the commitment. Precautionary diplomatic protection is not basically applicable. For this regard, a commitment should at first is broken and leads to inflicting damage to injured person in order to respective government of injured person can take action to protect him diplomatically. Although according to some law scholars, in some special cases, injured person can protect diplomatically referring to breaking a commitment which may be imminent which it seems that this teaching assuming acceptance regarding legal persons is not imaginable. Meanwhile, all the actions which took place regarding exercising diplomatic protection, was related to governments' exclusive competence. Respective government of injured person has absolute authorities in granting or failure to grant the diplomatic protection. Such situation seemed unfair toward injured person and its solution could not be found in international system. Sometime injured person can find its solution in his country's domestic legal system. In this way that such a right (exercising diplomatic protection) has been identified in domestic law of his respective government. The transformations in constitutive interests of this institution have caused some new seeking in this establishment, so that its structure has been somehow changed to create right for injured person and mutually some obligation for his respective government. International judicial proceeding authorities (whether judicial, arbitration, conflict peaceful settlement commissions, etc.) have not adopted a unit precedent regarding the validity of Kalo's condition. In some cases, they gave a verdict for invalidity and in some cases they gave verdict for legitimacy and legal validity and in some cases, they have accepted its validity or its limited nullity. Therefore, international judicial precedent in this regard is different. The dominant precedent of many of international authorities and conflict peaceful settlement commissions are based on lack of legal validity and nullity of mentioned condition.

New tendency of diplomatic protection has been rarely observed as a weaker precedent in conflict peaceful settlement commissions and arbitration votes which is based on legal legitimacy and validity of Kalo's condition (Bigdeli, 1373). The first discussion of court and its relationship which is close to domestic rights is diplomatic relationship. There are two main conditions for this protection: nationality and reference to domestic authorities. The pureness of claimant is considered as condition which it was not accepted by international law commission and it is only raised in framework of international customary law. Both conditions are related to domestic law. A country can takes responsibility of protecting its citizen against other country in the condition that there is a blood-relationship between them and that person later resorted to domestic authorities and he has not achieved any result. Diplomatic protection is a rotary tablet: It converts a dispute between one people with one country to a dispute between two countries. Diplomatic protection is proposed in the framework of international responsibility issue and of course it has not been dealt in responsibility plan of 2001 and it has been investigated in a separate plan in international commission which has been approved by this commission in 2006. Although this plan was not converted to a treaty, the court refers to this plan in its votes in 2006.

The court must recourse to domestic right for investigating the nationality of injured person. What precedent does the court have regard domestic protection and its relationship with domestic right? This work is an extraction of court's votes in the field of domestic protection. The court states that the nationality's conditions of each country determines according to its domestic rights. But when two countries grant their nationality to one country, this is dual nationality which is not limited to domestic competence and it is drawn to international arena. International law has accepted the effective and actual nationality in this regard. This issue has been posed in Note Bam case in 1995. The second point which the court dealt with is that the relationship between countries' precedent (without noting to mental element) with nationality expresses this fact that nationality is a domestic affair. Note Bam in this vote defines somehow nationality. It is correct to say countries' precedent, but it is countries' precedent as long as it is not converted to international custom. The third point: The issue that one stranger country's property and possessions can be considered as the enemy country's property or impartial one and consequently they are suspended and seized, is an issue which must determines in the light of international laws and principles .(Inter Handel case, 1959). As you know, some countries

basically have a specific rule regarding enemy's trade. And if it is determined that some commercial actions takes place in contrast with them, they seize related property. This fact that the court states that although the countries act according to domestic law, but they should be in light of international laws, in other word, we accept domestic laws to the extent that they are not in contrast with international laws. The fourth point: the court states that international laws is changing regarding diplomatic protection and it recognizes the domestic institution such as defining company and its separating from its shareholders., but it is the court that should specify whether violated claimed rights belong to company or shareholder? (Barselona Tarakonesh, 1970) One of the important and transformative votes in the court's precedent is Barselona Tarakonesh's vote, especially regarding domestic right and trading right, not international trading). In fact, each country is free to determine its corporation and shareholders. But when the topic of diplomatic protection is concerned, this is international law which works. The fifth point: the court states that international law resorts to some rule regarding this concluding that because the rights of company are damaged, eventually the rights of shareholders are also damaged, which they have been accepted generally by international law system and that negative answer is for discussed issue and bringing legal actions of one country to support its citizens is not adequate and the court rejected claim of Belgium against Spanish. It means that it cannot be said that because the rights of company are damaged, eventually the rights of shareholders are also damaged. This is a principle whose root is in domestic rights. The sixth point: the court states that if the competent person recognizes that foreign country's seizure has been done in contrast with domestic rights, he must declare it illegal and then (host country) has prevented from exercising direct rights of shareholders in settlement of assets in a legal and orderly manner. The seizure of a country is possible but if it is illegal, this is the court that has the competence of investigation and it specifies that it has prevented from exercising rights of shareholders because it has taken place against domestic rights and so it is illegal. It completely enters into the discussion of bankruptcy and the manager of bankruptcy. Meanwhile, as it is observed, dual nationality is international law has had some special complexities and different theories have been offered in this regard and some different treaties in this field have been concluded between countries. What that has been more considered now is effective and dominant nationality which international court of justice has interpreted for the first time the theory of dominant nationality and some criteria have been determined for determining certain effective nationality which was mentioned.

4. Conclusion

Meanwhile, the Liberalism theory in international trading and investment has been considered and accepted by the most countries. This issue has very much effect on legal framework of international economic activities. The fundamental theory here is that economic benefits must be provided regardless of companies' or investors' nationality appropriately. The basic purpose is providing economic benefits and the growth of international trading and investment which it needs a friendly atmosphere at bilateral and multilateral levels. In bilateral level, especially in the area of foreign investment, we observe a wonderful enhancement of bilateral investment treaties. In multilateral level, the international institutions including world trade organization and World Bank group have effective and continuous activities.

The governments' precedents regarding diplomatic protection in the area of foreign investment shows that the separating the rights and benefits of company and shareholders which have been considered by international court of justice and the effect of this separation on diplomatic protection in the international law level has lost previous importance. In the other words, although diplomatic protection can yet be a practical tool for protecting from foreign investment in the international law level. Now, because of economic realities, this right has been granted to company or shareholders in order to take action in earning interests. The most of the bilateral treaties of investment and also some institutions including international center for investment disputes have predicted such issue. This transformation has occurred especially in the area of multinational companies.

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