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SOME ISSUES ON THE EXERCISING OF DIPLOMATIC PROTECTION IN THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE: THE NOTTEBOHM CASE

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Summary

The article is devoted to the analysis of the Nottebohm Caseand its influence on the concept of diplomatic protection. In this case the International Court of Justice declared that it is inadmissible because Liechtenstein has no right to extend its protection to Mr. Nottebohm regarding Guatemala, as its naturalization was carried out only in order to give Mr. Nottebohm the opportunity to change its status as a citizen of the belligerent state to the status of a citizen of a neutral state with the sole purpose of getting under the protection of Liechtenstein rather than creating a connection with its traditions, interests and lifestyle or no obligation other than financial obligations, and exercise rights related to the status obtained in this way.

Key words: diplomatic protection, citizenship, International Court of Justice, Nottebohm Case.

НЕКОТОРЫЕ ВОПРОСЫ ОСУЩЕСТВЛЕНИЯ ДИПЛОМАТИЧЕСКОЙ ЗАЩИТЫ В ПРАКТИКЕ МЕЖДУНАРОДНОГО СУДА: ДЕЛО НОТТЕБОМА

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Аннотация

Статья посвящена анализу дела Ноттебома и его влиянию на концепцию дипломатической защиты. Международный Суд объявил, что дело Ноттебома неприемлемо, поскольку Лихтенштейн не имеет права оказывать дипломатическую защиту г-ну Ноттебому в отношении Гватемалы, поскольку его натурализация осуществлялась только для того, чтобы дать г-ну Ноттебому возможность изменить свой статус гражданина воюющего государства на статус гражданина нейтрального государства с единственной целью – попасть под защиту Лихтенштейна, а не создавать связь с его традициями, интересами и без обязательств, кроме финансовых обязательств, и осуществлять права, связанные с полученным таким образом статусом.

Ключевые слова: дипломатическая защита, гражданство, Международный Суд ООН, дело Ноттебома.

Formulation of the problem. In the modern international law, the institution of diplomatic protection is universally recognised. It has been enshrined in such universal conventions as the Vienna Convention on diplomatic relations of 1961 (Article 3) and the Vienna Convention on consular relations of 1963 (Article 5). The development of international law brings novels to the institute of diplomatic protection. A significant influence on the development of the institution of diplomatic protection, its forms and content are made by international courts practice.

Whatever the role of precedent in the international system is, a review of the practice of international courts shows a tendency to hold on and follow previous decisions. Yet the Permanent Chamber of International Justice noted that it has no reason to deviate from the construction that is built on previous decisions if the Chamber considers the argument that lies at the heart of smart decisions.

The Statute of the International Court of Justice (Article 59) states that the decision of the Court has no binding force except between the parties and in respect of that particular case. Nevertheless, often the Court would refer to its past decisions and advisory opinions to support its explanation of a present case. Some authors even believe that court decisions currently constitute one of the "new" sources of international law along with the UN General Assembly resolutions. For example, E. Mc Queen writes that judicial decisions "are increasingly viewed as normative and right-making in the process of modernising an "old" international law and developing a "new one", while the Court is now more representative in the politico-ideological and system-legal sense" [1, c. 80–81].

One of the most interesting and significant cases regarding the diplomatic protection is Nottebohm Case (Liechtenstein v. Guatemala) resolved by the Court of Justice in 1955.

Scientific background. The problem of diplomatic protection of citizens has been developed in sufficient detail in the works of well-known Ukrainian and Russian scientists. The research of the theory and practice of the issue was made in the works of A.Kh. Abashidze, I.P. Blischenko, V.A. Vasilenko, I.I. Lukashuk, K.K. Sandrovsky, N.A. Ushakov and others. In addition, this subject has repeatedly been the subject of research by international scholars, primarily A. Brauer, E. Borchard, L. Brierly, L. Lee, C. Vicer, D. Anzilotti, J. Brownlie, A. Ferdross and others.

The paper aim is to review the Nottebohm Case and analyse its influence on the concept of diplomatic protection.

Presentation of the main results. Nottebohm Case (Liechtenstein v. Guatemala) is the proper name for the contentious 1955 case adjudicated by the International Court of Justice. Liechtenstein sought a ruling to force Guatemal an recognition of Friedrich Nottebohma sa Liechtenstein national.

F. Nottebohm was born in Hamburg on September 16, 1881. He was a German by birth and had German citizenship when in October 1939 he applied for naturalization in Liechtenstein.

In 1905 he moved to Guatemala, settled there, and made this country the centre of his commercial activities, which expanded on to the field of commerce, banking and land cultivation. As an employee of Nottebohm Hermanos, founded by his brothers Juan and Arturo, in 1912 Nottebohm became their partner, and later, in 1937, headed the firm. After 1905, he visited several times Germany on business. He still had business contacts in Germany. He paid several visits to his brother, who had lived in Liechtenstein since 1931. Some of his other brothers, relatives and friends were in Germany, other sin Guatemala. He himself had a permanent residence in Guatemala until 1943, in other words, before the events that formed the basis of this dispute.

In 1939, after he secured his interests in Guatemala by issuing a power of attorney to Nottebohm Hermanoson 22 March, he left the country apparently for Hamburg, and later made several short visits to Vaduz, where he visited in early October 1939. It was then, on October 9, a little more than a month after World War II, which was marked by Germany's attack on Poland, that his lawyer, Dr. Marxer, submitted a statement on behalf of Nottebohm regarding naturalisation.

The law of Liechtenste in on January 4, 1934, formulates the conditions for the naturalization of foreigners, establishes the supporting documents that must be submitted, and the guarantees that must be provided, as well as the competent authorities responsible for issuing the decision and the procedure to be followed. The law defines certain mandatory requirements, namely that the applicant applying for naturalization should prove:

(1) that the acceptance into the commune of Liechtenstein was promised to him in the event of acquiring the citizenship of the State;

(2) that he will lose his former citizen ship as a result of naturalisation, al though this requirement could be waived under the specified conditions.

In addition, another condition for naturalization is the requirement to stay at least three years in the Principality, al though this stipulated that "this requirement may be lifted in the presence of circumstances deserving special consideration and on an exceptional basis". More over, a person applying for naturalization is required to provide a number of documents, such as proof of his residence on the territory of the Principality, a certificate of non-conviction issued by the competent authorities in the place of residence, documents relating to his property and income, and, if he is not a resident of the Principality, confirmation of the agreement concluded between him and the tax authorities, "after consideration by the commission on taxes of the alleged domestic commune".

The law admits naturalization only if all relevant facts are known, for there as on that it explicitly provides for an investigation of the applicant's relationship with the country of his former citizenship, as well as all other personal and family circum stances, and adds that the granting of citizenship is prohibited in the case that there are reasonable concerns that, duetotheadoption of citizenship, can cause any damage to the Principality.

Regarding there view of the application by the competent authorities and the procedure that they needed to follow, the law provides that after reviewing the application and related documents, and after receiving satisfactory information regarding the applicant, the Government must submit a statement to the Parliament. If the statement is approved by the latter, the Government must submit the necessary petition to the Prince, who is the only one who has the right to grant citizenship of the Principality.

Finally, the law grants the right to the Government of the Principality, for a period of five years from the date of naturalization, to deprive the citizenship of Liechtenstein of any person who could obtain it, should it become clear that the requirements established in the law were not met; similarly, it provides that the Government may at any time deprive a person of his nationality in the event of obtaining a naturalization permit by fraud.

This was the legal position with regard to applications for authorization

for naturalization at the time of filing Nottebohm's application.

On October 9, 1939, Nottebohm, being the resident of Guatemala since 1905 (now living as aguest of his brother Herman Nottebohmin Vaduz), requested to be recognized as a citizen of Liechtenstein and, at the same time, prior to be granted him the citizenship of the Mauren community. He asked for an exemption from the stipulated in the law of residence for three years, with out specifying the special circum stances that caused there fus al to comply with this requirement. He submitted an extract from Bankin Zurich regarding his assets and under to oktopay 25,000 Swiss francs to the Mauren community and 12,500 Swiss francs to the state, with the addition of duties related to the proceedings. In addition, he announced the achievement of agreements with the tax authorities of the Government of Liechtenstein on the conclusion of a formal agreement to pay the man an nual tax for naturalization in the amount of 1,000 Swiss francs, of which 600 Swiss francs are paid to the Mauren community and 400 Swiss francs to the Principality of Liechtenstein, with are observation that the payment of the se taxes will be credited against the payment of ordinary taxes payable in the event of the applicant's settlement in one of the communities of the Principality". In addition, he under took to pledge an a mount of 30,000 Swiss francs as collateral. He also provided general information on his financial situation and testified that he would not be a burden to the community whose citizenship he sought.

Finally, he asked "that the conduct of the naturalization case be started and completed in the Government of the Principality and the Mauren community with out delay, so that the application there after is submitted to the Parliament for consideration with a favorable recommendation and, finally, that then the application be submitted with all the necessary lightness to His Highness, the ruling Prince".

In the original of the type written statement, the photocopy of which was provided, it can be seen that the name of the Mauren community and the a mounts pay able were in scribed by hand; this fact caused some objections from the lawyers of the parties. There is also a link of the ruling Prince to "Vorausverständnis", received on October 13, 1939, which Liechtenstein interprets as proof of the decision to grant naturalisation, but such an interpretation is doubtful. Finally, the application is accompanied by a blank sheet with the signature of the ruling Prince, Franz Josef, but with out indicating any date or other explanation.

The document, dated October 15, 1939, certifies that on that day the Mauren community honoured Mr. Nottebohm of being its citizen and asked the Government to transfert his decision to the Parliament for approval. The certificate of October 17, 1939, confirms the payment of necessary taxes by Mr. Nottebohm. On October 20,1939, Mr. Nottebohm swore an oath of allegiance, and on October 23 the final agreement on responsibility for paying taxes was concluded.

This was the procedure followed in the case of Nottebohm's naturalisation.

A certificate of citizen ship was also signed, signed on be half of the Government of the Principality and dated October 20,1939, confirming that Nottebohm was naturalized by the Highest Decision of the ruling Prince of October 13,1939.

Having received the passport of acitizen of Liechtenstein, on December1, 1939, Nottebohm enrolled it at the Consul General of Guatemala in Zurich and returned to Guatemala in early 1940, where he resumed his previous activities, including managing the Nottebohm Hermanosfirm.

Proceeding from the citizen ship granted to Nottebohm in this way, Liechtenstein considersitselfent it led to apply to the Court with its application on its behalf, and its Final Conclusions contain two statements in this regard. Liechtenstein requests the Court to establish and declare, firstly, "that the naturalization of Mr. Frederik Nottebohm in Liechtenstein on 13 October 1939 did not conflict with international law" and, secondly, "that Liechtenstein's statement on behalf of Mr. Nottebohm as a citizen of Liechtenstein is admissible in the Court". On the other hand, Guatemala's Final Conclusions request the Court "to declare that the statement of the Principality of Liechtenstein is unacceptable" and to setout an umber of grounds relating to the citizen ship of Liechtenstein granted to Nottebohm by naturalisation.

Thus, the main is suefacing the Court is the admissibility of Liechtenstein's application in relation to Nottebohm for consideration in the Court. The first statement of Liechtenstein mentioned above is the basis for the decision of the Court in favour of Liechtenstein, while some of the grounds given by Guatemala on the issue of citizen ship are grounds for the inadmissibility of Liechtenstein's statement. The current task of the Courtis to decide on the admissibility of Liechtenstein's application in respect of Nottebohm for reasons such as it deems relevant and appropriate.

In order to decide on the admissibility of the application, the Court must define whether the citizenship, granted by Liechtenstein to Nottebohm through naturalization under the circum stances described, suggests the possibility of lawful treatment to Guatemala, whether it gives Liechtenstein sufficient rights to protect Nottebohm from Guatemala and, there fore, whether it gives Liechten stein the right to appeal to the Court with the appropriate application. In this regard, Liechtenstein's law yer stated: "The fundamental questionis whe ther the citizenship of Liechtenstein, acquired by Mr. Nottebohm, issuchanac quisition of citizenship that must be recognized by other States". This wording is accurate given the bilateral reservation that, firstly, recognition is not in all respects, but only with respect to the admissibility of the application, and secondly, what is implied is not recognition by all States, but only by Guatemala.

The Court does not propose to go beyond the limited scope of the question on which it should decide whether it is possible to us et he citizenship granted to Nottebohm as abasis for Guatemala to initiate proceedings before the Court. He must solve this issue on the basis of international law – this corresponds to the essence of the question and the essence of the Court' sown function.

The facts clearly show, on the one hand, the absence of any ties of

belonging between Nottebohm and Liechtenstein, and on the other hand the existence of along and close link between him and Guatemala, the link that his naturalisation did not weaken in any way. This naturalization was not based on any truly previous relationship with Liechtenstein and did not in any way alter the way of life of the person to who mit was granted unde rexceptional circum stances related to unusual haste and disposition. In both respects, it lacked the hone stynecessary for such an importance, if it was supposed that it should have the right to respect by the state in the position of Guatemala. It was granted with out taking in to account the concept of citizenship ad opted in international relations.

Naturalization was requested not so much to obtain a legal recognition of Mr. Nottebohm's actual be longing to the population of Liechtenstein, but rather to give him the opportunity to change his status as a citizen of the belligerent state to the status of a citizen of a neutral state with the sole purpose of being protected by Liechtenstein, and not create a link with its traditions, interests and lifestyle, or take on any obligations other than financial ones, and exercise rights related to the status, obtained this way.

In the se circumstances, Guatemala does not have any obligations regarding the recognition of citizenship. Consequently, Liechtenstein has no right to extend its protection to Mr. Nottebohm concerning Guatemala, and, there fore, his application is declared in admissible.

Conclusions. Al though the Court stated that it is the sovereign right of all states to determine its own citizens and criteria for becoming one in municipal law, such a process would have to be scrutinised on the international plane where the question is of diplomatic protection. The Court upheld the principle of effective nationality (the Nottebohm principle), where the national must prove a meaningful connection to the state in question. This principle was previously applied only in cases of dual nationality to determine which nationality should be used in a given case. However, Nottebohm had forfeited his German nationality and thus only had Liechtenstein nationality. The question arises, who then had the power to grant Nottebohm diplomatic protection?

Thus, the Court should not consider other objections to the merits of their applications put forward by Guatemala or the Conclusions of the Parties to earth in those for which it makes a decision on the basis of the above reasons.

The International Court of Justice declared that the Nottebohm case (Liechtenstein v. Guatemala) is in admissible because Liechtenstein has no right to extend its protection to Mr. Nottebohm regarding Guatemala, as its naturalization was carried out only in order to give Mr. Nottebohm the opportunity to change its status as a citizen of the belligerent state to the status of a citizen of a neutral state with the sole purpose of getting under the protection of Liechtenstein rather than creating a connection with its traditions, Interests and lifestyle or no obligation other than financial obligations, and exercise rights related to the status obtained in this way.

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