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THE WANING POPULARITY OF DIPLOMATIC PROTECTION IN RESOLVING INTERNATIONAL INVESTMENT DISPUTES

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INTRODUCTION

In a bid to impact the local economy of a State, most developed and developing countries strive to attract foreign direct investment ("FDI") with a view to bringing new opportunities for education, technology, and culture. Investors leverage this by establishing local companies (which may most times require acquisition of properties) and carrying on businesses in the host state. Accordingly, by virtue of their investments in the host state, there exists a business relationship between an investor and the host state, which occasionally is prone to disputes.[1]

Historically and under customary international law, the protection of investors in host states was the direct responsibility of the home state of the investor.[2] Thus, where an investor's right has been violated by the host state, the home state would usually espouse the claims of their national (investor) and settle the dispute with the host state in a diplomatic way.[3] This type of protection is called Diplomatic protection. However, over the years, some powerful states employed forceful mechanisms, including 'gunboat diplomacy' against host states in exploring diplomatic protection. This approach has created a political atmosphere that has metamorphosed investor-state disputes into state-state conflicts. This article seeks to examine the concept of diplomatic protection, the scope of its application, and its waning popularity in present-day international law.

[1]Harrison Ogalagu & Nnamdi Ezekwem, 'An Examination of Triple Identity Test in Resolving Fork-In-The-Road Clause Objections' www.topeadebaylp.com accessed on 22nd May 2023.
[2]Habyyev, 'Diplomatic Protection as a Dispute Settlement Mechanism in Investor-State Arbitration, in the Light of Modern International Law' https://bura.brunel.ac.uk/bitstream/2438/19616/1/FulltextThesis.pdf accessed on 10th May 2023.
[3]Habyyev, op cit p. 1.

DIPLOMATIC PROTECTION

International relations attest that a state can only survive if it can protect its citizens and sovereign territory.[4] The implication of this is that it is the sole responsibility of a state to protect its territory as well as its citizens and their properties within or outside the state. Originally in International arena, only States and not individuals were subject of international law, individuals could not protect their own rights under International Law.[5] Thus, investors' rights were usually protected by the home state of the investors.

The idea of diplomatic protection was first defined by Emmerich Vattel as **"whoever ill-treats a citizen indirectly injures the state, which must protect that citizen and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation since otherwise, the citizen would not obtain the great end of the civil association, which is safety".**[6] The main aim of the above proposition of Vattel was geared towards the protection of aliens abroad. Concordantly, diplomatic protection has been defined as **"the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility".**[7]

[4]Habyyev, op cit p. 15.
[5]Guido Acquaviva, 'Subjects of International Law: A Power-Based Analysis' https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1526&context=vjtl accessed on 10th May 2023.
[6]Emmerich Vattel, The Law of Nations, or the Principles of Natural Law (Book II Chapter VI, Liberty Fund 1758) https://lonang.com/library/reference/vattel-law-of-nations/ accessed on 10th May 2023.
[7]International Law Convention Draft Articles on Diplomatic Protection (2006) https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_8_2006.pdf accessed on 10th May 2023

The popularity of diplomatic protection reached its peak in the 18th and 19th centuries.[8] As stated earlier, this period was when states were regarded as the sole subjects of public international law. Thus, neither individual investors nor corporations reserved any legal rights to initiate a claim against a state for violating international rules. It was a state's duty to protect its citizens and their properties from the governments and subjects of other countries. For instance, between 1820 and 1914, the British armed forces intervened in Latin America about twenty-six (26) times to enforce the claims of the British subjects in relation to injury or to restore order and protect their properties.[9] It is important to state at this juncture that in a bid to protect its nationals, most powerful states employed the use of force and other military medium to enforce the protection of its nationals. It is also important to note that the use of force by the home state to protect nationals' (investor) lives and properties were recognized by jurists as universally legal.[10]

Essentially, the exercise of diplomatic protection is not automatic, there are certain conditions that must be met for a home state to consider exercising diplomatic protection on behalf of its nationals. The two essential conditions that an investor must fulfil in invoking the exercise of diplomatic protection by the home state are namely, nationality of the home state and exhaustion of local remedies available in the host state. The two conditions will be discussed briefly.

NATIONALITY OF A STATE

This is one of the requirements for the exercise of diplomatic protection. Essentially, a home state cannot espouse the claims of an individual investor abroad who is not its national.[11] The nationality requirement is the most significant formal prerequisite for diplomatic protection.[12] Simply put, nationality is the legal relationship or link between an investor and a state. Nationality can be seen either as a political legal term or as sociological term.[13] Nationality as a political term is defined as "a 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",[14] while as a sociological term, it stresses on the responsibility of an individual in his relationship with a state and admits the existence of the feeling of nationality before the formal creation of the state.[15] The differences between the two concepts cannot always be distinguished,

[8]Habyyev, op cit p. 1-2
[9]Charles Lipson, 'Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries' https://www.cambridge.org/core/journals/journal-of-economic-history/article/standing-guard-protecting-foreign-capital-in-the-nineteenth-and-twentieth-centuries-by-charles-lipson-berkeley-university-of-california-press-1985-pp-xvii-332-2950/474C458FD2A6A0CDBF484DFAC26F0416 accessed on 10th May 2023.
[10]Joseph, C., Diplomatic Protection and Nationality: The Commonwealth of Nations. Gateshead, Northumberland Press, 1968. (Thesis, University of Geneva), 1.
[11]Guy I F Leigh, 'Nationality and Diplomatic Protection' (1971) 20 International and Comparative Law Quarterly 453.
[12]Noah Rubins and Stephan Kinsella, International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide (Oceana Publications, 2005) 407.
[13]Habyyev, op cit p. 62
[14]The Nottebohm Case (Liechtenstein v Guatemala) (Second Phase 1955) ICJ 23, https://www.icj-cij.org/public/files/case-related/18/018-19550406-JUD-01-00-EN.pdf accessed on 11th May 2023
[15]Carmen Tiburcio, 'The Human Rights of Aliens under International and Comparative Law' (Martinus Nijhoff Publishers 2001) p. 4

because one concept does not exclude the other.[16]

It is commonly accepted that a state's national law has the power to grant or withdraw nationality in accordance with its provisions. In the Nottebohm's case,[17] the court enunciated that "it is for every sovereign state, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalisation, granted by its own organs in accordance with that legislation". Thus, it is not enough for an investor to consider himself a national of a state, the state in question must expressly recognise the investor as it national. The requirement of nationality is fundamental because there must be a state-individual relationship to invoke the exercise of diplomatic protection. This is because the state that is empowered to exercise diplomatic protection is the state of nationality.[18]

It is important to state at this juncture that the power of a state to grant nationality for the purpose of exercising diplomatic protection under international law is not without limitations.[19] The limitations includes that a Claimant must be a national on the date of the injury; he must be a national at the date of presentation of the claim; and the link of nationality must remain uninterrupted during the intervening period. These conditions must be fulfilled for the home state to exercise diplomatic protection as it is believed that the fulfillment of the conditions prevent abuse of diplomatic protection in the international arena.[20] However, the question that may arise from this, is the determination of the nationality of an individual with dual nationality. In proffering an answer to the above question, Article 5 of the Convention on Certain Questions Relating To the Conflict of Nationality Laws the Hague[21] states that "within a third State, a person having more than one nationality shall be treated as if he had only one, either the nationality of the country in which he is habitually and principally resident, or the nationality of the country with which in the circumstances he appears to be in fact most closely connected". This is the principle of the most dominant and effective nationality.

In the case of the nationality of a corporation (company or firm), the court in the Barcelona traction case[22] enunciated that the nationality of a corporation is the "state under the laws of which it is incorporated, and, in whose territory, it has its registered office." In that case, the Spanish Government caused the bankruptcy of a Canadian

[16]Tiburcio Op Cit. P. 3.
[17]The Nottebohm Case (supra); The Hague Convention on Nationality (1997) Article 1.
[18]International law convention Draft Articles on Diplomatic protection (2006) Article 3 Op Cit p. 1.
[19]Harvard Research Draft Convention on Nationality [1929] Article 2.
[20]International law convention Draft Articles on Diplomatic protection (2006), Article 5 (1) Op Cit p. 1; H. F. Van Panhuys, The Role of Nationality in International Law. An Outline (Sijthoff 1959) p. 929.
[21]Convention On Certain Questions Relating To The Conflict Of Nationality Laws The Hague - 12 April 1930 https://prawo.uni.wroc.pl/sites/default/files/students-resources/Convention%20on%20certain%20questions%20relating%20to%20the%20conflict%20of%20nationality%20laws%20FULL%20TEXT_0.pdf accessed on 11th May 2023.
[22]Case Concerning Barcelona Traction, Light and Power Limited (Belguim v Spain) (Second Phase, 1970).

company whose founders also had Belgian nationality. The Belgium government tried to obtain compensation from the Spanish government for its nationals by espousing their claims. However, the Spanish government raised objections on grounds that the company in question was Canadian. The International Court of Justice upheld the objection and dismissed the case. In its ruling, it held that "the general rule of international law states that where an unlawful act was committed against a company representing foreign capital, only the national of state of company could make a claim."

Concordantly, shareholders of a corporation were not allowed to bring claims in their own name, irrespective of the fact that they hold shares directly or indirectly in the corporation. However, there are exceptions to this general rule under customary international law. These exceptions include situations where the direct rights of the shareholder have been infringed;[23] where the company has wound up in the country of incorporation;[24] and where the state of incorporation lacks the capacity to take actions.[25]

EXHAUSTION OF LOCAL REMEDIES

This is the second requirement for the exercise of Diplomatic protection, it allows an investor to have recourse first to the local remedies available in the host state before invoking the diplomatic powers of his home state. Local remedies can be defined as any legal remedies (be it special or ordinary) made available by the local judicial or administrative courts to an investor in respect of the injury caused by the host state.[26] Thus, an investor must first seek reparation for the wrongful acts of the host state under the national laws of the host state before invoking diplomatic protection of his home state. It is submitted that this requirement is justified on the following grounds: that an investor traveling abroad is presumed to take into account the means afforded by local laws for the redress of wrongs; the doctrine of sovereignty and independence of state supports freedom from interference in

[23]The Barcelona Traction Case (supra).
[24]The Barcelona Traction Case (supra)
[25]The Barcelona Traction Case (supra)
[26]ILC Draft Articles on Diplomatic Protection with Commentaries [2006] Article, 14 (2) https://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf accessed on 13th May 2023.

courts of a state on the assumption that they are capable of doing justice; a state should be afforded the opportunity to offer justice to the injured investor and remedy its wrong and so on.[27]

Exhaustion of local remedies being a prerequisite for the invocation of diplomatic protection also serves as a bar to the exercise of diplomatic protection where the local remedies are available, adequate, and effective but has not been exhausted by the investor.[28] In the **Interhandel case (Switzerland v. United States America),**[29] the International Court of Justice enunciated that **"the rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law; the rule has been generally observed in cases in which a State has adopted the cause of its national whose rights are claimed to have been disregarded in another State in violation of international law. Before resort may be had to an international court in such a situation, it has been considered necessary that the State where the violation occurred should have an opportunity to redress it by its own means, within the framework of its own domestic legal system".** Therefore, if the home state does not comply with the exhaustion of local remedies, it cannot espouse the claims of its nationals. Diplomatic protection in this instance can only be exercised where there is no local remedy provided by the host state to redress the alleged wrong or where the local remedy available in the host state is not satisfactory or effective in redressing the wrong.[30] Until then the home state only has potential right to intervene in an investor's claim.

It is important to state that exhaustion of local remedies is not applicable where a state is directly aggrieved or wronged.[31] The implication of this is that the rule is not applicable between states and is irrelevant where there is a direct breach of international law by a state against another state. This is seen in cases where the said injury is done against diplomatic or consular staff (heads of state, ministries, consular agents, or diplomatic agents) enjoying special international protection in the host state.[32] The reasoning behind this exception is that they are viewed or classed as state organs and are accepted as a state itself while in another state.[33]

[27]Edwin M Bochard, The Diplomatic Protection of Citizens Abroad or the Law of International Claims (The Banks Law Publishing Co., 1916) 817
[28]ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001) Article 44 (b) https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf accessed on 13th May 2023
[29]The Interhandel Case, (Switzerland v. United States of America) (Preliminary Objections 1959) Judgment of March 21st, 1959 https://www.icj-cij.org/public/files/case-related/34/034-19590321-JUD-01-00-EN.pdf accessed on 14th May 2023
[30]Algot Bagge, 'Intervention on the Ground of Damage caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders' (1958) British Yearbook of International Law 34; International Law Convention Draft Articles on Diplomatic Protection, Article 15 Op. Cit. p. 4-5.
[31]Ursula Kreibaum, 'Local Remedies and the Standards for the Protection of Investment' in Christina Binder et al (eds), International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer (Oxford University Press 2009) 420.
[32]Report of the Commission to the General Assembly on the Work of its Twenty-Ninth Session [1977] II (2) Yearbook of the International Law Commission https://legal.un.org/ilc/documentation/english/reports/a_32_10.pdf accessed on 14th May 2023
[33]ibid

THE WANING POPULARITY OF DIPLOMATIC PROTECTION

The concept of espousing a claim on behalf of investors-nationals is fraught with many challenges and deficiencies. These challenges and deficiencies led to the description of the concept of diplomatic protection by scholars and international investment communities as unpopular. These challenges are attributed to some factors. Firstly, there is reluctance of the home state to espouse an investor's claim especially where there is possibility of souring diplomatic relationship with the host state. Clearly, the right to espouse a national investor's claim is held by his home state, and as a matter of policy, its powers to defend an investor's claim is discretionary. Therefore, the home state may choose not to pursue the investor's claim in a bid to maintain international relations between it and the host state.[34] Put differently, the home state may prioritise its international relations with the host state at the expense of the national investor's claims.

There is also the detached position of the home state and near-absence of keen interest in espousing the claim of an investor, the inability of the investor to contribute in making robust claims or determining how to prosecute the claim, non-participation of the investor in negotiations towards settlement of the claim with the risk of the home state accepting just anything in reparation of the injury and inability of the investor to determine appropriate forum for making of the claim. In all, even in cases where the home state successfully pursues an investor's claim, it is not legally obliged to transfer the proceeds of the claim to the investor.[35] These and many more contributed in fueling the agitation for a neutral, depoliticised and delocalised forum for investor-state dispute resolution system.

In the 19th and early 20th Centuries, diplomatic protection was used by powerful states (developed states) against

[34]United Nations Conference on Trade and Development - Dispute Settlement: Investor-State https://unctad.org/system/files/official-document/iteiit30_en.pdf accessed on 22nd May 2023.
[35]Jennings and Watts, 'Oppenheim's International Law' (9th edition) Vol.I (Harlow, Essex: Longman)

underdeveloped states in forms of threat and military intervention (gunboat diplomacy).[36] By the second half of the 20th century, diplomatic protection became visibly associated as a political tussle between developed and underdeveloped states by virtue of the foreign investment made by the nationals of developed states in most underdeveloped states. In most cases, the political tussle employed by the home state against the host state ends up not addressing the claims of an investor.

It became clear to international officials that diplomatic protection cannot be used as a primary investor-state dispute resolution mechanism. Thus, there was need for other institutions that are autonomous with the capacity to move investment disputes away from the political tussle or depoliticalise investment disagreements.[37] This led to the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) in 1966 by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States under the supervision of the World Bank. The ICSID is an independent, depoliticised, and effective dispute-settlement mechanism. It promotes international investment by providing confidence in the dispute resolution process between states and nationals of other states.

Under the ICSID, an investor is permitted to sue the host state using a neutral third-party tribunal without the involvement of his home state. The ICSID has become a popular medium for resolving investor-state disputes. As of December 31, 2022, ICSID has registered a total of 821 cases under the ICSID Convention and 76 cases under the Additional Facility Rules.[38] Clearly, the use of Diplomatic protection could not have resolved this large number of disputes within such timeframe.

It is important to note that the establishment of ICSID also brought an alternative option to the use of Diplomatic protection and its numerous bottleneck procedures in investor-state dispute settlement. Essentially, the satisfaction of the nationality test and exhaustion of local remedies by an investor is not automatic to the exercise of diplomatic protection. The home state reserves the discretion of not espousing the claims of an investor despite the fulfilment of the requirements discussed above.[39] Diplomats of the home state in the host state play an important role in the invocation of diplomatic protection by reporting any

[36] Jonathan Gimblett and O Thomson Johnson, Jr., 'From Gunboats to BITs: The Evolution of Modern International Investment Law' in Karl P Sauvant (ed) Yearbook on International Investment Law & Policy Vol. 2010-2011 (Oxford University Press 2012).
[37] Habyyev, op cit p. 15
[38] ICSID Releases 2022 Caseload Statistics: An Analytical Review And Prognosis Of Investment Disputes Post-Covid-19 https://www.afslaw.com/perspectives/international-arbitration-dispute-resolution-blog/icsid-releases-2022-caseload accessed on 15th May 2023.
[39] Resul, op cit p. 15

application made by nationals whose right has been infringed to the home state to enable the home state espouse their claims. Bearing this in mind, the role of a diplomat cannot be overemphasized as he is in the right position to report, support, or reject applications made by national investors to the home state. A Diplomat will usually investigate the claims of the national investor and evaluate the relationship between the home state and the host state of the investor in order to form an opinion on the worthiness of the protection requested for by the investor. In most cases, the diplomat while in the process of investigating the claims of a national, might be asked by the home state to return to the home. In such situations, the investor is to make a fresh application to the new diplomat sent to the host state. However, with the establishment of ICSID, an investor can decide to bring his action personally before an independent tribunal without the involvement of the home state.

One of the purposes of ICSID convention is to depoliticalise investor-state disputes by encouraging parties to avoid dealing with host state courts.[40] Exhaustion of local remedies is permitted under the convention, however, it is only upon the agreement of the parties. **Article 26 of ICSID Convention [1965]**[41] provides that **"consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."** Flowing from the above, it is clear that the level of importance attributed to exhaustion of local remedies under the customary

[40] Habyyev, op cit p.104
[41] ICSID Convention [1965] Article 26 https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf accessed on 19th May 2023

international law is to a large extent different from that attributed to it under the contemporary international law/ICSID convention. This has equally contributed to the waning popularity of diplomatic protection in resolving international investment disputes through investor-state dispute settlement system.

CONCLUSION

Diplomatic protection is a mechanism of investor-state dispute resolution where the home state of an investor whose rights were violated by another state abroad (host state), intervenes to protect its nationals and claim reparation or compensation for the injury suffered. However, in practice, this concept was used by developed states against underdeveloped states as a discriminatory exercise of power rather than as a method of espousing the claims of its nationals.

This power tussle or politicalisation of the use of diplomatic protection led to the quest for the establishment of ICSID which has as its principal purpose, the depoliticalisation of investor-state dispute. Under ICSID, investors can initiate actions in the arbitral tribunal in their names without the involvement of their home state and access justice within a reasonable time. This led to the waning popularity of diplomatic protection in resolving foreign investment disputes through investor-state dispute settlement system.

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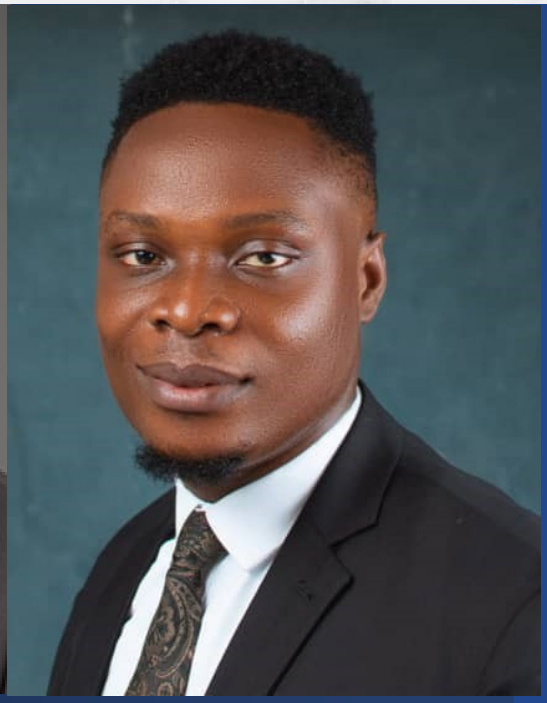

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