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THE ACT OF STATE DOCTRINE: APPLICATION FEATURES

The Act of State Doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation.

The Act of State doctrine preferably exists in Anglo-Saxon countries (case-of- Law) (USA, UK, Canada, etc.). Now it is under debate whether the Act of state doctrine belongs to public international law and, accordingly, whether it provides protection similar to state immunity. The Act of State doctrine can be used as a defense when the dispute arose from an act/action taken within the sovereign authority of a State in its territory, with no generally accepted international principles to be related to the subject of the act/action.

The doctrine is not required by international law (neither customary international law nor treaty law), but it is a principle recognized and adhered to by the United States federal courts.

The «Act of State Doctrine» is a doctrine developed through case law, executive-branch actions, and, more recently, federal legislation. The doctrine limits the ability of courts, in certain instances, from determining the legality of the acts of a sovereign state within that sovereign's own territory.

In deciding whether or not to apply the Act of State doctrine, and thus, grant immunity from inquiry to an act, a court must first of all consider whether the act in question is an «Act of State». The Act of State doctrine is applied to those acts carried out by a governmental official or body. There are two qualities for act of State: 1) The act must be that of a governmental body or of a body having governmental powers and must be carried out in the exercise of such governmental or sovereign powers. 2) The act in question must be a formal act or evidenced by formal action such as legislation or an executive order.

The acts of State officials will amount to an act of State where the official is acting in the exercise of his official functions. In deciding whether acts of officials are acts of State, the courts consider whether the official was acting in his public capacity. When the official is acting for his own private benefit rather than for the benefit of the State, then such acts will not benefit from the application of the act of State doctrine.

The Act of State doctrine was initially developed in the US in cases against officials or agents of foreign governments and applied as a corollary to the personal immunity of foreign sovereigns. This connection between the Act of State doctrine and sovereign immunity is evident from a 19th century American case, *Underhill v. Hernandez* 168 U. S. 250 (U. S. 1897) which established the doctrine. In this case the Supreme Court held that a citizen of the United

States was not entitled to recover damages in a United States court from a Venezuelan Military General who refused to issue a passport to him because the acts of the General were held to be acts of the Venezuelan government.

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

There are three principal theories to justify the application of the Act of State doctrine. Two of these theories, the «international law» and «territorial choice of law» theories, are theories of external deference which gained approval in the early Supreme Court cases establishing the doctrine. However, the third, the «separation of powers» theory is based on the theory of internal deference.

In the early act of State cases, the courts were of the clear view that the Act of State doctrine was required by the universal comity of nations and the established rules of international law. In the opinion of the court, relief for wrongs committed abroad was to be sought either in the courts of the country where the wrong was committed or through international (i.e. diplomatic) means. It has been argued that the early act of State cases utilized the Act of State doctrine as an aspect of the territorial choice of law principle. This is the principle that the validity of an act is to be determined by the law of the territory where the act took place. Thus, acts of the sovereign, or acts of state, done within the sovereign's own territory, are legally valid everywhere.

The Act of State doctrine is based on separation of powers and reflects notions of internal deference. The Supreme Court in Sabbatino took the view that the basis of the doctrine was not external deference but internal deference, holding that the doctrine concerns a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community.

Although older case law suggested that the doctrine applied more broadly, in 1990, the Supreme Court strictly limited its application to cases in which a court is required to squarely determine the legality of a sovereign state's official acts under that sovereign's own laws. In *Kirkpatrick*, the Court reconfirmed that Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.

To the extent that a case involves the «official act of a foreign sovereign,» the Act of State doctrine applies only when a U. S. court *must* declare such official act invalid, and thus ineffective as a rule of decision for the courts of this country. The fact that the issues may be embarrassing to a sovereign is not enough to warrant application of the Act of State doctrine. Nor is it enough that the facts to be found in the U. S. proceeding would also establish that a sovereign's acts were illegal. In *Kilpatrick*, the Court held that the Act of State doctrine was not applicable even though the plaintiff intended to show that

the defendant had acquired its contract with the Nigerian government through bribery, which everyone agreed was unlawful under Nigerian law.

The doctrine applies only to the «official» or «public» acts of a sovereign. «Official» acts include passage of laws, decrees, creation of government agencies, military actions, police actions, etc. that are both official and governmental in nature. Isolated acts of an official may or may not be «official» acts depending on whether the official was authorized to act for and «bind» the state. Elements to examine (or prove) include clear authorization for the act or ratification by a governing body. Whether the action is uniquely governmental in nature or could just as easily be performed by a private actor also is a factor to consider.

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УНІФІКАЦІЯ ПРАВА, ЯКЕ ЗАСТОСОВУЄТЬСЯ ДО ПРАВОВІДНОСИН, ПОВ'ЯЗАНИХ З НЕДОБРОСОВІСНОЮ КОНКУРЕНЦІЄЮ

В даний час практично відсутня уніфікація колізійних і матеріально-правових норм в такій області деліктних відносин, як відносини недобросовісної конкуренції.

Спочатку термін «недобросовісна конкуренція» мав різний зміст у праві різних країн. Уніфіковане розуміння недобросовісної конкуренції з'явилося на базі міжнародного договору — Паризької конвенції про охорону промислової власності від 20 березня 1883 р., яка не містила загального визначення недобросовісної конкуренції, а надавала лише невичерпний перелік форм її вияву.

Конвенція закріплює зобов'язання країн-членів забезпечувати «ефективний захист від недобросовісної конкуренції». Визначення недобросовісної конкуренції, яке дано в ст. 10bis Конвенції, максимально широко: актом недобросовісної конкуренції вважаються будь-які дії у конкуренції, що суперечать торговим та іншим чесним звичаям у господарській діяльності. Проте, стаття встановлює «мінімум» дій, які повині бути кваліфіковані в якості дій недобросовісної конкуренції. Це в тому числі всі дії, здатні яким би то не було чином призвести до змішування щодо виробництва, продуктів, виробничої або торговельної діяльності конкурента; помилкові твердження при здійснені комерційної діяльності, здатні дескридитувати виробництва, продукти,

