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A Comparative and Critical Assessment of Estoppel in International Law

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"Must a name mean something?" Alice asked doubtfully.

"Of course it must," Humpty Dumpty said with a short laugh: "My name means the shape I am—and a good handsome shape it is, too. With a name like yours, you might be any shape, almost."

...

"When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."

LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE
FOUND THERE 111-12 (1941).

I. INTRODUCTION¹

The body of American law might be viewed as a forest of giant sequoia trees. The bark is the rough surface over the cambium of growth that adds its accretions to the knowledge and vitality of ages past in much the same way that today's legal practitioners add their knowledge to the wisdom of the common law jurists of antiquity. The intricate roots and branches of the trees represent the scope and breadth of the law. It is as hard to cut down one of these great trees as it is to make sweeping changes in the law. Their age and massiveness lend them a powerful eloquence which, generally, is reason enough to leave them as they are.

International law, by contrast, is a grove of saplings. There are few universally accepted doctrines or rules of procedure and practice, and much of what does exist is relatively recent. More significantly, the detail and refinement of the common law system, with specific procedural and substantive regimes in the areas of criminal, property, contract, and tort law, are markedly absent.

Rules of equity have traditionally served the function of altering the course of the common law system where its results, in spite of long and steady development, are plainly unreasonable, unjust, or offensive. In our American sequoia forest, these rules function as pruning shears that clip an errant branch or root which threatens destruction of that tree. However, the same shears that prune in the sequoia forest lop down nascent growth in the international sapling grove, at best hindering development, at worst killing new trees.

It is the central thesis of this Comment that the common law equity rule of estoppel, as used in international law, threatens to substitute for and obliterate developing doctrine rather than modify it. Estoppel in international practice is a principle of law used in so many different circumstances, a term associated with so many other fundamental principles of law, that it threatens to become a hatchet in the hands of inept woodsmen.

This Comment will examine the use of estoppel in international law from an Anglo-American perspective. Estoppel in international law is a direct descendant of its Anglo-American counterpart. In Anglo-Ameri-

1. Frequent references will be made to "procedural," "substantive" and "evidentiary" rules. Although definitions of these terms are given in the body of the paper, some clarification is in order at this point. "Procedure" refers to those rules and principles which govern the introduction and prosecution of a claim before a given body. BLACK'S LAW DICTIONARY 1203 (6th ed. 1990). A "substantive" rule creates and defines rights under which a party brings an action before a legal decision-making body. *Id.* at 1429. "Evidentiary" rules govern the admissibility of evidence to the trier of fact. *Id.* at 555.

can municipal law estoppel is a highly complex, multifarious theory with numerous forms and different theoretical moorings that apply in vastly different circumstances. International jurists, however, approach estoppel with befuddled abandon. Their reaction is easy to understand. Even a cursory glance at the numerous legal theories bearing the name "estoppel" at common law reveals a veritable jungle of concepts: estoppel by record, estoppel by deed, estoppel by matter *in pais*, estoppel by representation, equitable estoppel, estoppel by *res judicata*, collateral estoppel, estoppel by acquiescence, proprietary estoppel, promissory estoppel, quasi-estoppel, issue estoppel.² The confusion becomes heightened if one includes other principles of municipal and international law which share elements and characteristics of estoppel: laches, forclusion, waiver, etc.

It would be impossible to analyze estoppel in international law without first attempting to analyze the family of concepts in Anglo-American law from which it is nominally derived. Parts II and III of this Comment will address this, emphasizing the notion of promissory estoppel; the most modern form of estoppel in the Anglo-American law system, and arguably the most important in that it is, to a large extent, what American jurists think of when the word estoppel is evoked.

Part IV will trace the foundation and development of estoppel in international law and compare it to its Anglo-American precursors. Finally, the existing rule (or rules) of estoppel in international law will be examined critically and compared with its Anglo-American counterparts in Part V.

II. THE FORMS OF ESTOPPEL IN THE COMMON LAW

According to Spencer Bower, the English word estoppel is derived from the ancient word "estop," a synonym of the word "stop."³ "Estop," in turn, evolved from the word *estoupper*, meaning *boucher*.⁴ This term implied that an act connoting the acceptance of a given state of affairs would prevent an actor from subsequently denying or challenging that state of affairs. Thus, based on the etymology of the word, the legal principle is unrelated to the truth or falsity of the events in question. Rather it restrains a party from testifying or speaking as to the truth or falsity of those events.

2. See generally GEORGE S. BOWER & SIR ALEXANDER K. TURNER, *THE LAW RELATING TO ESTOPPEL BY REPRESENTATION* (1966); 16 HALSBURY'S LAWS OF ENGLAND 839-947 (Lord Hailsham of St. Marylebone ed., 4th ed. 1992).

3. See BOWER & TURNER, *supra* note 2, at 3.

4. "Boucher" is defined as follows: "*Fermer (une overture)* [to close (an opening)]." DICTIONNAIRE LE ROBERT 202 (1984).

There are four primary rubrics under which the numerous forms of estoppel can be placed: estoppel by representation, estoppel by record, estoppel by deed, and the various forms of estoppel by silence.⁵ These categories are examined in the following Section.

A. *Estoppel by Representation*

This category of estoppel is used most often in contemporary Anglo-American parlance. As will be noted below, estoppel by record and its subsidiary theories, as well as estoppel by silence, are branches of the original estoppel tree. However in modern practice the theoretical bases and functions of estoppel by silence are significantly removed from the estoppel which falls into the category presently under discussion.⁶

Estoppel by representation evolved from the medieval common law theory of estoppel by matter *in pais* ("in the country" or "on the land").⁷ This form was originally a means of proving acts *in pais*, or acts that had occurred in public where neighbors and other people could bear witness, with their testimony becoming binding upon the actor.⁸ Thus, in its most primitive form, estoppel was little more than a general rule permitting the use of testimony as conclusive evidence of certain facts or events. Over time, this simple evidentiary concept was transformed in the English courts of chancery into the more narrow notion of estoppel by representation which is defined as follows:

[W]here one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.⁹

5. Bower separates estoppel theories into three groups: estoppel by record, estoppel by deed and estoppel by matter *in pais*. See BOWER & TURNER, *supra* note 2, at 3. I have chosen to divide the numerous estoppels and related principles according to their theoretical underpinnings. Hence the inclusion of what will be denoted "estoppel by silence."

6. See generally discussion *infra* part III.

7. See ANTOINE MARTIN, L'ESTOPPEL EN DROIT INTERNATIONAL PUBLIC 11 (1979).

8. Martin notes that "[s]i un différend venait à s'élever à leur propos, le témoignage des gens du pays qui avaient assisté à la transaction, ou en avaient eu connaissance, revêtait un tel degré de certitude, du fait de la solennité de l'acte, qu'il ne pouvait être contredit." *Id.* at 12.

9. BOWER & TURNER, *supra* note 2, at 4 (footnote omitted).

As estoppel by matter *in pais* evolved to become estoppel by representation, certain rudiments of the classic elements of estoppel developed: one party's words, actions, or silence, the inducement of a second party's action or inaction to his detriment, and the denial of the first party's right to present evidence that would contradict his former representation.

The theoretical basis of this principle is expressed in *Cave v. Mills*:¹⁰

[A] man shall not be allowed to blow hot and cold, to affirm at one time and deny at another, making a claim on those whom he has deluded to their disadvantage, and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called "estoppel" or by any other name, it is one which courts of law have in modern times most usefully adopted.¹¹

This oft cited passage reveals a theme that will occur with frustrating regularity in the current examination; namely, that the theoretical underpinnings of estoppel by representation and its kin are often stated in such general terms as to be reduced to the level of a platitude devoid of any legal meaning. In the English courts of equity, estoppel was created in order to furnish justice in cases where the existing law failed, in the opinion of the judge, to provide for an adequate remedy.¹² But in scholarly materials, as well as case law referring to estoppel, jurists hesitate when trying to settle on the foundations of this principle.¹³ Although various bases proffered in support of the numerous estoppel theories are discussed in greater detail below, it is notable at this point that estoppel

10. 31 L.J. Ex. 265 (1862).

11. *Id.* at 271.

12. "Equity" in Anglo-American law refers to a system of rules and principles that originated in England as an alternative to the intractable rules of common law. Courts of equity, as the name suggests, ruled on the basis of what was fair in a particular situation. See J.F. O'CONNOR, GOOD FAITH IN ENGLISH LAW 1-16 (1990); see also BLACK'S LAW DICTIONARY 540 (6th ed. 1990).

13. See generally P.V. BAKER & P. ST.J. LANGAN, SNELL'S EQUITY 569 (1990) ("The cases show that at least three types of conduct suffice to raise the estoppel . . . But all these are aspects of a wider doctrine. Recent authorities 'have supported a much wider jurisdiction to interfere in cases where the assertion of strict legal rights is found by the court to be unconscionable.'") (footnote omitted). See also GRANT GILMORE, DEATH OF CONTRACT 64 (1974) ("[T]he word which instinctively comes to the mind of any [common law] judge is, of course, 'estoppel'—which is simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for the plaintiff."). Note, however, that the uncertainty manifested with regard to estoppel by representation does not apply to *res judicata* and its related principles which have their own precise legal bases. See discussion *infra* at part II.C.

by representation is variously said to be based on good faith,¹⁴ fault,¹⁵ and implied contract or reliance.¹⁶

B. *Other Aspects of Estoppel by Representation*

While estoppel by representation is often cited as a mere evidentiary or procedural rule serving "as a shield but never as a sword,"¹⁷ its application can have significant effects on the substantive aspects of a claim. Nonetheless, estoppel by representation in Anglo-American law is a rule of procedure and cannot serve as the basis of a claim. It is a mere defensive device.

Another important aspect of estoppel by representation is its application only to existing facts.¹⁸ Equitable (or promissory) estoppel is distinguished from other forms of estoppel by representation in that it

14. See, e.g., O'CONNOR, *supra* note 12, at 20 (recognizing that the principle of "good faith" in English law is at the root of the doctrine of promissory estoppel). But see Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 AM. J. INT'L L. 1, 9 (1977) ("[S]ince no concept of 'good faith' can make binding a policy declaration or other pronouncement that is not binding because not conceived as binding by any party concerned, to argue that 'good faith' alone creates the obligation is to argue in support of an obvious absurdity.").

15. See G.H.L. Fridman, *Promissory Estoppel*, 35 CAN. B. REV. 279, 285 (1957). But see MARTIN, *supra* note 7, at 38 ("[L]'estoppel by representation, règle de la procédure probatoire qui opère indépendamment de la culpabilité ou de la non-culpabilité de l'auteur de la representation, se situe en dehors du droit de la responsabilité.").

16. See, e.g., *Burkinshaw v. Nicolls*, 3 App. Cas. 1004 (1878) (appeal taken from C.A.).

When a person makes to another the representation, "I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist," and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts, which the two parties agreed to make the basis of their action.

Id. at 1026; see also discussion *infra* parts III.A and B.

17. *Combe v. Combe*, 1 T.L.R. 811, 817 (1951); see also BAKER & LANGAN, *supra* note 13, at 573; BOWER & TURNER, *supra* note 2, at 6.

The doctrine of estoppel by representation forms part of the English law of evidence, and such estoppel, except as a bar to testimony, has no operation or efficacy whatsoever. Its sole office is either to place an obstacle in the way of a case which might otherwise succeed, or to remove an impediment out of the way of a case which might otherwise fail. . . . To use the language of naval warfare, estoppel must always be either a mine-layer or a mine-sweeper: it can never be a capital unit.

BOWER & TURNER at 6-7 (footnotes omitted); see also David Jackson, *Estoppel as a Sword*, 81 L.Q. REV. 84 (1965).

18. 16 HALSBURY'S LAWS OF ENGLAND, *supra* note 2, at 904. "In order to found an estoppel a representation must be of an existing fact, not of a mere intention, nor of a mere belief." *Id.* (footnote omitted). For example, suppose a party seeks to place a billboard on the property of another who does not object to this action. The first party could not subsequently invoke estoppel as a means of preventing the property owner from challenging the placement of the billboard because the action of placing the billboard would occur in the future; and therefore, it is not an existing fact. *Kelson v. Imperial Tobacco Co.*, 2 All E.R. 343 (Q.B. 1957).

relates to future facts or promises.¹⁹

C. Estoppel by Record

Estoppel by matter *in pais* was essentially an early evidentiary rule which allowed the testimony of witnesses conclusively to establish facts against the estopped party.²⁰ Estoppel by record, sometimes referred to as *res judicata*, differs only in that it refers to the testimony of witnesses which over time became written.²¹

In spite of the historical association between estoppel by *res judicata* and the other forms of estoppel, the former is founded on vastly different principles.²² The principle of *res judicata*, or estoppel by record, is expressed in two maxims of the common law: *interest reipublicae ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa*.²³ Along with collateral estoppel, *res judicata* is part of the procedural world of the common law. The function of these principles, as the cited maxims suggest, is to bring an end to litigation. Each is an intricate realm unto itself with a vast array of subtle variations. However some understanding of these rules is essential to the examination of estoppel in the international legal process.

Res judicata may be viewed as a rule of battle which forces one side to fire all of its guns at once rather than withhold some of its rounds for later in the battle.²⁴ *Res judicata* differs significantly from issue pre-

19. See discussion *infra* part III.B.

20. See *supra* note 7 and accompanying text.

21. See, e.g., MARTIN, *supra* note 7, at 11 ("Très vite ces documents, revêtus du sceau royal, acquièrent un caractère officiel d'authenticité qui explique le degré d'autorité particulièrement élevé dont ils bénéficièrent, en tant que moyens de preuve de leur contenu. Ils revêtaient un tel degré de crédit et de vérité que. . . l'on ne pouvait rien avérer, plaider ou prouver à leur encontre. Ce genre d'estoppel s'est transformé en notion contemporaine—<<estoppel by *res judicata*.>>"). See also BOWER & TURNER, *supra* note 2, at 3 ("[E]stoppel by matter of record corresponds roughly in modern times to estoppel *per rem judicatam*.").

22. See GEORGE S. BOWER & SIR ALEXANDER K. TURNER, *THE DOCTRINE OF RES JUDICATA* 3 (2d ed. 1969) (the authors note that "as regards . . . *res judicata*, . . . though it is correctly described as an estoppel, its description as 'estoppel by matter of record' or (more shortly) 'estoppel by record' is a misnomer.").

23. "[I]t is in the public interest that there should be an end of litigation." 16 HALSBURY'S LAWS OF ENGLAND, *supra* note 2, at 852 n.1. "[N]o man should be proceeded against twice for the same cause." *Id.* at 852 n.2.

24. The more contemporary terms for collateral estoppel and *res judicata* are issue preclusion and claim preclusion, respectively. This is further evidence of the effort in American law to distinguish these principles from estoppel. RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982):

A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment;

(2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim;

clusion—collateral or issue estoppel—which is a doctrine of former adjudication in the common law. Issue preclusion prevents a party from raising issues which have been previously adjudicated, whereas *res judicata* prevents a party from readjudicating an entire claim which has already been decided.²⁵ For present purposes, both issue estoppel and estoppel by *res judicata* seek to prevent the readjudication of previously settled issues and claims, and to prevent claimants from harassing other parties or profiting from their own ineptitude or lethargy in litigating a claim. These theories have significantly different objectives from the quasi-contractual objectives of estoppel by representation.²⁶ Thus, in contemporary practice, they are not considered estoppels at all in spite of their nomenclature.

D. *Estoppel by Deed*²⁷

As with estoppel by record, estoppel by deed evolved in order to accord a character of truth to acts concluded between parties.²⁸ In contemporary practice, this principle is a narrow rule in the law of deeds for real property. According to this principle, a bona fide purchaser of real property who acquires a deed from a seller who does not have proper title will be deemed to have acquired good title if the seller subsequently obtains it.²⁹ This principle is largely irrelevant to the present discussion except to the extent that it illustrates the particularity of cases in which estoppel theories currently apply.

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

Id.

25. "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Id.* § 27.

26. See discussion *infra* part III.B.

27. The terms estoppel by deed and estoppel by convention are synonymous. BOWER & TURNER, *supra* note 2, at 157.

28. See MARTIN, *supra* note 7, at 11.

29. See, e.g., *Cleveland Boat Serv. v. City of Cleveland*, 130 N.E.2d 421, 425 ("Estoppel by deed is the precluding of a party from denying a certain fact recited in the deed executed by or accepted by him in an action brought upon the instrument by the party to be detrimentally affected thereby."); see also BOWER & TURNER, *supra* note 2, at 146-47, explaining that this form of estoppel is founded, not on a representation of fact made by a representor and believed by a representee, but on an agreed statement of facts, the truth of which has been assumed, by the convention of the parties, as the basis of a transaction into which they are about to enter. When the parties have acted upon the agreed assumption, then, as regards that transaction, each party will be estopped from questioning the truth of the statement of facts so assumed.

E. Estoppels by Silence

There is a final category of theories in municipal law which often bears the name estoppel, even though it is far removed from estoppel by representation in the strict sense: estoppels by silence. The first of these theories is acquiescence or proprietary estoppel.³⁰ Acquiescence applies when a party remains silent while another party mistakenly violates the first party's rights and the first party's willful silence encourages the latter party unwittingly to continue the violation.³¹ Compared with other forms of estoppel by representation, acquiescence includes two additional elements. First, the party against whom it is invoked must know that he has a legal right to staunch the violation of the other party.³² Moreover, the party committing the "wrongful" act must be ignorant of the fact that he is violating a legal right of the first party.³³

The knowledge element is an essential difference between acquiescence and other estoppel theories and implies that the legal foundations of the respective theories are fundamentally different. Where estoppel by record is said to be based on reliance or quasi-contract,³⁴ acquiescence is more appropriately viewed as a quasi-tortious event in that it requires fault.³⁵ As will be seen in subsequent discussion, the two theories are seldom distinguished in international law.

Another theory which belongs to the estoppels by silence is the doctrine of laches. Born in the English equity courts, laches aims to

30. See BOWER & TURNER, *supra* note 2, at 261-82.

31. See 16 HALSBURY'S LAWS OF ENGLAND, *supra* note 2, at 933, which sets out the elements of acquiescence as follows:

When A stands by while his right is being infringed by B, it has been said that the following circumstances must be present in order that an estoppel may be raised against A:

- (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted;
- (2) B must expend money, or do some act, on the faith of his mistaken belief; otherwise, he does not suffer by A's subsequent assertion of his rights;
- (3) acquiescence is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights;
- (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake;
- (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right.

Id. (footnote omitted).

32. *Id.*

33. See, e.g., BOWER & TURNER, *supra* note 2, at 265, noting that actual knowledge on the part of the representor is an essential characteristic of all estoppels by acquiescence.

34. See discussion *infra* at part III.B.

35. See, e.g., 16 HALSBURY'S LAWS OF ENGLAND, *supra* note 2, at 828 (footnote omitted) ("The doctrine of acquiescence operating as an estoppel was founded on fraud.").

prevent a party from bringing claims after a long delay.³⁶ Although acquiescence and laches are often confused, there is a subtle but important difference between them. Laches requires the passage of a period of time during which a party has failed to act,³⁷ and is an affirmative defense asserted by a defending party.³⁸ In this sense, laches fits into the general category of estoppels which, recalling Lord Coke's metaphor, may serve as shields but not as swords.³⁹ Acquiescence, on the other hand, may serve as a sword. This situation generally arises where one party unknowingly enters the property of another and makes some improvement thereon with the full knowledge and encouragement of the rightful owner.⁴⁰

Accordingly, it can be used by the relying party as a sword to stake a claim over the improvements. The distinctions drawn between the numerous forms of estoppel in municipal law, especially the differences between the estoppels which operate via the inaction or silence of the representor and the various forms of estoppel by representation, will be central to the subsequent discussion of estoppel as it has been applied in international law.

III. THE EVOLUTION OF PROMISSORY ESTOPPEL

A. *Classical Elements of American Contract Theory from Which Promissory Estoppel Evolved*

Equitable estoppel, as the name suggests, is a principle that developed in the English equity courts and is synonymous with promissory estoppel.⁴¹ As a subform of estoppel by representation, promissory estoppel differs from other forms in that it applies to future acts. This distinction runs counter to the notions of estoppel seen thus far; in fact, the notion of an estoppel based on a "promise," in some ways, is a contradiction in terms.⁴² When the acts or representations of a representor

36. In the words of the common law, "*vigilantibus et non dormientibus lex succurrit*." [equity aids the vigilant, not the indolent.]. Laches may be loosely viewed as equity's version of statutes of limitations. *Id.* at 829.

37. *Id.* at 830.

38. *Id.*

39. *Combe v. Combe*, 1 T.L.R. at 817.

40. See generally BOWER & TURNER, *supra* note 2, at 261-82.

41. Bower and Turner note that the two terms are synonymous: they prefer the latter. *Id.* at 12. The debate over the terminology applicable to this theory dates at least from the time of the adoption of § 90 by the American Law Institute. ARTHUR L. CORBIN, CORBIN ON CONTRACTS 232-35 (1963).

42. See Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969), who observes:

It was . . . inevitable that a rule of promissory estoppel would develop in recognition of the applicability of the estoppel principle to promises. The basic difficulty with

take the form of promises, he cannot, in a pure sense, be estopped. The relying party is depending on a promise rather than an objective act or state of affairs to which the actor/representor can be bound or estopped.

In spite of this technical distinction, the term estoppel, as any lawyer trained in the American legal system can attest, is inextricably woven into the nomenclature of the theory of binding promises. In fact, it is not an exaggeration to posit that for most American lawyers, the word estoppel immediately calls to mind the legal principle stated in the *Restatement (Second) of the Law of Contracts* § 90, commonly referred to as promissory estoppel.⁴³ This theory developed as an answer to a perceived gap in the prevailing contract law of the early part of this century. Accordingly, an adequate understanding of promissory estoppel requires an appreciation of the context from which it developed in American contract law.

Classical American contract law, which developed from the early 19th century to the middle part of this century, was characterized by the objective "bargain theory." The formation of a contract was determined by a "meeting of the minds" of the parties, expressed in overt acts that manifested the willingness of those parties to be bound.⁴⁴ This highly formalistic doctrine, codified in the *Restatement*, created a narrow spectrum within which agreements were enforceable. The formalism of the bargain theory and its requirement of consideration⁴⁵ served to exclude

this innovation is that the underlying theory of estoppel is not mechanically suited for application to promises. To "estop" the maker of a statement of fact by sealing his mouth in court has the effect of establishing a factual basis for an action, which, standing alone, will support recovery. The consequences of misleading conduct supply the injury, and the estoppel theory renders the representor powerless to dispute the facts upon which liability is based.

Id. at 376 (footnote omitted).

43. Corbin disfavored the use of the term "estoppel," when he assisted in the drafting of Section 90:

[T]he phrase is objectionable. The word estoppel is so widely and loosely used as almost to defy definition; yet, in the main, it has been applied to cases of misrepresentation of facts and not to promises. The American Law Institute was well advised in not adopting this phrase and in stating its rule in terms of action or forbearance in reliance on the promise.

CORBIN, *supra* note 41, at 232-35 (footnote omitted); *see also* BAKER & LANGAN, *supra* note 13, at 573.

44. *See* GILMORE, *supra* note 13, at 19-22.

45. Consideration is described as:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
 - (a) an act other than a promise, or

gratuitous promises from the realm of enforceable agreements.⁴⁶ The manifold theoretical and technical details of the "bargain theory" are of little import to this discussion. What is significant is the theory's inveterate formalism—the only commitments which were legally binding under the bargain theory were those which satisfied the rigid requirement that parties give an objectively discernible manifestation of their desire to be bound. The limitations of this strict notion of contract in American law engendered a bold effort to broaden the domain of binding contracts. Section 90 is the result of this effort.

B. *Restatement (Second) of Contracts § 90: Promissory Estoppel*⁴⁷

Promissory estoppel was created to accommodate promises in the realm of legally binding agreements.⁴⁸ The first element of promissory estoppel is that a promise be made and broken.⁴⁹ A promise is not wholly dissimilar in character from acts or representations underlying various forms of estoppel by representation. However, it differs significantly from the underlying basis of the doctrines of acquiescence or laches. In the context of promissory estoppel, the mere silence of the

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation. . . .

RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 71 (1979).

46. As an illustration, consider the case where A promises to give a gift of ten dollars to B and B subsequently buys a book from C, agreeing to pay C ten dollars. Although B has relied upon A's promise to him in contracting to buy a book, A's promise would have no binding effect as it was not bargained for. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 71 cmt. b, illus. 3 (1979). The comment further states that "it is not enough that the promise induces the conduct of the promisee or that the conduct of the promisee induces the making of the promise; both elements must be present, or there is no bargain." *Id.* § 71 cmt. b; see also OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1945):

[I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of *reciprocal conventional inducement*, each for the other, between consideration and promise.

Id. at 293-94 (emphasis added).

47. Here is what has become known in the parlance of American law as "promissory estoppel:"

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 90 (1981).

48. Although the authors of Section 90 drafted it in the hope that the rigidity of the doctrine of consideration would be relaxed somewhat, promissory estoppel has not been warmly embraced. In practice, much of the formalism of the bargain theory has remained firmly in place. See *infra* note 63 and accompanying text.

49. See generally E. ALLAN FARNSWORTH, *CONTRACTS* 92-102 (1990).

promisor will not create a legally binding obligation.⁵⁰ Moreover, the party who makes the promise must have reason to believe that the party invoking Section 90 will rely upon it.⁵¹ Finally, the promise must induce a change in the relative positions of the parties.⁵² This element generally requires that the promisee suffer a detriment or loss as a result of his reliance upon the promise.⁵³ Like acquiescence, Section 90 can theoretically be employed as the basis of an action—as a sword (this in spite of the fact that unlike acquiescence, mere silence on the part of the promisor will not suffice to create a legally binding commitment).⁵⁴

Section 90 has proved to be more of a summer breeze of academic interest than a monsoon wind shattering the walls of existing doctrine.⁵⁵ Although several commentators have observed that promissory estoppel threatens to swallow current contract theory, the traditional elements of bargain theory remain firmly rooted. There are, without a doubt, cases in which promissory estoppel serves as the basis for an action.⁵⁶ Nonetheless, American judges have limited themselves in applying this principle, showing an instinctive reluctance to allow unilateral promises to creep into the realm of legally enforceable agreements. Much of the case law construing Section 90 reveals that judges frequently revert to traditional notions of contract law which require consideration to validate agreements.⁵⁷

A primary reason for promissory estoppel's tepid reception in American law is a problem with the policy behind the rule.⁵⁸ The language of Section 90 suggests that it is based on the law's desire to vindi-

50. See discussion at part II.E.

51. This is an objective element of promissory estoppel which excludes from the field of enforceability outlandish promises or promises on which no reasonable person would rely. RESTATEMENT (SECOND) OF THE LAW OF CONTRACTS § 90(1) (1981).

52. *Id.*

53. See, e.g., *Ricketts v. Scothorn*, 77 N.W. 365, 366 (Neb. 1898) (A man promised his granddaughter that if she would quit her job, he would give her two thousand dollars. When the granddaughter subsequently quit, the grandfather refused to fully perform. The court affirmed that the grandfather was bound by his promise.).

54. See *Henderson*, *supra* note 42, at 375-76.

55. See FARNSWORTH, *supra* note 49, at 102 (harmonizing promissory estoppel with more traditional contract and tort theory).

56. See, e.g., *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958) ("The very purpose of section 90 is to make a promise binding even though there was no consideration 'in the sense of something that is bargained for and given in exchange.'") (citation omitted); see also *Goodman v. Dicker*, 169 F.2d 684 (D.D.C. 1948); *Chrysler Corp. v. Quimby*, 144 A.2d 123 (Del. 1958).

57. See, e.g., *Pitts v McGraw-Edison Co.*, 329 F.2d 412 (6th Cir. 1964); *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933); *Tatsch v. Hamilton-Erikson Mfg.*, 418 P.2d 187 (N.M. 1966).

58. See *Henderson*, *supra* note 42, at 383-84 (explaining that the policy basis of promissory estoppel and the purposes to be served by section 90 are hardly clear).

cate those who rely upon others to their own detriment.⁵⁹ This is a point of considerable importance. Reliance theory suggests that a judge apply his blinders and look only to the detriment incurred by the relying party and to the *objective* reasonableness of his reliance. "Good faith," which involves the *subjective* intentions of the promisor, does not come into play. In theory, a bad faith promisor can be relieved of the burden of performance if the relying party acts unreasonably in his reliance or suffers no loss or detriment as the result of his reliance.⁶⁰ Good faith is concerned with honesty in fact, whereas reliance theory (and promissory estoppel) aims at consistency regardless of the subjective intentions of the actors.⁶¹ Nonetheless, one finds numerous references to good faith and implied contract theory as policy bases for estoppel.⁶²

The policy bases of the various estoppel theories are critical to any understanding of this area of law. The policies underlying a particular estoppel theory will determine the breadth of application of that theory. Moreover, as the foregoing discussion has demonstrated, the elements of a given theory in common law vary according to what policy that theory purportedly serves. One of the problems encountered by legal theorists in the implementation of Section 90 has been the inability of those theorists to settle upon a firm justification for such a powerful and sweeping device. Consequently, judges tend to resort to more familiar and well-established contract principles.⁶³ In international law, however, the lack of established principles has created a situation where estoppel has grown unchecked.

In spite of the effort made in the foregoing Section to present a concise and well-differentiated description of the complex field of estoppel, perhaps the following remarks best captures the spirit of the doctrine:

59. In theory, the law of promissory estoppel, such as it is, is not based on the virtues of consistency and has only an uncertain relationship to obligations of "good faith" in municipal law. Instead, it is based on the so-called reliance theory of contract. To the degree a declaration of intention is enforced as if it were a contractual promise in Anglo-American municipal law, it is as a recognition of the social desirability of holding the gratuitous promisor to his promise as a last resort to avoid injury to one who has acted to his detriment in reliance on the promise. . . . From this point of view there is no question of "good faith."

Rubin, *supra* note 14, at 20-21.

60. *Id.*

61. See O'CONNOR, *supra* note 12, at 27-28.

62. See, e.g., Chrysler Corp. v. Quimby, 144 A.2d 123, 129 (Del. 1958) (referring to a "moral obligation" on the part of the defendant); see also Goodman v. Dicker, 169 F.2d 684, 685 (D.D.C. 1948) (explaining that promissory estoppel encompasses "justice and fair dealing").

63. "The mere breadth of statement of section 90 gives the impression that the objective is to declare a legal effect without regard to specific meanings. Consequently, the development of criteria for determining whether a promise ought to be enforced is likely to be heavily shaped by familiar doctrine." Henderson, *supra* note 42, at 351 n.36.

[T]he proposition [of estoppel] being first correctly stated and its terms defined, the opportunity has been seized of enlarging on the "justice" of the doctrine, or its "natural equity", "good sense", "good faith", "common sense", "common justice", "morality", "fairness", "wholesomeness", and the like quite apart from its general utility and convenience, and on the "iniquity", "injustice", "unfairness", "mischievousness", "playing fast and loose with justice", and similar evils, which would result from any hesitation to give effect to it. And a very cursory examination of the long series of decisions on the subject . . . will convince any one that in practice the principle has always "made for righteousness", and has in most cases operated to defeat some grossly dishonest claim or defence.⁶⁴

Herein lies both the power and the danger of this tool of the English equity courts; it permits a court to withdraw itself from doctrinal justifications, ignore the veracity of substantive matters asserted by parties before it, and to mete out justice virtually *ex æquo et bono*.⁶⁵ The wisdom of the common law has manifested itself in the creation of numerous estoppel theories which have different elements, different areas of application and different theoretical foundations. Where a given theory has not lent itself to such precise definition and application, as in the case of promissory estoppel, that theory will not be embraced.⁶⁶

IV. NOTIONS OF ESTOPPEL IN INTERNATIONAL LAW

A. *Origins of Estoppel Theory in International Law*

The existence—at least nominally—of a theory or theories of estoppel in international jurisprudence can hardly be questioned.⁶⁷ The means by which estoppel became such a "well-established principle" of international law are not so easily identified.⁶⁸ What passes for a rule of

64. BOWER & TURNER, *supra* note 2, at 19-20 (footnotes omitted).

65. See generally O'CONNOR, *supra* note 12.

66. Briefly to summarize, the theories of estoppel discussed may be categorized in the following manner: (1) estoppel by record which includes estoppel by deed, *res judicata*, issue preclusion and collateral estoppel; (2) estoppel by silence; and (3) estoppel by representation which includes estoppel by matter *in pais*. All of the estoppel theories discussed herein belong to one of these subclasses.

67. See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 641 (1990); BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 140 (1953); HERSCH LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (WITH SPECIAL REFERENCE TO INTERNATIONAL ARBITRATION)* (1970); ARNOLD D. MCNAIR, *THE LAW OF TREATIES* (1961); I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468 (1958).

68. The sources of international law upon which the court may rely include, "international custom, as evidence of a general practice accepted as law [and] the general principles of law recognized by civilized nations." STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38; see also MacGibbon, *supra* note 67, at 468 (noting that "[t]he question whether the juridical basis of the doctrine of estoppel is to be found in customary international law rather than in the 'general

estoppel in international practice is little more than a maxim exhorting parties to act consistently. However, the basic proposition that parties should act consistently is so broad that it cannot blithely be accepted as a general principle of law any more than the notion that "truth is good." The possible means of implementing such a proposition are so numerous that one must look to more specific municipal law analogies.

An examination of subsection (1)(b) of Article 38 of the Statute of the International Court of Justice,⁶⁹ reveals that it is equally difficult to maintain that international custom is the foundation of estoppel in international law.⁷⁰ According to Brownlie, there are four elements which must be satisfied for a practice or custom to become law under Article 38(1)(b): 1) duration, 2) consistency of practice, 3) generality of practice and 4) *opinio juris et necessitatis*.⁷¹ Even if the first and third elements exist, the other two elements present problems. First, although certain jurists recognize a consistent and well-established practice with regard to estoppel,⁷² arbitral decisions and cases before international courts dealing with estoppel have failed to arrive at clear and workable definition of the rule.⁷³ Second, in applying the element of *opinio juris et necessitatis*,⁷⁴ the subjective element of customary law, one can properly ask how any certainty or conviction can exist with regard to a prin-

principles of law' is not free from difficulty."); MARTIN, *supra* note 7, at 240 (concluding that what passes for estoppel in international law has derived from a mélange of different theories from numerous municipal systems, while the more precise Anglo-American notion of estoppel by representation could hardly be said to have made its way into international law via Article 38(1)(c)). *But see* Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6, 43 (June 15) (separate opinion of Judge Alfaro) ("I have no hesitation in asserting that this principle, known to the world since the days of the Romans, is one of the 'general principles of law recognized by civilized nations' applicable and in fact frequently applied by the International Court of Justice in conformity with Article 38, para. I(c) of its Statute.") and McNAIR, *supra* note 67, at 175.

69. The U.N. Charter cites among the sources of international law "international custom, as evidence of a general practice accepted as law." U.N. CHARTER art. 38, ¶ (1)(b).

70. MARTIN, *supra* note 7, at 246:

La question se pose certes de savoir si l'on peut véritablement parler d'une coutume en l'absence de précédents . . . Ou plutôt: peut-on retenir comme précédents des décisions arbitrales et judiciaires qui se sont prononcées nettement sur l'existence et le contenu d'une règle, mais ne l'ont pas appliquée parce que ses éléments constitutifs ne leur ont pas paru réunis?

The uncertainty to which Martin refers will be discussed at greater length in sections IV.B. through IV.F.

71. BROWNIE, *supra* note 67, at 5-7.

72. *See* MacGibbon, *supra* note 67, at 468; *see also* CHENG, *supra* note 67, at 141-49; LAUTERPACHT, *supra* note 67; Charles Valée, *Quelques observations sur l'estoppel en droit des gens*, 3 REV. GEN. INT'L 949 (1973).

73. The remainder of this Comment will focus on the immense difficulties involved in attempting to show a correspondence between estoppel as a rule of international law and the various municipal law estoppel theories from which the former is purportedly derived.

74. *Opinio juris et necessitatis* is loosely defined as the belief on the part of the actors of the international legal system that a given rule is obligatory. *See* MARTIN, *supra* note 7, at 242.

ciple as ill-defined as international estoppel. Thus it seems that neither international custom nor the general principles of law of civilized nations is a satisfactory explanation as the source of estoppel in international law.

Yet curiously, there are few who would question the existence of estoppel as a general principle of international law.⁷⁵ What accounts for the rote acceptance of this principle's existence by international jurists? A possible explanation is that estoppel is such a tantalizingly powerful device that, absent its common law restrictions, can serve as a juridical wild card allowing one who plays it in international law to make it represent any legal notion he desires.

One might recall that the policy bases of the various forms of estoppel in Anglo-American law differ, and in some cases are subject to debate.⁷⁶ Most forms examined in the previous section, though loosely associated with notions of good faith, are more precisely grounded. Acquiescence, for example is fault based,⁷⁷ *res judicata* reflects the desire to bring an end to litigation,⁷⁸ and promissory estoppel exists (at least in theory) to protect a party's reasonable reliance.⁷⁹ In international law, however, estoppel, is seldom identified with any one particular municipal law estoppel theory or any specific juridical objective.⁸⁰ The justifications which are almost universally cited for estoppel in international law are broad and ambiguous notions of good faith, consis-

75. See, e.g., LAUTERPACHT, *supra* note 67; LORD McNAIR, *THE LAW OF TREATIES* 175 (1961); Christian Dominicé, *A propos du principe de l'estoppel en droit des gens*, in *RECUEIL D'ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE A PAUL GUGGENHEIM* 327 (1968); MacGibbon, *supra* note 67; D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 *BRIT. Y.B. INT'L L.* 176 (1957).

76. See *supra* part II.

77. See *supra* part II.E.

78. See *supra* part II.C.

79. See *supra* part III.

80. *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 *I.C.J.* 6, 40 (June 15) (separate opinion of Judge Alfaro) ("Whatever term or terms be employed to designate this principle such as it has been applied in the international sphere, its substance is always the same: inconsistency between claims or allegations put forward by a State, and its previous conduct in connection therewith, is not admissible . . .").

tency,⁸¹ or even more ambiguous notions of public policy.⁸²

B. Doctrinal Bases

1. ARBITRATIONS

The term "estoppel" originally came to international law via numerous arbitrations involving English and American parties. The *Corvaia* arbitration,⁸³ in 1903, involved Baron Fortunato Corvaia, who was born in Sicily and had been a Venezuelan diplomat. Italy alleged, on behalf of Corvaia, that Venezuela owed a large sum of money to the Baron's heirs in Italy. Italy contended that although Baron Corvaia had worked for the Venezuelan Government for many years and had all but severed his ties with his native Sicily, Italy could still assert a claim on his behalf. The American arbitrator, Ralston, rejected Italy's claim based on what he termed estoppel.⁸⁴ Ralston applied estoppel *stricto*

81. "[I]nternational practice, if not international jurisprudence, has accorded less tentative recognition to the principle of consistency . . . to comprehend the principle underlying estoppel as part of customary international law." MacGibbon, *supra* note 67, at 469. Some observers view the emergence of a broad "anti-inconsistency" rule as a positive development. See, e.g., ELISABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* (1977):

Dès lors la règle selon laquelle les États . . . doivent observer une certaine logique de comportement et une certaine cohérence de leurs attitudes ne peut se fonder juridiquement sur le principe de la bonne foi; elle découle de l'idée, non pas que l'on doit être fidèle à sa parole et à ses engagements, mais que l'on doit assumer les conséquences de ses actes, qu'on est responsable des convictions erronées que l'on fait naître chez autrui.

Id. at 290. Others, however, are less sanguine about the possible consequences of a broad based estoppel theory in the hands of international decision makers. See, e.g., Rubin, *supra* note 14, at 22-23.

82. See, e.g., MacGibbon, *supra* note 67, at 468:

Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation. Such a demand may be rooted in the continuing need for at least a modicum of stability and for some measure of predictability in the pattern of State conduct. It may be, and often is, grounded on considerations of good faith.

Id. In *Tinoco*, the sole arbitrator, Taft, opined that "[t]here are other estoppels recognized in municipal law than those that rest on equitable considerations. They are based on public policy." *Tinoco* (U.K. v. Costa Rica), 18 AM. J. INT'L L. 147, 157 (Oct. 18, 1923).

83. *Corvaia* (Italy v. Venez.), 10 R.I.A.A. 609 (1903).

84. We may believe Venezuela knew, as she might well have known, that when Corvaia entered her diplomatic service he abandoned all right to call himself a Sicilian. The Government might properly have hesitated or refused to receive into one of its most important employments a man who would be recognized by his original government as still attached to its interests.

Italy is, therefore, now *estopped* to claim Corvaia as her citizen, standing in this respect as did the Two Sicilies, and may not say that her laws are made to be broken and have no binding force when assumed interests dictate their disregard.

Another consideration: The umpire is disposed to believe that the man who accepts, without the express permission of his own government and against the positive inhibitions of her laws, public and confidential employment from another

sensu, or estoppel by record in the common law sense, identifying both the acts of inducement on the part of the party to be estopped and reliance on that inducement as elements of the estoppel theory as applied.⁸⁵

Twenty years later, in the *Tinoco* case,⁸⁶ Costa Rica based a defense in an arbitral claim against the United Kingdom entirely upon a broadly interpreted estoppel theory. The Government of Costa Rica was overthrown in January, 1917, by its then Minister of War, Tinoco, who remained at the head of the government until August, 1919.⁸⁷ During Tinoco's administration, the government entered into numerous contracts with foreign investors financed by the Royal Bank of Canada.⁸⁸ When the Tinoco government collapsed and the former government was restored, the newly restored government refused to honor the contracts made by the "illegitimate" Tinoco government.⁸⁹ Great Britain, acting on behalf of the Royal Bank of Canada, sought enforcement under a "continuity of state" theory. In response, Costa Rica claimed that Great Britain was "estopped" from being reimbursed for losses caused by the Tinoco government because the British government had never recognized the Tinoco regime.⁹⁰ The arbitrator, William Howard Taft, former Chief Justice of the United States Supreme Court and thus familiar with the nuances of Anglo-American theories of estoppel, refused the Costa Rican estoppel defense, relying on a strict understanding of the theory, as had Ralston in the *Corvaia* case.⁹¹ It is noteworthy that Taft understood equitable estoppel to be the controlling form of estoppel on the facts presented.

In the *Shufeldt* case,⁹² another arbitral case, the United States

nation is himself *estopped* from reverting to his prior condition to the prejudice of the country whose interests he has adopted.

Id. at 633 (emphasis added).

85. *Id.* at 635.

86. *Tinoco* (U.K. v. Costa Rica), 18 AM. J. INT'L L. 147, 149 (Oct. 18, 1923).

87. *Id.* at 148.

88. *Id.* at 148-49.

89. *Id.* at 148.

90. *Id.* at 149.

91. I do not understand the arguments on which an equitable estoppel in such case can rest. The failure to recognize the *de facto* government did not lead the succeeding government to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but *subsequent presentation of claims based on the de facto existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith*. An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.

Id. at 156-57 (emphasis added).

92. *Shufeldt Claim* (U.S. v. Guat.), 2 R.I.A.A. 1083 (July 24, 1930).

charged that after beginning performance of a concession obtained by an American diplomat, Guatemala could not subsequently declare the concession invalid due to failure of its parliament to approve it.⁹³ Although the arbitrator based his holding on the existence of a preexisting obligation, he recognized the legitimacy of estoppel in international law as asserted by the United States.⁹⁴ Nonetheless, unlike Taft's cogent restatement of the rule of equitable estoppel in *Tinoco*, the arbitrator's opinion in *Shufeldt* is unclear as to the precise form of estoppel at issue.⁹⁵

2. CASES BEFORE THE PERMANENT COURT OF INTERNATIONAL JUSTICE

The Permanent Court of International Justice (P.C.I.J.) examined the question of estoppel for the first time in the *Serbian Loans* case in 1929.⁹⁶ *Serbian Loans* involved certain loan contracts concluded between Serbian and French financiers. The Serb-Croat-Slovene government alleged that, although the terms of the loans required payments be made in gold specie, the lenders previously accepted payment in currency and had thereby forfeited the right to demand that subsequent payments be made in gold; that is, the lenders were estopped by their acts from relying upon the strict terms of the contract.⁹⁷ The court rejected the estoppel defense citing the ambiguity of the representations as the rationale for its holding.⁹⁸ Following the example set forth in the *Tinoco*, the court recognized estoppel in the common law sense. In both *Tinoco* and *Serbian Loans*, the respective tribunals were (in the first case overtly and in the second, tacitly) applying an Anglo-American notion of equitable estoppel. Both cases required an unequivocal representation from the party to be estopped and the detrimental reliance of the invoking party.

In 1933, the P.C.I.J. reexamined estoppel in the case of the *Legal Status of Eastern Greenland*.⁹⁹ Denmark tried, over the course of sev-

93. *Id.*

94. *Id.* at 1094.

95. *Id.*

96. *Payment of Various Serbian Loans Issued in France (Serbia v. Fr.)*, 1929 P.C.I.J. (ser. A) Nos. 20/21, at 38 (July 12).

97. *Id.*

98. [I]t is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied. There has been no change in position on the part of the debtor State. The Serbian debt remains as it was originally incurred; the only action taken by the debtor State has been to pay less than the amount owing under the terms of the loan contracts.

Id. at 39.

99. *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 15).

eral decades, to obtain recognition by other states of its sovereignty over certain parts of Eastern Greenland.¹⁰⁰ In 1919, Denmark sent a minister to Oslo where, during negotiations, Norwegian Foreign Minister Ihlen made statements indicating that Norway would not challenge Denmark's sovereignty claims over Eastern Greenland.¹⁰¹ Both parties invoked estoppel. Denmark alleged estoppel *stricto sensu*,¹⁰² claiming that the actions of Norway with regard to the disputed territory and the so-called "Ihlen Declaration," should prevent Norway from challenging Danish sovereignty.¹⁰³ Norway countered with its own estoppel claim, alleging that Denmark's attempt at recognition was tantamount to an admission that she lacked sovereignty.¹⁰⁴ The court rejected Norway's claim without explanation.¹⁰⁵

Although the court was more accommodating to the Danish claim, it was no less forthcoming in its reasoning. Denmark offered a strict common law definition of estoppel in its pleadings,¹⁰⁶ however, the court limited its holding to an examination of Norway's act which recognized Danish sovereignty without specifically reaching the estoppel claim. Instead, the court held that Norway was "debarred" from claiming sovereignty over the disputed territory.¹⁰⁷ This cryptic use of the

100. *Id.* at 35-44.

101. Ihlen's precise words were: "[t]he plans of the Royal [Danish] Government respecting sovereignty over the whole of Greenland . . . would meet with no difficulties on the part of Norway." *Id.* at 36.

102. Danish Reply, Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. C) No. 63, at 841 (July 22, 1932):

La Norvège n'a d'ailleurs pas seulement reconnu expressément la souveraineté du Danemark sur l'ensemble du Groënland; elle a reçu des compensations en échange de cette reconnaissance; elle a, en donnant ladite reconnaissance, amené le Gouvernement danois à entreprendre en faveur de la Norvège certains actes que, dans le cas contraire, le Danemark n'aurait jamais consenti à faire.

103. *Id.* at 843.

104. On the Norwegian side it was maintained that the attitude which Denmark adopted between 1915 and 1921, when she addressed herself to various Powers in order to obtain a recognition of her position in Greenland, was inconsistent with a claim to be already in possession of the sovereignty over all Greenland, and that in the circumstances she is now estopped from alleging a long established sovereignty over the whole country.

Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 45 (Apr. 5).

105. In these circumstances, there can be no ground for holding that, by the attitude which the Danish Government adopted, it admitted that it possessed no sovereignty over the uncolonized part of Greenland, nor for holding that it is estopped from claiming, as it claims in the present case, that Denmark possesses an old established sovereignty over all Greenland.

Id. at 62.

106. Danish Reply, Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. C) No. 63, at 843 (July 22, 1932).

107. A second series of undertakings by Norway, recognizing Danish sovereignty over Greenland, is afforded by various bilateral agreements concluded by Norway with

term "debarred" may represent the court's approval of Denmark's estoppel theory, however, it is noteworthy that the court did not discuss the absence of harm suffered by Denmark in reliance upon Norway's representations. It is unclear whether the P.C.I.J. required this element or rather, that this requirement was satisfied. Additionally, if Denmark's estoppel claim was accepted, upon what source or precedent did the court rely to allow the use of an estoppel as an offensive device? The P.C.I.J.'s enigmatic pronouncements in the *Eastern Greenland* case raise more questions than they answer with regard to estoppel as a rule of international law.

3. CASES BEFORE THE INTERNATIONAL COURT OF JUSTICE

Estoppel is a well-accepted doctrine in matters before the International Court of Justice (I.C.J.). The *Fisheries* case¹⁰⁸ of 1951, involving a claim by the United Kingdom against Norway, made no specific reference to estoppel. Nonetheless, it is often cited as an example of estoppel in international law. The court accepted the Norwegian defense that the United Kingdom, along with several other countries, had recognized certain seas adjacent to Norway as part of Norway's territorial waters.¹⁰⁹ Norway promulgated a series of decrees beginning in 1869 to support her claim to these waters.¹¹⁰ These decrees were never challenged by other nations.¹¹¹ The significance of this case will be examined in greater detail below, however, it is important to observe that neither the parties nor the court actually referred to estoppel.

Several years later estoppel was directly invoked in the *Nottebohm* case.¹¹² There, in defense of a claim by Liechtenstein on the part of its alleged national Frederick Nottebohm, Guatemala challenged the validity of Nottebohm's status as a citizen of Liechtenstein.¹¹³ Liechtenstein countered that Guatemala, by her acceptance of Nottebohm's Liechten-

Denmark, and by various multilateral agreements to which both Denmark and Norway were contracting Parties, in which Greenland has been described as a Danish colony or as forming part of Denmark or in which Denmark has been allowed to exclude Greenland from the operation of the agreement. . . . In accepting these bilateral and multilateral agreements as binding upon herself, Norway reaffirmed that she recognized the whole of Greenland as Danish; and thereby she has *debarred* herself from contesting Danish sovereignty over the whole of Greenland, and, in consequence, from proceeding to occupy any part of it.

Legal Status of Eastern Greenland (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 68-69 (Apr. 5) (emphasis added).

108. *Fisheries* (Nor. v. U.K.), 1951 I.C.J. 116 (Dec. 18).

109. *Id.* at 138-39.

110. *Id.* at 138.

111. *Id.*

112. *Nottebohm* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6).

113. *Id.* at 9-10.

stein passport, was estopped from denying his nationality.¹¹⁴ Although the court disagreed with Liechtenstein's position on other grounds,¹¹⁵ Judge Read, in his dissenting opinion, invoked estoppel in the common law sense of estoppel by representation.

If one party has by any clear and unequivocal act or assertion led the other party to believe that that act is valid or that assertion true and in reliance upon that act or assertion the second party has acted or refrained from acting in a manner which results in detriment to that party, the first party is thereafter precluded from denying as against the second party the validity of that act or the truth of that assertion.¹¹⁶

This defensive theory is normally put forth to prevent the author of certain acts or representations from denying them after another party has relied upon them.¹¹⁷ Here, the court acknowledged the existence of this particular estoppel theory while holding that the elements of such a theory were simply absent in this particular case. According to the court, the actions which Liechtenstein offered did not rise to the level of representations necessary to support an estoppel.¹¹⁸

If we assume that Guatemala would have been estopped had there been a direct government-to-government communication, then we may also conclude that the court acknowledged the existence of an international theory of estoppel. However, an inexplicable alteration in terminology¹¹⁹ again prevents one from drawing any definite conclusions. Moreover, the court does not discuss Liechtenstein's (or, more precisely, Nottebohm's) detrimental reliance on Guatemala's representations. Assuming the existence of estoppel as a rule of international law, it is unclear whether the court meant to suggest that reliance is not an element of the theory, or whether it simply chose not to reach this question. One might assume the latter, as Nottebohm's reliance on Guatemala's acts would arguably have been difficult to demonstrate on the facts.

In the International Court of Justice's 1960 decision of the *Arbitral Award Made by the King of Spain on December 23, 1906*,¹²⁰ Honduras invoked estoppel against Nicaragua. The case involved the validity of

114. *Id.* at 17-18.

115. Nottebohm (Liech. v. Guat.), 1955 I.C.J. 4, 17-18 (Apr. 6) (dismissing the estoppel claim based on the fact that interactions at the consular level were not sufficient to support Guatemalan recognition of Nottebohm's alleged Liechtenstein citizenship).

116. *Id.* at 43.

117. See discussion *supra* at part II.A.

118. Nottebohm, 1955 I.C.J. at 19.

119. Liechtenstein uses the term "estoppel" in its memorial whereas the court opts for the word "precluded". *Id.*

120. *Arbitral Award Made by the King of Spain on 23 December 1906* (Hond. v. Nicar.), 1960 I.C.J. 192 (Nov. 18).

an arbitral decision in which the King of Spain fixed the frontier line between the two countries.¹²¹ Nicaragua questioned the legitimacy of the award based on the arbitrator's incompetency, and Honduras, in defense, raised a broadly stated theory similar to estoppel.¹²² Although the court accepted the Honduran defense, it did not actually comment on the question of estoppel in its opinion.¹²³ Again, the court's decision does not allow one to draw clear conclusions as to the nature of estoppel, or even to determine whether estoppel is in fact the operative theory. Moreover, the court did not consider any of the complaints alleged by Nicaragua in the case; consequently it is impossible to conclude whether the court accepted Honduras' estoppel theory.

The most comprehensive examination of the estoppel doctrine made by the International Court of Justice was in the *Temple of Preah Vihear* case.¹²⁴ Cambodia and Thailand both claimed sovereignty over territory which was a site of great religious and historical significance to both parties.¹²⁵ The dispute focused on a series of earlier events which occurred when France, as a protectorate, had controlled Indochina. Pursuant to a 1904 convention, a joint commission composed of French and Siamese members agreed on a provisional border and commissioned a series of maps to determine the precise contours of the frontier line.¹²⁶ These maps, which placed the temple on the Cambodian side of the border, were central to Cambodia's broad and loosely defined estoppel claim.

Thailand responded to the Cambodian arguments with a definition of estoppel more closely corresponding to the common law estoppel by representation.¹²⁷ Although the court accepted the Cambodian version of estoppel—a broad inchoate notion of the rule—the numerous sepa-

121. *Id.* at 204-05.

122. In the Honduran pleadings, Mr. Paul DeVisscher gave a rather lengthy explanation of the difference between Anglo-Saxon notions of estoppel, which he reduced to the point of misstatement, and the broader corresponding theory in international law. Memorial of Honduras, (Hond. v. Nicar.), 1960 I.C.J. Pleadings (1 Arbitral Award Made by the King of Spain on 23 December 1906) 51.

123. Arbitral Award Made by the King of Spain on 23 December 1906 (Hond v. Nic.), 1960 I.C.J. 192, 209 (Nov. 18) ("[T]he Court considers that, having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gámez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award.").

124. (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15).

125. *Id.* at 15.

126. *Id.* at 17-18.

127. *Id.* at 9-13.

rate opinions in the case reveal a high degree of uncertainty as to the rule's parameters. First, the majority defined the operative theory in the case as a "preclusion."¹²⁸ It is curious that the majority avoided using the term estoppel while tacitly applying the elements of an estoppel to the facts of the case. The opinion speaks of Thailand's "conduct" as an inducement to Cambodia, and of Cambodia's "reliance" on Thailand's conduct in accepting the maps.¹²⁹

The separate opinions in the case indicate differences on the use of estoppel as a doctrine of international law. Judge Alfaro's opinion addressed the use and scope of the term "preclusion" by the court. He distinguished the Cambodian estoppel theory from its common law counterpart by holding that the former is not subject to the formalism of the latter.¹³⁰ Sir Gerald Fitzmaurice's concurrence indicated that although he accepted the majority's conclusions, he did so using a different analysis of the operative theory in the case. Fitzmaurice held that the rule of preclusion cited by the majority was little more than the familiar common law rule of equitable estoppel.¹³¹ He further held that even by applying this more precise version of estoppel, Cambodia's

128. *Id.* at 32.

Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now *precluded* by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.

Id. (emphasis added).

129. *Id.*

130. [W]hen compared with definitions and comments contained in Anglo-American legal texts we cannot fail to recognize that while the principle, as above enunciated, underlies the Anglo-Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, and procedural features of the municipal system. It thus results that in some international cases the decision may have nothing in common with the Anglo-Saxon estoppel, while at the same time notions may be found in the latter that are manifestly extraneous to international practice and jurisprudence.

Id. at 39-40.

131. The essential condition of the operation of the rule of preclusion or estoppel, as strictly to be understood, is that the party invoking the rule must have 'relied upon' the statements or conduct of the other party, either to its own detriment or to the other's advantage. The often invoked necessity for a consequent 'change of position' on the part of the party invoking preclusion or estoppel is implied in this.

Id. at 63.

claim would still succeed.¹³² Even so, his observations curiously omitted any discussion of the detriment suffered by Cambodia in reliance upon Thailand's acceptance of the purported border. Rather, he nakedly asserted that such a harm was suffered.¹³³ A final interpretation of these facts was set forth by Sir Percy Spender in a dissenting opinion. While he agreed with the rule propounded by Fitzmaurice, he carried the analysis a step further, finding that none of the elements of the rule was satisfied on the facts.¹³⁴

Despite the number of pages devoted to the topic of estoppel/preclusion in these opinions, none of the judges discussed the sources of the theory in any detail. In fact, while the existence of some estoppel-like theory in international law seemed to be beyond doubt, a series of divergent and conclusory views left its definition and scope uncertain.

The International Court of Justice also examined estoppel in some detail in the *Barcelona Traction Light and Power* case¹³⁵ and the *North Sea Continental Shelf* cases.¹³⁶ In *Barcelona Traction*, Belgium sued Spain. After Spain presented its preliminary exceptions, the two parties agreed to engage in negotiations and Belgium withdrew its claim.¹³⁷ When negotiations subsequently failed, Belgium reintroduced its claim.¹³⁸ In its preliminary exceptions, Spain alleged that, having previously dismissed its action, Belgium forfeited the right to reintroduce the same claim.¹³⁹ The court rejected Spain's claim favoring a definition of

132. *Id.* at 64. "Applying this test to the circumstances of the present case, there can be little doubt that Cambodia's legal position was weakened by the fact that (although a striking assertion of her sovereignty had been manifested on the occasion of Prince Damrong's visit in 1930) it was not until 1949 that any protest on the diplomatic level was made about local acts of Thailand in violation, or at any rate in implied denial of that sovereignty." *Id.*

133. *Id.*

134. *Id.* at 144. "I greatly doubt whether any of the elements of preclusion have been established by Cambodia. Even were it established that Thailand's conduct did amount to some clear and unequivocal representation, and that France relied upon it and was entitled so to do, I do not think there is any evidence that France—or Cambodia—suffered any prejudice. Certainly no piece of evidence so far as I can recall was ever presented which could establish that either State did." *Id.*

135. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1964 I.C.J. 6 (July 24).

136. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

137. *Barcelona Traction*, 1964 I.C.J. at 6.

138. *Id.*

139. A second contention, having the character of a plea of estoppel, was advanced by the Respondent Government in seeking to discharge the onus of proof referred to above. This was to the effect that, independently of the existence of any understanding, the Applicant Government by its conduct misled the Respondent about the import of the discontinuance, but for which the Respondent would not have agreed to it, and as a result of agreeing to which, it had suffered prejudice. Accordingly, it is contended, the Applicant is now estopped or precluded from denying that by, or in consequence of the discontinuance, it renounced all further right of action.

estoppel that corresponded very closely to the Anglo-American theory.¹⁴⁰ The court found no estoppel since no prejudice was suffered by the claimant.¹⁴¹

In the *North Sea Continental Shelf* cases, Denmark and the Netherlands brought actions against the Federal Republic of Germany (F.R.G.). The dispute concerned delimitation of the continental shelf adjacent to those countries. The claimants based their action on the 1958 Convention on the Continental Shelf.¹⁴² Although the F.R.G. never ratified the Convention, the claimants alleged that by taking part in its drafting and subsequently acting in accordance with the rules contained therein, the F.R.G. was bound by its terms.¹⁴³ After affirming that the F.R.G. was not a party to the Convention, the court examined the estoppel theory put forth by the claimants. The court first held that an estoppel could exist only if the representations upon which it was founded were clear and unequivocal, which was not the case on these facts.¹⁴⁴ The court set forth a precise rule of estoppel closely akin to Anglo-American estoppel by representation.¹⁴⁵

International cases and arbitral decisions have unwittingly eschewed Anglo-American estoppel rules; the result has been the emer-

Id. at 24.

140. As regards the substance, in so far as the Applicant Government was, for the purposes of its Application in the present proceedings, able to modify the presentation of its claim in order to take account of objections advanced by the Respondent in the original proceedings, it appears to the Court that the Applicant could, in the light of those objections, have done exactly the same thing for the purposes of its final submissions in those proceedings themselves, which would have continued. The Applicant is always free to modify its submissions and, in fact, the final submissions of a party frequently vary from those found in the written pleadings. Consequently the court is not able to hold that any true prejudice was suffered by the Respondent.

Id. at 25.

141. *Id.*

142. Convention on the Continental Shelf, April 29, 1958, 499 U.N.T.S. 312.

143. Also central to Denmark and Holland's argument was the allegation that certain key provisions of the Convention had become customary law and that the F.R.G. was therefore bound, regardless of her failure to adhere formally to the Convention itself. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.) 1969 I.C.J. 3, 25 (Feb. 20).

144. *Id.*

145. *Id.* at 26.

Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention,—that is to say if the [F.R.G.] were now precluded from denying the applicability of the conventional régime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that régime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case.

Id.

gence of two estoppel paradigms.¹⁴⁶ First, international cases employ a narrow rule that adheres somewhat to the strictures of Anglo-American estoppel by representation. Second, international cases employ a broad notion which, though related to common law estoppel, is less strictly defined and has a broader scope of application. The following section discusses these two ideas.

C. *The Broad Notion of Estoppel in International Law*

The foregoing doctrinal overview reveals a loose pattern in the development of international estoppel theory where two versions of this principle seem to have evolved. Some scholars and practitioners accept a broad principle while others favor a more narrow theory conforming to municipal law analogues. Finding a common law theme among cases is problematic as courts and tribunals tended to apply estoppel or an estoppel-like theory without denoting it as such, or to call something estoppel which, at least at common law, is not.¹⁴⁷ Untangling the terminology and theory is no mean feat. In the case of the *Legal Status of Eastern Greenland*,¹⁴⁸ for example, in which both parties invoked estoppel, the court allowed one claim and dismissed the other. However, the court made no direct reference to estoppel in its opinion, even though the Danish pleadings specifically referred to it.¹⁴⁹

Considering the elements of estoppel laid out in such cases as *Tinoco* and *Barcelona Traction*, the court in *Eastern Greenland*, seemed to apply a less restrictive theory. In fact, the *Eastern Greenland* case reflects an early example of a broader international rule of estoppel. The first element of *Tinoco* (referring to equitable estoppel, *stricto sensu*), namely, reliance on the part of the party invoking the estoppel, was satisfied. However, as to the detriment suffered, it is not at all clear that the court identified this as a requirement.¹⁵⁰ Moreover, the court's rejection of Norway's estoppel claim without giving any details regarding the proposed rule added to the mystery.¹⁵¹

Another example of the "broad rule" of estoppel was presented in

146. See generally discussion *supra* at parts IV.C and D.

147. See, e.g., Dominice, *supra* note 75, at 329-31.

148. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

149. Danish Reply, *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. C) No. 63, at 841 (July 22, 1932) ("Du côté danois, on n'a aucune espèce de raison de s'opposer à l'application, dans le procès actuel, du principe de l'estoppel. Au contraire, le Danemark l'invoque expressément à l'encontre de la Norvège. . .").

150. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 73 (Apr. 5).

151. See MARTIN, *supra* note 7, at 102 (agreeing that the court's holding was ambiguous).

Temple of Preah Vihear,¹⁵² which, as previously noted, also contained numerous ambiguities.¹⁵³ First, although the facts of the case appear to involve the elements of an estoppel, the majority made reference only to "preclusion," rather than estoppel.¹⁵⁴ Moreover, even if the term preclusion is meant to be synonymous with estoppel, the elements of this theory were not satisfied.¹⁵⁵

D. *The Narrow Notion of Estoppel in International Law*

A narrower version of estoppel, which corresponds more closely to estoppel by representation in Anglo-American law, has also emerged in international jurisprudence. The *Barcelona Traction* case,¹⁵⁶ where Spain raised an estoppel defense against Belgium, is a notable example. The court, in defining estoppel, first held that the party invoking estoppel must establish that the opponent induced the invoking party to act or to refrain from acting.¹⁵⁷ Second, the court held that the party raising the estoppel must show that it has suffered some injury or damage in its reliance upon the other party's representations.¹⁵⁸ In the *North Sea Continental Shelf* cases,¹⁵⁹ the court offered an even more precise definition of estoppel.¹⁶⁰ The concurring opinions also favored a narrow rule of estoppel. Several judges affirmed that the first element of estoppel was not satisfied where the relative positions of the parties had not changed.¹⁶¹

Although there are two separate concepts of the estoppel principle in international jurisprudence, the more recent decisions of the International Court of Justice seem to favor the restrictive notion.¹⁶² In fact, since the rather wanton application of estoppel in *Temple of Preah Vihear*, the International Court of Justice has not accepted an estoppel

152. *Temple of Preah Vihear*, (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15).

153. See *supra* notes 124-35 and accompanying text.

154. See *supra* note 135.

155. *Id.*

156. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4 (Feb. 5).

157. *Id.* at 17.

158. *Id.* at 25.

159. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3 (Feb. 20).

160. "[I]t is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the [F.R.G.] could justify the Court in upholding [the estoppel claims of the plaintiffs]." *Id.* at 25.

161. *Id.* at 94 (separate opinion of Judge Padilla Nervo); see also *id.* at 121 (separate opinion of Judge Fouad Ammoun) ("[estoppel] demands that the intention be ascertained by the manifestation of a definite expression of will, free of ambiguity"). But see the separate opinion of Judge Lachs who believed that the F.R.G. should be bound by her prior representations without making any reference to estoppel. *Id.* at 238 (dissenting opinion of Judge Lachs).

162. See, e.g., MARTIN, *supra* note 7, who concurs that "[u]ne analyse des documents de la jurisprudence internationale permet cependant de constater également, au plan international, un recours marqué à l'estoppel strictement défini . . ." *Id.* at 334-35.

claim and has consistently suggested that its notion of this theory is generally consistent with Anglo-American estoppel by representation.¹⁶³ Indeed the court explicitly distinguished the facts of the 1984 case on the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,¹⁶⁴ from those in the *Temple of Preah Vihear* and the *Fisheries* case, holding that those cases presented clearer representations of fact over a longer period of time.¹⁶⁵

Despite consistent failures on the part of the I.C.J. to issue a consistent definition of the narrow form of estoppel, at least one writer has attempted to identify the nascent strict theory's elements.¹⁶⁶ Nonetheless, a closer examination of both the broad and the narrow notions of estoppel in international practice reveals inconsistencies between estoppel as it is used in international law and the various estoppel theories of the common law. The following section examines each of the primary modalities of Anglo-American estoppel and juxtaposes it with those international claims to which it would correspond. The incongruity between municipal modes and terminologies and those used in international practice is an interesting indicator of the potential for instability in this area of international law.

V. DISTINCTIONS BETWEEN ESTOPPEL IN ANGLO-AMERICAN LAW AND ESTOPPEL IN INTERNATIONAL LAW

This Section examines the varied applications of estoppel in international law, and compares those applications with their corresponding common law theories.

163. See *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1990 I.C.J. 92, 118 (Sept. 13) ("[S]ome essential elements required by estoppel: a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it."); see also *Elettronica Sicala S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, 44 (July 29) (the court held that a mere failure to mention a state of facts, that is, a party's silence, would permit an estoppel to succeed only in rare cases); *Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.)*, 1984 I.C.J. 246, 308 (Oct. 12) (only a very clear and consistent pattern of representations at a high diplomatic level would be sufficient to satisfy an estoppel claim).

164. (*Canada v. U.S.*), 1984 I.C.J. 246 (Oct. 12).

165. *Id.* at 309.

166. See Bowett, *supra* note 75, at 202:

- (a) The statement of fact must be clear and unambiguous.
- (b) The statement of fact must be made voluntarily, unconditionally, and must be authorized.
- (c) There must be reliance in good faith upon the statement either to the detriment of the party so relying on the statement or to the advantage of the party making the statement.

See also IAN BROWNLEE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 641 (1990); McNair, *supra* note 67, at 485-86.

A. *Res Judicata*

There are numerous international decisions which purport to apply estoppel where legal consequences flow from a prior legal determination; that is, a prior legal ruling controls the outcome of a current one. The *Case Concerning Arbitral Award Made by the King of Spain on 23 December 1906*,¹⁶⁷ is perhaps the clearest example. There, the I.C.J. found nonjusticiable a claim by Nicaragua to reexamine the substantive issues of a dispute which was decided by the King of Spain in a prior arbitration case.¹⁶⁸ Similarly, in *The Pious Fund Case*,¹⁶⁹ the United States won a dispute against Mexico, arguing that Mexico was raising issues decided in a previous legal action.¹⁷⁰ These decisions correspond to the common law theory of *res judicata* because they involve the refusal of a claim which was already adjudicated.¹⁷¹ Recall that in the Anglo-American system, estoppel by representation has entirely different policy objectives from those of estoppel by *res judicata*;¹⁷² the latter functions to bring an end to litigation whereas the former is used to indicate that a party has relied upon another's words or actions.¹⁷³

The decision of the arbitrator in the *Serbian Loans*¹⁷⁴ case is further evidence of the failure of international bodies to take account of subtle yet significant differences between municipal estoppel and *res judicata* theories. Although the court defined a theory corresponding to common law estoppel by representation,¹⁷⁵ the rationale of the ruling rested on the existence of a prior agreement between the parties.¹⁷⁶ In effect, the court engaged in an examination of the intentions of the parties with regard to their agreement.¹⁷⁷

B. *Admissions*

A second legal principal from the Anglo-American system is often improperly viewed as estoppel in international practice—the concept of the party admission. Though its practical effect is in many instances to “estop” the declarants, admissions are not estoppels. Rather, admissions

167. (*Hond. v. Nicar.*), 1960 I.C.J. 192 (Nov. 18).

168. *Id.* at 20.

169. (*U.S. v. Mex.*), 9 R.I.A.A. 1 (May 22, 1902).

170. *Id.* at 6.

171. *See supra* part II.C.

172. *Id.*

173. *See id.*

174. *Payment of Various Serbian Loans Issued in France (Serbia v. Fr.)*, 1929 P.C.I.J. (ser. A) Nos. 20/21 (July 12).

175. *Id.* at 44.

176. *Id.*

177. *Id.*

are part of the law of evidence.¹⁷⁸ In its most basic form, an admission is a statement made by a party, against that party's interest, which an opponent may use to prove his case.¹⁷⁹ Although admissions have a significant place in evidence, they involve none of the preclusive finality of an estoppel.¹⁸⁰ An estoppel prevents a party from offering the truth, in that once a party has been "estopped" on a given issue, he is then precluded from offering any evidence thereto; consequently, evidence, and the rules which govern it, is never even presented. Evidentiary rules like admissions, however, exist precisely for the purpose of determining truth.¹⁸¹ What a party has said in the past is weighed against what he is saying now to determine whether and when he is telling the truth.¹⁸² Finally, at common law, a party is not bound by its admission except to the extent that the trier of fact chooses to believe the admission over other evidence.¹⁸³ An estoppel, however, ends the debate on a given issue. This is a critical distinction.

The significant differences between admissions and estoppel in Anglo-American law are blurred in international law.¹⁸⁴ Frequently, admissions are given the force of an estoppel even though certain authors and jurists have endeavored to show differences between the two

178. The law of evidence, codified by statute in most American states and in the American federal system, is a body of procedural rules that decides which evidence may be heard by a trier of fact in deciding a case. See generally MICHAEL H. GRAHAM, *MODERN STATE AND FEDERAL EVIDENCE: A COMPREHENSIVE REFERENCE TEXT* (1989). Evidentiary principles differ from estoppel in a critical sense; whereas an estoppel serves as an affirmative defense or, in some cases, as the basis of a claim, evidentiary principles merely dictate how a party may proceed in proving its claim or defense.

179. Under American federal law, for example, subject to certain restrictions, prior inconsistent statements made by a party are admissible. FED. R. EVID. 801(d)(1)(A).

180. Bowett, *supra* note 75, at 197:

An estoppel will exclude altogether evidence of a disputed fact, whereas an admission will either render evidence superfluous where there is no other evidence to contradict the admission or, where there is such contradictory evidence, will weaken or perhaps nullify the contradictory evidence—depending on the relative weight of the admission and such evidence.

181. See FED. R. EVID. 102, which requires that evidence rules "be construed to . . . [promote the] . . . growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.*; see also David Jackson, *Estoppel as a Sword*, 81 L.Q. REV. 84, 85 (1965) ("[e]stoppel precludes the truth. . . . Once the plea is made out there is no further inquiry. It is not that on the one side there is falsehood, which is recognised, and on the other, truth, which is not. It is that inquiry as to the accuracy of the evidence stops short."). Contrast the objective of admissions with the objectives of the various Anglo-American estoppel theories which range from the desire to end litigation regardless of the truth (*res judicata*), to vindicating reasonable reliance that causes harm. See *supra* part II.

182. See FED. R. EVID. 801(d)(1) (advisory committee's note).

183. See FED. R. EVID. 801(d)(2) (advisory committee's note). See generally GRAHAM, *supra* note 178.

184. See, e.g., *Elettronica Sicula, S.p.A. (ELSI)* (U.S. v. Italy), 1989 I.C.J. 15, 73 (July 20); see also Bowett, *supra* note 75, at 196.

theories.¹⁸⁵

C. Acquiescence

There is yet another legal principle in international law which is imprecisely and improperly applied as estoppel—acquiescence. In *Temple of Preah Vihear*,¹⁸⁶ *Fisheries*,¹⁸⁷ and the *Legal Status of Eastern Greenland* cases,¹⁸⁸ mentioned above, both the I.C.J. and the P.C.I.J. applied estoppel without precisely defining it. Since all three cases involved legal consequences resulting from the silence of one of the parties, the only possible corresponding common law estoppel theory would be acquiescence.¹⁸⁹ Nonetheless, the opinions do not lay the foundation for acquiescence as it is defined at common law. In fact, international law appears to draw no distinction between estoppel and acquiescence. Recall that while promissory estoppel aims to protect the faith or reliance that one party has placed in another,¹⁹⁰ acquiescence does not. In fact, more often than not the party claiming acquiescence has nothing to lose since he has not relied on the other party in any way.¹⁹¹ It is the party against whom acquiescence is raised who is at risk.¹⁹² Moreover, with the exception of promissory estoppel, estoppel theories cannot be wielded against parties which have remained silent.¹⁹³

There is another significant difference between acquiescence and the other forms of estoppel. At common law, the former is a fault based theory; that is, he who remains silent in order to encourage the detriment of another will not be vindicated.¹⁹⁴ Therefore, acquiescence requires an element which estoppels do not—knowledge by the party against whom the theory is raised. Moreover, acquiescence can be used as the foundation of an action: as a sword.

In the international cases cited above, however, the threshold of knowledge required by the alleged acquiescing party is not specified. In fact, no real distinction is made between acquiescence and estoppel in

185. See MARTIN, *supra* note 7, at 201-03.

186. *Temple of Preah Vihear* (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15).

187. *Fisheries* (Nor. v. U.K.), 1951 I.C.J. 116 (Dec. 18).

188. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53 (Apr. 5).

189. See discussion *supra* part II.E.

190. See discussion *supra* part III.

191. See discussion *supra* part II.E.

192. *Id.*

193. See Bowett, *supra* note 75, at 200-01; see also CHENG, *supra* note 67, at 174.

194. See generally *Yench v. Stockmar*, 483 F.2d 820, 823 (10th Cir. 1973); *Lebold v. Inland Steel Co.*, 125 F.2d 369, 375 (7th Cir. 1941); *Natural Soda Prod. Co. v. Los Angeles*, 132 P.2d 553, 563 (Cal. Dist. Ct. App. 1943); see also James W. Day, *The Validation of Erroneously Located Boundaries by Adverse Possession and Related Doctrines*, 10 U. FLA. L. REV. 245 (1957); Jackson, *supra* note 181, at 99.

these cases. The numerous concurring opinions in *Temple of Preah Vihear* suggest that the court made no distinction whatsoever between these significantly different theories, despite specifically referring to "acquiescence."¹⁹⁵ Judge Alfaro, at least, recognized the existence of "complicated classifications, modalities, species, and procedural features of [estoppel in] the municipal system,"¹⁹⁶ but he did not discuss them or their relationship to estoppel as it exists in international law.

In the *Fisheries* case,¹⁹⁷ the court was seemingly on the verge of defining a more precise doctrine of acquiescence. There, the judges identified at least one significant difference between international estoppel theory and acquiescence. According to the dissent of Judge Read, acquiescence requires that the entire international community remain silent for the claimant to succeed.¹⁹⁸ With estoppel, it is necessary only that the party against whom one is opposed remain silent.¹⁹⁹ Nonetheless, more recent practice suggests that the confusion surrounding acquiescence in international law is still widespread,²⁰⁰ and the I.C.J. seems generally content to collapse the notions of estoppel and acquiescence.

195. *Temple of Preah Vihear (Cambodia v. Thai.)*, 1962 I.C.J. 6, 39 (June 15).

196. *Id.*

197. (*Nor. v. U.K.*), 1951 I.C.J. 116 (Dec. 18, 1951).

198. *Fisheries (Nor. v. U.K.)*, 1951 I.C.J. 116, 194 (Dec. 18).

199. *Id.* As with municipal acquiescence, the disputes involving this theory are almost of necessity over territorial demarcation. Therefore, the silence of an entire community *vel non* is relevant. Bowett has suggested that acquiescence is an autonomous international law theory and has proposed the following definition:

- (i) The purported acquisition of some right or interest by State A in ignorance of State B's conflicting right or interest.
- (ii) Actual or constructive knowledge by State B that State A purports to be acquiring some right or interest in conflict with its own right or interest.
- (iii) Silence or inaction by State B such as to lead State A to suppose it possessed no conflicting right or interest.
- (iv) Some detriment to State A as a result of reliance upon the silence or inaction of State B, or some gain to State B as a result of State A's action.

Bowett, *supra* note 75, at 200 (footnote omitted).

200. *See, e.g., Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12) where the court gave the following desultory discussion of acquiescence as it relates to estoppel:

The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principle of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle.

Id. at 305.

D. *Promissory Estoppel*

Recall that promissory estoppel, or equitable estoppel, is unique among estoppel theories in that it applies to promised future events.²⁰¹ Moreover, it is the only common law estoppel theory, with the exclusion of acquiescence, that can serve as the basis of a legal claim.²⁰² Another distinguishing characteristic of promissory estoppel is that it requires a promise on the part of the party against whom it is alleged.²⁰³

In contrast, even the more restrictive version of international estoppel does not appear to require a promise. In *Barcelona Traction*, for example, Spain did not base its estoppel claim on a promise given by Belgium. Nevertheless, the court's opinion suggests that had Spain suffered some detriment, her estoppel claim would have been actionable.²⁰⁴ *North Sea Continental Shelf* is no more clear in this regard.²⁰⁵ Although West Germany gave certain assurances to the claimants, it is unclear whether these assurances could be construed as promises. Moreover, the court's opinion is unclear on whether the estoppel failed due to lack of detriment, lack of a promise, or lack of clear assurances on West Germany's part.²⁰⁶ Thus, perhaps a promise by the party against whom an estoppel is raised is not a required element, and silence may be deemed "action" sufficient to set an estoppel in motion.²⁰⁷ Also, promissory estoppel is the only municipal estoppel theory, other than acquiescence, that may function as the basis of a claim.²⁰⁸ The question is not settled in international law, where offensive claims of estoppel abound.²⁰⁹

E. *Estoppel as a Substantive Theory*

Although estoppel theory, with certain exceptions, is a procedural device, international practice has accorded this theory broader pow-

201. See *supra* part II.A.

202. See *supra* part III.

203. See *supra* part III.

204. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 4 (Feb. 5).

205. *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)* 1969 I.C.J. 3 (Feb. 20).

206. *Id.* at 42.

207. See, e.g., *Fisheries (Nor. v. U.K.)*, 1951 I.C.J. 116, 142 (Dec. 18), where Great Britain's silence was held not to defeat Norway's estoppel claim. The notoriety and tolerance by other members of the international community was deemed sufficient to support the Norwegian position. No promise was required from Great Britain.

208. See *supra* part III.

209. See, e.g., *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 6 (June 15); *Fisheries (Nor. v. U.K.)*, 1951 I.C.J. 116, 142 (Dec. 18). But see *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, 73 (July 29); *Delimitation of the Maritime Boundary in the Gulf of Maine Area, (Can. v. U.S.)*, 1984 I.C.J. 246, 305 (Oct. 12); *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5); *North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.)*, 1969 I.C.J. 3, 242 (Feb. 20).

ers.²¹⁰ The mere fact that estoppel has been applied as the basis of a legal claim in international decisions suggests that, however unwittingly, that it has become a substantive device in international law. Recalling the discussion in Section I, among the Anglo-American estoppel forms, only acquiescence and promissory estoppel may serve in this capacity.²¹¹ Nonetheless, the international decisions where estoppel has been the basis of a legal claim do not distinguish between estoppels by silence and other forms of estoppel in common law systems. In the *Legal Status of Eastern Greenland*,²¹² for example, the P.C.I.J. accepted a claim of Denmark that was nominally based upon estoppel in its narrow sense—that is, estoppel by representation. The court, however, did not in any way specify the required elements, nor did it explain how estoppel could be accepted as the foundation of a claim.²¹³ The court did find that Norway was bound by her prior acts and by the assurances given by her foreign minister.²¹⁴ It is unclear whether the court accepted estoppel as the basis of a claim against another state, or whether it merely failed to distinguish between estoppel and acquiescence. If the court wanted to relax the requirements for making out a prima facie estoppel claim, it offered no explanation. Denmark, the party invoking estoppel, incurred no loss to satisfy that element of estoppel.²¹⁵ Moreover, Norway was not shown to satisfy the knowledge requirement for a claim of acquiescence in the common law understanding of the theory.²¹⁶

Temple of Preah Vihear is another example of estoppel presented as the basis of a legal claim. There, the I.C.J. dealt with substantially the same factual situation as faced by the P.C.I.J. in *Legal Status of Eastern Greenland* and reached a substantially similar conclusion. The I.C.J. accepted the estoppel claim of Cambodia, however, the opinions of the

210. See, e.g., MacGibbon, *supra* note 67, at 68 (“[T]he marked increase . . . in international judicial and arbitral activity has provided substantial grounds for the modern tendency to consider estoppel as one of the general principles of law recognised by civilised nations.”); *Temple of Preah Vihear* (Cambodia v. Thail.), 1962 I.C.J. 6, 41 (June 15) (separate opinion of Judge Alfaro):

In my judgment, the principle [estoppel] is *substantive* in character. It constitutes a presumption *juris et de jure* in virtue of which a State is held to have abandoned its right if it ever had it, or else that such a State never felt that it had a clear legal title on which it could base opposition to the right asserted or claimed by another State. In short, the legal effects of the principle are so fundamental that they decide by themselves alone the matter in dispute and its infraction cannot be looked upon as a mere incident of the proceedings.

Id. (emphasis added).

211. See *supra* parts II.E. and III.

212. *Legal Status of Eastern Greenland* (Den. v. Nor.), 1933 P.C.I.J. (ser. A/B) No. 53, at 22 (Apr. 5).

213. *Id.* at 55.

214. *Id.* at 56.

215. *Id.*

216. *Id.*

judges were anything but unanimous.²¹⁷ Recall that no member of the court, with the exception of Judge Alfaro, distinguished between the various common law forms of estoppel, even though the court purported to apply an estoppel theory borrowed from the common law.²¹⁸ Judge Alfaro held that estoppel as an international legal concept does not bear the marks of its municipal law counterparts.²¹⁹ In support of this theory, he referred in detail to a litany of arbitral decisions and P.C.I.J. decisions which, in his opinion, demonstrated the existence of a long-standing and unique international estoppel theory.²²⁰ Judge Alfaro's opinion has raised considerable controversy. Although some writers support his expansive notion of estoppel in the law of nations,²²¹ others are justifiably troubled by such a development.²²²

F. General Observations

Estoppel's substance/procedure dichotomy is, in many ways, a mask for a more general systemic problem in international law. Much of the confusion surrounding estoppel devolves from the fact that common law systems have developed precise procedural and evidentiary rules that are often codified and well-defined. When these precise terms are wrested from their common law context and flung pell-mell into the international realm, a realm almost completely devoid of either codified or customary rules of procedure, every issue becomes a substantive issue of first impression.

The noncriminal realm of common law legal systems may be loosely divided into procedural and substantive classifications. Procedural rules govern how a claim may be brought, when it may be brought, and the rules to be followed in order to have a claim decided on its merits.²²³ In American practice these rules are codified in almost all jurisdictions. It has already been established that what corresponds to the municipal evidentiary rule of party admissions is not distinguished from estoppel in international law.²²⁴ Other procedural rules also correspond to instances of estoppel in international practice. The estoppel claim made in *Barcelona Traction, Light and Power*, for example, might

217. See *supra* notes 124-35 and accompanying text.

218. *Id.*

219. Temple of Preah Vihear, 1962 I.C.J. 6, 41-42 (June 15) (separate opinion of Judge Alfaro).

220. *Id.* at 43-51.

221. See generally MacGibbon, *supra* note 67.

222. See generally Rubin, *supra* note 14 (criticizing Judge Alfaro's expansive view of the international estoppel doctrine).

223. See, e.g., BLACK'S LAW DICTIONARY 1203 (6th ed. 1990).

224. See part V.B.

have been categorized a "voluntary dismissal" in municipal practice.²²⁵ Similarly, the estoppel theory raised in *Elettronica Sicula*²²⁶ was not estoppel in the Anglo-American sense. There, Italy previously informed the claimant United States that all local remedies were exhausted. When Italy subsequently raised a local remedies defense, the United States claimed that Italy was estopped from doing so by her previous representations.²²⁷ In a common law pleading system, procedural rules govern the ability of a party to raise defenses in an untimely or inconsistent manner,²²⁸ yet international practice tends to refer to any forfeiture of right as an estoppel.²²⁹

Finally, the term "forclusion" often appears in international disputes. The I.C.J. defines this term as a "loss of entitlement to rely upon a right owing to its not having been invoked in time or its having been expressly or tacitly abandoned."²³⁰ This definition corresponds to statutes of limitations in municipal law, or to the equitable doctrine of laches,²³¹ and should not be grouped with estoppel theories. The use of "forclusion" by the I.C.J. might suggest a nascent bifurcation in international law between that theory and estoppel.²³² All these examples illustrate that, absent a clearly defined procedural or evidentiary regime, estoppel is often employed as a catchall term to create a legal effect which the regime should otherwise provide.

225. See FED. R. CIV. P. 41(a)(1) ("[A]n action may be dismissed by the plaintiff without order of court . . . by filing a notice of dismissal at any time before service by the adverse party of an answer Unless otherwise stated in the notice of dismissal, . . . the dismissal is without prejudice.").

226. *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15 (July 29).

227. *Id.* at 44.

228. Typical common law pleading rules require that parties raise defenses in a timely manner. If a party fails to do so, it waives those defenses. The legal effect of such rules, though similar to that of an estoppel, is not identical since procedural waiver rules, unlike estoppel, exist primarily to expedite litigation. See FED. R. CIV. P. 12(h).

229. See *Dominicé*, *supra* note 75, at 353 ("à chaque fois qu'il y a déchéance d'un droit ou irrecevabilité d'une prétention par le fait que l'intéressé n'a pas sauvegardé ce droit ou la possibilité d'émettre sa prétention conformément aux prescriptions d'une norme précise, c'est celle-ci qui trouve application devant le juge, et non pas un principe général de forclusion (estoppel), même si les effets de l'application de la règle sont précisément une forclusion.").

230. *Frontier Dispute (Burkina Faso v. Mali)*, 1986 I.C.J. 554, 654 (Dec. 22) (separate opinion of Judge Luchaire).

231. Recall that laches operates as a waiver since it expedites litigation. See *supra* notes 36-40 and accompanying text.

232. See ELISABETH ZOLLER, *LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC* 279 (1977), noting that unlike private party litigants, states are assumed always to act on their volition. The corollary to this assumption is that actions that are presumed to be the product of volition may more easily bind their authors. See LOUIS HENKIN, *HOW NATIONS BEHAVE* 7 n.† (1968) ("Even to speak of 'behavior' smacks of anthropomorphism. In fact . . . for me governments 'are aware' or 'ignore,' 'think' and 'feel,' 'consider' and 'decide,' 'expect' and 'rely.' Obviously, these are linguistic conveniences which, I hope, do not obscure the multifaceted complexities of the proceses of governmental decision.").

Another problem inherent in analogies between estoppel theories in municipal and international law lies in the vast differences between the respective litigants in the two systems. Municipal systems apply legal theory to individuals; in international practice legal theory is applied to states. Consequently, certain concerns which are relevant when discussing individual or corporate parties are inapplicable.²³³ It is interesting to examine the practice of the United States-Iran Claims Tribunal, which has the advantage of quasi-permanent status and well-established rules of operation.²³⁴ It is significant that many, if not most, of the claimants before the tribunal are individuals, and thus, the presumptions of volition and the impossibility of accidental behavior which inhere to state claimants do not cloud the discussion of estoppel. Before the tribunal, the rules of estoppel are much more clearly applied than in the International Court of Justice.²³⁵

A final explanation for the divergence between international and municipal estoppels is that unlike common law systems, the I.C.J. is not technically bound by *stare decisis*.²³⁶ This fact coupled with the diversity and rapid turnover among its constituents makes for broad vacillation in legal analysis.

The cases examined in this Section are evidence of the broad inconsistency in the "rule of estoppel" as it exists in international law. If it has indeed become a rule of international law, as a general principle of law of civilized nations under I.C.J. law, then the court has been remiss in its failure to adhere to its common law roots. If the deviation from common law forms has been intentional, the I.C.J. has failed to take account of the perils involved. Sir Percy Spender, in his concurrence in *Temple of Preah Vihear*, described the attendant dangers of an ill-conceived estoppel doctrine:

The principle of preclusion is a beneficent and powerful instrument of substantive international law. . . . It should not however be permitted to become so indefinite as to acquire the somewhat formless content of a maxim. And since the principle, when it is applicable to any given set of facts, substitutes relative truth for the judicial search for

233. "Il y aurait intérêt à distinguer la forclusion de l'estoppel, dans ce sens que la forclusion désigne simplement une déchéance, elle décrit un effet juridique, et ne constitue donc pas un principe de droit, la cause de la forclusion étant, elle, une institution juridique." Dominicé, *supra* note 75, at 365 (footnote omitted).

234. See generally SEVENTH SOKOL COLLOQUIUM, THE IRAN-UNITED STATES CLAIMS TRIBUNAL, 1981-1983 (Richard B. Lillich ed., 1984).

235. See, e.g., *General Dynamics Co. v. Iran*, 5 Iran-U.S.Cl. Trib. Rep. 386 (1986); *Oil Field of Tex., Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 308 (1986); *American Housing Int'l, Inc. v. Housing Coop. Soc'y*, 5 Iran-U.S. Cl. Trib. Rep. 235 (1984).

236. See STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

the truth, it should be applied with caution.²³⁷

Even if estoppel were conceived as a customary rule, it would be a rule that defies definition. If, as Spender and Alfaro claim,²³⁸ an international law rule of estoppel has evolved that differs from its common law antecedents, it is not easily applied without taking account of the complex modalities of its common law kin. William Howard Taft, ruling in *Tinoco*, noted:

There are other estoppels recognized in municipal law than those which rest on equitable considerations. They are based on public policy. It may be urged that it would be in the interest of the stability of governments and international law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied . . . as a principle of international law.²³⁹

The rule to which Taft referred in the early part of this century may well be deemed to exist today by the sheer quantitative force of constant references to it in international practice. However, the rule remains as ambiguous and unworkable as it did in 1923 when Taft examined it.

G. *Unilateral Promise Theory and Estoppel*

One can hardly discuss promissory estoppel, which deals in large measure with promises as legal obligations, without taking account of the extraordinary decision of the International Court of Justice in the *French Nuclear Tests* case.²⁴⁰ In 1966, France undertook a vast program of atmospheric nuclear testing in Polynesia which provoked the protests of neighboring nations, most notably Australia.²⁴¹ The protests increased with the testing, first through diplomatic channels and ultimately through the I.C.J. The case reached the court on May 9, 1973. Australia demanded that the court command France to refrain from further nuclear testing near its South Pacific territories. The court accepted the claim and commanded France to refrain from further tests while the case proceeded.

France contested the court's jurisdiction, citing a caveat to France's

237. *Temple of Preah Vihear (Cambodia v. Thail.)*, 1962 I.C.J. 6, 143 (June 15) (separate opinion of Judge Spender).

238. See *supra* notes 124-35 and accompanying text.

239. *Tinoco (U.K. v. Costa Rica)*, 18 AM. J. INT'L L. 147, 157 (1923).

240. *Nuclear Tests (Austr. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20).

241. *Id.* at 256.

acceptance of the obligatory jurisdiction of the I.C.J. which specifically exempted activities relating to national defense.²⁴² Despite the hardening of the French position (France, on January 10, 1974, abrogated its acceptance of jurisdiction) did not end diplomatic efforts to resolve the dispute. The 1974 presidential election in France brought about a change in the French position with the announcement in July 1974, that the testing campaign of 1974 would be the last.²⁴³ The President's statements were reaffirmed in a declaration by the French Minister of Defense in November of the same year. It was expected that the court would examine France's preliminary exceptions concerning jurisdiction, but instead the court examined the justiciability of the claim and ultimately found the dispute moot.²⁴⁴ Despite this finding, which relieved the court of the obligation to reach the unilateral promise issue, the court issued astonishingly broad dicta, suggesting that France's prior unilateral announcements were legally binding obligations.²⁴⁵ Whatever the status of estoppel as a principle of international law prior to the I.C.J.'s decision in this case, the court's pronouncement's may well have shattered any hope of refining and narrowing estoppel. The court, in effect, accepted a promissory estoppel claim without requiring that the party invoking it suffer any detriment or harm. Furthermore, no actual harm was demonstrated or demanded by the court, perhaps because it would have been difficult for the claimants to show even a risk of actual damage accruing to them as a result of the testing.

The efforts of some writers to distinguish estoppel from unilateral promise serve only to show the vast misunderstandings in this area of the law. Consider, for example, the opinion of Jacqué. He asserts that the two theories differ in that estoppel devolves from the meaning given to acts or promises by the "promisee" (the party invoking the estoppel) whereas a promise depends on the intention of the promisor.²⁴⁶ Accord-

242. *Id.* at 259-60.

243. *Id.* at 259.

244. *Id.* at 272.

245. *Id.* at 267.

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being therefor legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

246. Jean-Paul Jacqué, *A propos de la promesse unilatérale*, in *MÉLANGES OFFERTS À PAUL REUTER LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ* 327, 339 (1981).

L'identité de fondement n'entraîne pas une confusion entre l'institution de la

ingly, this means that both theories apply subjective tests of intent to the parties; however, promissory estoppel specifically employs an objective reasonableness test.²⁴⁷ Unilateral promise theory has neither element. In fact, this latter principle, as described by Jaqué, is nothing less than promissory estoppel shorn of its reliance and detriment elements. According to this theory, one would never have to show a detriment in order to legally bind another party to its unilateral declarations.²⁴⁸

Another inconsistency exists in Jaqué's distinction between unilateral promise theory and estoppel. As discussed above, both theories are said to derive their usefulness from the law's desire to enforce good faith. Good faith, however, implies intent or willful action by the party who is said to have violated it.²⁴⁹ If estoppel were based on the good faith of the party to be estopped, as Jaqué posits, a finding of estoppel would necessarily devolve from that party's intent—otherwise reference to "good faith" would be meaningless. However, this contradicts Jaqué's proposition that estoppel is based on the subjective understanding of the promisee. If a party could be bound by the mere utterance of a promise or assurance, one can only conclude that, in international law, the theory of unilateral promise would be a modification of estoppel and that the latter theory would be rendered largely obsolete.

VI. CONCLUSION

It is a trite, yet pertinent, truism that a term which means everything ultimately means nothing. Such is the case with the international rule of estoppel—the word has come to represent so many principles and notions that it no longer retains the workability or precision of a legal rule. As this Comment has shown, the purported international rule of estoppel is not a principle that can be applied with any certainty. Between the practitioner and the rule, to borrow Humpty Dumpty's wisdom, "[t]he question is . . . which is to be master."²⁵⁰

promesse et de l'estoppel. . . . S'agissant de la promesse qui est un acte juridique, la manifestation de volonté de l'auteur est à la source de l'obligation. Dans le cadre de l'estoppel, les effets ne découlent pas de la volonté, mais de la représentation que le tiers s'est fait de bonne foi de la volonté de l'auteur. C'est pour cette raison que dans le cadre de l'estoppel, le comportement du destinataire est fondamental. Lui seul permettra de montrer que l'État s'est fié à la représentation. S'agissant de la promesse au contraire, le comportement du destinataire n'ajoute rien à la force obligatoire de la déclaration unilatérale.

Id.

247. See *supra* note 51 and accompanying text.

248. It is interesting that Jaqué's emphasis on the intent of the actor is closely related to the assumption that nations always act on their volition.

249. See *supra* part III.

250. LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 112 (1941).

Unlike estoppel as it exists in Anglo-American law, international law versions of the rule are imprecise. Although the rule was derived from the common law and, according to some, entered international law by the mechanism of Article 38(1)(c) of the Statute of the International Court of Justice, the international version completely ignores the complexities of its municipal counterpart and is only nominally the same principle. Given the doctrinal inconsistency and the theoretical doubts surrounding estoppel in international law, one may rightfully question the very existence of any such principle. The apogee of uncertainty may have been reached in the *French Nuclear Tests* case. Can one still speak of an international rule of estoppel when a mere unilateral promise may be given legally binding force absent a demonstrable detriment to the promisee?

Estoppel in its many municipal forms reflects the genius of the common law. It is a rule which has evolved into precise and varied forms to suit different areas of the law and different situations. More importantly, common law estoppel rules rest on firmly established bodies of existing law. Development of these rules is slow and methodical given the constraints of the common law and its reverence for precedent. Thus, the radical fits and starts witnessed in international jurisprudence have not occurred. The complicated classifications and modalities of estoppel in Anglo-American estoppel are not the vestiges of happenstance; rather they represent the conclusions of several centuries of legal wisdom. The classifications of estoppel are distinguished by their policy objectives, their constitutive elements, and their potential power, so that judges might have some guidance in wielding an otherwise peremptory device.

The imprecision that is the hallmark of estoppel theory in international practice, though troubling, is easy to explain. In the absence of clearly developed procedural rules, a codified and uniform body of doctrine, or anything resembling evidentiary standards, international lawyers and judges are forced to improvise. When they do, estoppel is a convenient term to offer since it can serve as an emblem for any of a number of notions fundamental to any system of law: common sense, justice, consistency, fair play, or good faith. Indeed, estoppel seems inexorably to draw the attention of claimants in international fora precisely because it seems so well suited to achieving fundamental objectives of international law. But this does not alter the fact that the current "theory" of estoppel in international law is nothing more than an axiom in the guise of a legal principle. It allows for wild fluctuations in legal rulings depending on the whims of the parties and judges in a given dispute. Thus, paradoxically, a theory which seeks to promote stability

threatens to undermine it. One can only hope that the future development of international law will obviate the need for the current catchall estoppel doctrine. In its current form, "all the king's horses and all the king's men" cannot possibly make sense of it.

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