Maria Curie-Skłodowska University in Lublin
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Estoppel in International Investment Law

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ABBREVIATIONS

Judgments of the International Court of Justice

No.	Abbreviation	Full citation / full description
1.	*Anglo-Iranian Oil Co.*	*Anglo-Iranian Oil Co, United Kingdom v Iran*, Judgment, Jurisdiction, [1952] ICJ Rep 93, 22 July 1952
2.	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, Judgment, Merits, [2007] ICJ Rep 43, 26 February 2007
3.	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Yugoslavia*, Judgment, Preliminary Objections, [1996] ICJ Rep 595, 11 July 1996
4.	*Arbitral Award made by the King of Spain on 23 December 1906*	*Arbitral Award Made by the King of Spain on 23 December 1906, Honduras v Nicaragua*, Merits, Judgment, [1960] ICJ Rep 192, 18 November 1960
5.	*Armed Activities on the Territory of the Congo*	*Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Rwanda*, Judgment, Jurisdiction and Admissibility, [2006] ICJ Rep 6, 3 February 2006
6.	*Arrest Warrant of 11 April 2000*	*Arrest Warrant of 11 April 2000, Congo, The Democratic Republic of the v Belgium*, Judgment, Merits, Preliminary Objections, [2002] ICJ Rep 3, 14 February 2002
7.	*Barcelona Traction (Preliminary Objections)*	*Case concerning the Barcelona Traction, Light and Power Co Ltd (New Application, 1962), Belgium v Spain (Preliminary Objections)* [1964] ICJ Rep 6, 24 July 1964
8.	*Barcelona Traction (Second Phase)*	*Barcelona Traction, Light and Power Company Limited (New Application, 1962), Belgium v Spain*, Judgment, Merits, Second Phase, [1970] ICJ Rep 3, 5 February 1970
9.	*Bolivia v Chile*	*Obligation to Negotiate Access to the Pacific Ocean, Bolivia v Chile*, Merits, [2018] ICJ Rep 507, 1 October 2018
10.	*Burkina Faso v Mali*	*Frontier Dispute, Burkina Faso v Mali*, Merits, Judgment, [1986] ICJ Rep 554, 22 December 1986
11.	*Cameroon v Nigeria*	*Land and Maritime Boundary between Cameroon and Nigeria, Cameroon v Nigeria*, Judgment, Preliminary Objections, [1998] ICJ Rep 275, 11 June 1998
12.	*Case concerning Military and Par-*	*Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Jurisdiction of the Court

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13.	*Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*	*Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v United States*, Merits, Judgment, [1986] ICJ Rep 14, 27 June 1986
14.	*Certain Questions of Mutual Assistance in Criminal Matters*	*Certain Questions of Mutual Assistance in Criminal Matters, Djibouti v France*, Judgment, [2008] ICJ Rep 177, 4 June 2008
15.	*Continental Shelf (Tunisia/Libya)*	*Continental Shelf, Tunisia v Libyan Arab Jamahiriya*, Merits, Judgment, [1982] ICJ Rep 18, 24 February 1982
16.	*Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*	*Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Tunisia v Libya*, Judgment, Merits, [1985] ICJ Rep 192, 10 December 1985
17.	*Corfu Channel*	*Corfu Channel, United Kingdom v Albania*, Judgment, Merits, [1949] ICJ Rep 4, 9 April 1949
18.	*Costa Rica v Nicaragua*	*Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v Nicaragua), and Land Boundary in the Northern Part of Isla Portillos (Costa Rica v Nicaragua), Costa Rica v Nicaragua*, Merits, [2018] ICJ Rep 139, 2 February 2018
19.	*El Salvador v Honduras*	*Land, Island and Maritime Frontier Dispute, El Salvador v Honduras, Judgment, Application to Intervene*, [1990] ICJ Rep 92, 13 September 1990
20.	*Elettronica Sicula*	*Elettronica Sicula SpA (ELSI), United States v Italy*, Judgment, Merits, ICJ GL No 76, [1989] ICJ Rep 15, 20 July 1989
21.	*Fisheries Jurisdiction*	*Fisheries Jurisdiction, Spain v Canada*, Judgment, Jurisdiction, [1998] ICJ Rep 432, 4 December 1998
22.	*Gulf of Maine*	*Delimitation of the Maritime Boundary in the Gulf of Maine Area, Canada v United States*, Merits, Judgment, [1984] ICJ Rep 246, 12 October 1984
23.	*Libyan Arab Jamahiriya v Chad*	*Territorial Dispute, Libya v Chad*, Judgment, Merits, [1994] ICJ Rep 6, 3 February 1994
24.	*Nicaragua v Colombia*	*Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, [2016] ICJ Rep 100, 17 March 2016
25.	*North Sea Continental Shelf*	*North Sea Continental Shelf, Germany v Denmark*, Merits, Judgment, (1969) ICJ Rep 3, 20 February 1969
26.	*Nuclear Tests*	*Nuclear Tests, Australia v France*, Judgment on Admissibility, [1974] ICJ Rep 253, 20 December 1974
27.	*Nottebohm*	*Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)*, [1955] ICJ Rep 4, 6 April 1955
28.	*Oil Platforms*	*Oil Platforms, Iran v United States*, Judgment, Merits, ICJ

		GL No 90, [2003] ICJ Rep 161, 6 November 2003
29.	*Pulau Batu Puteh Case*	*Case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh Case, Middle Rocks and South Ledge (Malaysia/Singapore) (Judgment)* [2008] ICJ Rep 2, 23 May 2008
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4.	*Legal Status of Eastern Greenland*	*Legal Status of Eastern Greenland, Denmark v Norway*, Judgment, PCIJ Series A/B No 53, ICGJ 303 (PCIJ 1933), 5 April 1933
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19.	*Arif*	*Arif v Moldova*, Award, ICSID Case No. ARB/11/23, despatched 8 April 2013
20.	*ATA Construction*	*ATA Construction, Industrial and Trading Company v Jordan*, Award, ICSID Case No. ARB/08/2, 12 May 2010, despatched 18 May 2010
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104.	*Kim*	*Kim and ors v Uzbekistan*, Decision on jurisdiction, ICSID Case No. ARB/13/6, despatched 8 March 2017
105.	*KS Invest*	*KS Invest GmbH and TLS Invest GmbH v Spain*, Decision on the proposal to disqualify Professor Kaj Hobér, ICSID Case No. ARB/15/25, 15 May 2020
106.	*Lao Holdings*	*Lao Holdings NV v Lao People's Democratic Republic*, Award, ICSID Case No. ARB(AF)/12/6, despatched 6 August 2019
107.	*Lauder*	*Lauder v Czech Republic*, Final Award, 3 September 2001, Ad Hoc Tribunal (UNCITRAL)
108.	*Lemire*	*Lemire v Ukraine*, Decision on Jurisdiction and Liability, ICSID Case No. ARB/06/18, 14 January 2010
109.	*LG&E Energy*	*LG&E Energy Corporation and ors v Argentina*, Decision on Liability, ICSID Case No. ARB/02/1, 3 October 2006
110.	*Magyar Farming Company*	*Magyar Farming Company Limited and ors v Hungary*, Award, ICSID Case No. ARB/17/27, despatched 13 November 2019
111.	*Malaysian Historical Salvors*	*Malaysian Historical Salvors Sdn Bhd v Malaysia*, Award on Jurisdiction, ICSID Case No. ARB/05/10, 10 May 2007,

		despatched 17 May 2007
112.	*Malicorp*	*Malicorp Ltd v Egypt*, Award, ICSID Case No. ARB/08/18, 31 January 2011, despatched 7 February 2011
113.	*Mamidoil Jetoil*	*Mamidoil Jetoil Greek Petroleum Products Societe SA v Albania*, Award and Dissenting Opinion, ICSID Case No. ARB/11/24, despatched 30 March 2015
114.	*Maritime International Nominees Establishment*	*Maritime International Nominees Establishment v Republic of Guinea*, Decision of the Ad hoc Annulment Committee, ICSID Case No. ARB/84/4, 22 December 1989
115.	*Metal-Tech*	*Metal-Tech Limited v Uzbekistan*, Award, ICSID Case No. ARB/10/3, despatched 4 October 2013
116.	*Micula (Award)*	*Micula and ors v Romania*, Award and separate opinion, ICSID Case No. ARB/05/20, despatched 11 December 2013
117.	*Micula (Jurisdiction)*	*Micula and ors v Romania*, Decision on Jurisdiction and Admissibility, ICSID Case No. ARB/05/20, 24 September 2008
118.	*Middle East Cement*	*Middle East Cement Shipping and Handling Company SA v Egypt*, Award, ICSID Case No. ARB/99/6, 12 April 2002
119.	*MNSS BV*	*MNSS BV and Recupero Credito Acciaio NV v Montenegro*, Award, ICSID Case No. ARB(AF)/12/8, despatched 4 May 2016
120.	*Mobil Exploration*	*Mobil Exploration and Development Inc Suc Argentina and Mobil Argentina SA v Argentina*, Decision on jurisdiction and liability and dissenting opinion, ICSID Case No. ARB/04/16, despatched 10 April 2013
121.	*Mobil Investments Canada*	*Mobil Investments Canada Inc v Canada*, Decision on jurisdiction and admissibility, ICSID Case No. ARB/15/6, despatched 13 July 2018
122.	*MTD Equity*	*MTD Equity Sdn Bhd and MTD Chile SA v Chile*, Award, ICSID Case No. ARB/01/7, 25 May 2004
123.	*Murphy Exploration*	*Murphy Exploration and Production Company International v Ecuador*, Award on Jurisdiction and Dissenting Opinion, ICSID Case No. ARB/08/4, 15 December 2010
124.	*Mytilineos Holdings*	*Mytilineos Holdings S.A. (Greece) v. The Republic of Serbia*, Award, PCA Case No. 2014-30, August 2017, Permanent Court of Arbitration
125.	*National Grid*	*National Grid Public Limited Company v Argentina*, Award, Case 1:09-cv-00248-RBW, 3 November 2008, Ad Hoc Tribunal (UNCITRAL)
126.	*Nations Energy*	*Nations Energy Incorporated and ors v Panama*, Award, ICSID Case No. ARB/06/19, 9 November 2010, despatched 24 November 2010
127.	*Niko Resources*	*Niko Resources Limited v Bangladesh and ors*, Decision on jurisdiction, ICSID Case No. ARB/10/11, ICSID Case No. ARB/10/18, 19 August 2013
128.	*Nova Scotia Power*	*Nova Scotia Power Incorporated v Venezuela*, Decision on jurisdiction, 22 April 2010, Ad Hoc Tribunal (UNCITRAL)
129.	*Novenergia II*	*Novenergia II — Energy and Environment (SCA) (Grand Duchy of Luxembourg), SICAR v Spain*, Final arbitral award, SCC Case No. 2015/063, 15 February 2018, Arbitration In-

		stitute of the Stockholm Chamber of Commerce
130.	*Occidental*	*Occidental Exploration and Production Company v Ecuador*, Final Award, LCIA Case No. UN3467, 1 July 2004, London Court of International Arbitration
131.	*Occidental (Annulment)*	*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, Decision on annulment of the Award, ICSID Case No. ARB/06/11, despatched 2 November 2015
132.	*Olguin*	*Olguín v Paraguay*, Award, ICSID Case No. ARB/98/5, despatched 26 July 2001
133.	*OperaFund*	*OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v Spain*, Award and separate opinion, ICSID Case No. ARB/15/36, despatched 6 September 2019
134.	*Orascom*	*Orascom TMT Investments SARL v Algeria*, Award, ICSID Case No. ARB/12/35, despatched 31 May 2017
135.	*Pac Rim Cayman*	*Pac Rim Cayman LLC v El Salvador*, Award, ICSID Case No. ARB/09/12, despatched 14 October 2016
136.	*Pan American Energy*	*Pan American Energy LLC and BP Argentina Exploration Company v Argentina*, Decision on preliminary objections, ICSID Case No. ARB/03/13, ICSID Case No. ARB/04/8, 27 July 2006
137.	*Parkerings*	*Parkerings-Compagniet AS v Lithuania*, Award on jurisdiction and merits, ICSID Case No. ARB/05/8, IIC 302 (2007), 14 August 2007, despatched 11 September 2007
138.	*Perenco*	*Perenco Ecuador Limited v Ecuador*, Award, ICSID Case No. ARB/08/6, despatched 27 September 2019
139.	*Peter A Allard*	*Peter A Allard v The Government of Barbados*, Award, PCA Case No. 2012-06, 27 June 2016, Permanent Court of Arbitration
140.	*Petrobart*	*Petrobart Limited v Kyrgyzstan*, Award, SCC Case No. 126/2003, 29 March 2005, Arbitration Institute of the Stockholm Chamber of Commerce
141.	*Philip Morris*	*Philip Morris Asia Limited v Australia*, Award on jurisdiction and admissibility, PCA Case No. 2012-12, 17 December 2015, Permanent Court of Arbitration
142.	*Philip Morris Brands*	*Philip Morris Brands Sàrl and ors v Uruguay*, Award, ICSID Case No. ARB/10/7, 28 June 2016, despatched 8 July 2016
143.	*Phoenix Action*	*Phoenix Action Limited v Czech Republic*, Award, ICSID Case No. ARB/06/5, 9 April 2009, despatched 15 April 2009
144.	*Photovoltaik Knopf*	*Photovoltaik Knopf Betriebs-GmbH v Czech Republic*, Award, PCA Case No. 2014-21, 15 May 2019, Permanent Court of Arbitration
145.	*Plama*	*Plama Consortium Limited v Bulgaria*, Award, ICSID Case No. ARB/03/24, despatched 27 August 2008
146.	*Pomeroy*	*R.N. Pomeroy, et.al. v Government of the Islamic Republic of Iran*, IUSCT Case No. 41, Award No. 51-41-3, 8 June 1983
147.	*Pope & Talbot*	*Pope & Talbot Incorporated v Canada*, Interim award, 26 June 2000, Ad Hoc Tribunal (UNCITRAL)

148.	*Railroad Development Corporation*	*Railroad Development Corporation v Guatemala*, Second Decision on Objections to Jurisdiction, ICSID Case No. ARB/07/23, 18 May 2010
149.	*RayGo Wagner*	*RayGo Wagner Equipment Company v. Iran Express Terminal Corporation*, IUSCT Case No. 16, Award No. 30-16-3, 10 March 1983
150.	*REEF Infrastructure*	*RREEF Infrastructure (GP) Limited and RREEF Pan-European Infrastructure Two Lux Sàrl v Spain*, Decision on responsibility and on the principles of quantum and dissenting opinion, ICSID Case No. ARB/13/30, 30 November 2018
151.	*Renco Group*	*The Renco Group Inc v Peru*, Decision on expedited preliminary objections and dissenting opinion, PCA Case No. 2019-46, 30 June 2020, Permanent Court of Arbitration
152.	*Robert Schott*	*Robert R. Schott v. Islamic Republic of Iran, Ministry of Mines and Industries of Iran and others*, IUSCT Case No. 268, Award No. 474-268-1, 14 March 1990
153.	*RosInvest*	*RosInvest Company UK Limited v Russian Federation*, Jurisdiction award, SCC Case No. V079/2005, 1 October 2007, Arbitration Institute of the Stockholm Chamber of Commerce
154.	*RSM Production*	*RSM Production Corp and ors v Grenada*, Award, ICSID Case No. ARB/10/6, 7 December 2010, despatched 10 December 2010
155.	*Ruby Roz Agricol*	*Ruby Roz Agricol LLP v Kazakhstan*, Award on jurisdiction, SCl:3471053.2, 1 August 2013, UNCITRAL
156.	*Rumeli*	*Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Kazakhstan*, Award, ICSID Case No. ARB/05/16, 21 July 2008, despatched 29 July 2008
157.	*Rusoro Mining*	*Rusoro Mining Limited v Venezuela*, Award, ICSID Case No. ARB(AF)/12/5, despatched 22 August 2016
158.	*RWE Innogy*	*RWE Innogy GmbH and RWE Innogy Aersa SAU v Spain*, Award, ICSID Case No. ARB/14/34, IIC 1716 (2020), despatched 18 December 2020
159.	*Saipem*	*Saipem SpA v Bangladesh*, Decision on jurisdiction and recommendation on provisional measures, ICSID Case No. ARB/05/7, 21 March 2007
160.	*Salini Costruttori*	*Salini Costruttori SpA and Italstrade SpA v Morocco*, Decision on jurisdiction, ICSID Case No. ARB/00/4, 16 July 2001, despatched 23 July 2001
161.	*Salini Impregilo*	*Salini Impregilo SpA v Argentina*, Decision on jurisdiction and admissibility, ICSID Case No. ARB/15/39, 23 February 2018
162.	*SD Myers*	*SD Myers Incorporated v Canada*, Second partial award, 21 October 2002, Ad Hoc Tribunal (UNCITRAL)
163.	*Sempra*	*Sempra Energy International v Argentina*, Award, ICSID Case No. ARB/02/16, 18 September 2007, despatched 28 September 2007
164.	*SGS v Pakistan*	*SGS Société Générale de Surveillance SA v Pakistan*, Decision on Objections to Jurisdiction, ICSID Case No.

		ARB/01/13, 6 August 2003
165.	*SGS v Philippines*	*SGS Société Générale de Surveillance SA v Philippines*, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No. ARB/02/6, 29 January 2004
166.	*Siag (Award)*	*Siag and Vecchi v Egypt*, Award, ICSID Case No. ARB/05/15, 11 May 2009, despatched 1 June 2009
167.	*Siag (Jurisdiction)*	*Siag and Vecchi v Egypt*, Decision on jurisdiction and partial dissenting opinion of Professor Francisco Orrego Vicuna, ICSID Case No. ARB/05/15, 11 April 2007
168.	*Siemens*	*Siemens AG v Argentina*, Award and Separate Opinion, ICSID Case No. ARB/02/8, 6 February 2007
169.	*Silver Ridge Power*	*Silver Ridge Power BV v Italy*, Award, ICSID Case No. ARB/15/37, IIC 1717 (2021), despatched 26 February 2021
170.	*Sociedad Anónima Eduardo Vieira*	*Sociedad Anónima Eduardo Vieira v Chile*, Award, ICSID Case No. ARB/04/7, despatched 21 August 2007
171.	*Southern Pacific Properties*	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Award, ICSID Case No. ARB/84/3, 20 May 1992
172.	*Southern Pacific Properties (Jurisdiction)*	*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, Decision on Preliminary Objections to Jurisdiction, ICSID Case No. ARB/84/3, 27 November 1985
173.	*Standard Chartered Bank*	*Standard Chartered Bank (Hong Kong) Limited v Tanzania*, Award, ICSID Case No. ARB/15/41, despatched 11 October 2019
174.	*SunReserve*	*SunReserve Luxco Holdings SARL and ors v Italy*, Final award, SCC Arbitration V (2016/32), 25 March 2020, Arbitration Institute of the Stockholm Chamber of Commerce
175.	*SwemBalt*	*SwemBalt AB v Latvia*, Award, 23 October 2000, Ad Hoc Tribunal (UNCITRAL)
176.	*Swisslion*	*Swisslion DOO Skopje v Macedonia*, Final award, ICSID Case No. ARB/09/16, despatched 6 July 2012
177.	*Tanzania Electric Supply*	*Tanzania Electric Supply Company Limted v Independent Power Tanzania Limited*, Decision on Preliminary Issues, ICSID Case No. ARB/98/8, 22 June 2001
178.	*Tecmed*	*Técnicas Medioambientales Tecmed SA v Mexico*, Award, ARB(AF)/00/2, 29 May 2003
179.	*Tethyan Copper Company*	*Tethyan Copper Company Pty Limited v Pakistan*, Decision on jurisdiction and liability, ICSID Case No. ARB/12/1, despatched 10 November 2017
180.	*Thunderbird Gaming Corporation*	*International Thunderbird Gaming Corporation v Mexico*, Award, 26 January 2006, Ad Hoc Tribunal (UNCITRAL)
181.	*Tidewater Incorporated*	*Tidewater Incorporated and ors v Venezuela*, Decision on Jurisdiction, ICSID Case No. ARB/10/5, 17 December 2012, despatched 8 February 2013
182.	*Tokios Tokelės*	*Tokios Tokelės v Ukraine*, Award, ICSID Case No. ARB/02/18, 29 June 2007, despatched 26 July 2007
183.	*Total SA (Annulment)*	*Total Société Anonyme v Argentina*, Decision on Annulment, ICSID Case No. ARB/04/01, 1 February 2016

184.	*Total SA (Jurisdiction)*	*Total SA v Argentina*, Decision on Objections to Jurisdiction, ICSID Case No. ARB/04/01, 25 August 2006
185.	*Total SA (Liability)*	*Total SA v Argentina*, Decision on Liability, ICSID Case No. ARB/04/1, 21 December 2010, despatched 27 December 2010
186.	*Tulip Real Estate (Annulment)*	*Tulip Real Estate and Development Netherlands BV v Turkey*, Decision on Annulment, ICSID Case No. ARB/11/28, despatched 30 December 2015
187.	*UAB Energija*	*UAB E Energija v Latvia*, Award, ICSID Case No. ARB/12/33, despatched 22 December 2017
188.	*United Utilities*	*United Utilities (Tallinn) BV and Aktsiaselts Tallina Vesi v Estonia*, Award, ICSID Case No. ARB/14/24, despatched 21 June 2019
189.	*Urbaser (Award)*	*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, Award, ICSID Case No. ARB/07/26, despatched 8 December 2016
190.	*Urbaser (Jurisdiction)*	*Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentina*, Decision on jurisdiction, ICSID Case No. ARB/07/26, 19 December 2012
191.	*Vestey Group Limited*	*Vestey Group Limited v Venezuela*, Award, ICSID Case No. ARB/06/4, despatched 15 April 2016
192.	*Veteran Petroleum Limited (Award)*	*Veteran Petroleum Limited v Russian Federation*, Final Award, PCA Case No. AA 228, 18 July 2014, Permanent Court of Arbitration
193.	*Veteran Petroleum Limited (Jurisdiction)*	*Veteran Petroleum Limited v Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009, Permanent Court of Arbitration
194.	*Victor Pey Casado*	*"President Allende" Foundation, Victor Pey Casado and Coral Pey Grebe v Chile*, Award, PCA Case No. 2017-30, 28 November 2019, Permanent Court of Arbitration
195.	*Vivendi (Annulment)*	*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, Decision on annulment, ICSID Case No. ARB/97/3, 3 July 2002
196.	*Vivendi (Jurisdiction)*	*Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, Decision on jurisdiction, ICSID Case No. ARB/97/3, 14 November 2005
197.	*Voltaic Network*	*Voltaic Network GmbH v Czech Republic*, Award, PCA Case No. 2014-20, 15 May 2019, Permanent Court of Arbitration
198.	*WA Investments-Europa*	*WA Investments-Europa Nova Limited v Czech Republic*, Award, PCA Case No. 2014-19, 15 May 2019, Permanent Court of Arbitration
199.	*Walter Bau*	*Walter Bau AG (In Liquidation) v Thailand*, Partial award on jurisdiction, 5 October 2007, Ad Hoc Tribunal (UNCITRAL)
200.	*Waste Management I*	*Waste Management Incorporated v Mexico*, Award and dissent, ICSID Case No. ARB(AF)/98/2, 26 May 2000, despatched 2 June 2000
201.	*Waste Management II*	*Waste Management Incorporated v Mexico*, Award, ICSID Case No. ARB(AF)/00/3, despatched 30 April 2004

202.	*Waste Management (Preliminary Objection)*	*Waste Management Incorporated v Mexico*, Decision on Mexico's Preliminary Objection Concerning the Previous Proceedings, ICSID Case No. ARB(AF)/00/3, 26 June 2002
203.	*Webcor*	*Webcor ITP Limited and Grand Marche De Libreville v La Commune De Libreville and La Republique Gabonaise*, Final Award, ICC Case No. 21458/MCP/DDA, 21 June 2018, International Chamber of Commerce
204.	*Wena Hotels (Annulment)*	*Wena Hotels Limited v Egypt*, Decision on Annulment Application, ICSID Case No. ARB/98/4, 28 January 2002, despatched 5 February 2002
205.	*Wena Hotels (Award)*	*Wena Hotels Limited v Egypt*, Award, ICSID Case No. ARB/98/4, 8 December 2000
206.	*Wirtgen*	*Wirtgen and ors v Czech Republic*, Final Award, PCA Case No. 2014-03, 11 October 2017, Permanent Court of Arbitration
207.	*World Duty Free*	*World Duty Free Company Limited v Kenya*, Award, ICSID Case No. ARB/00/7, 25 September 2006, despatched 4 October 2006
208.	*Yukos Universal Limited (Award)*	*Yukos Universal Limited v Russian Federation*, Final Award, PCA Case No. AA 227, 18 July 2014, Permanent Court of Arbitration
209.	*Yukos Universal Limited (Jurisdiction)*	*Yukos Universal Limited v Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227, 30 November 2009, Permanent Court of Arbitration

Other arbitrations

1.	*Chagos Marine Protected Area Arbitration*	*Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom)*, Award, PCA Case No. 2011-03, 18 March 2015, Permanent Court of Arbitration
2.	*Fur Seal Arbitration*	*Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals* (1893) 28 RIAA 263, 15 August 1893
3.	*ICC Case No. 1110*	ICC Award No. 1110 of 1963 by Gunnar Lagergren, YCA 1996, at 47 et seq.
4.	*Kunkel*	*Kunkel et al. v Polish State*, Award, 2 December 1925, Germano-Polish Mixed Arbitral Tribunal
5.	*Orinoco Steamship Company*	*The Orinoco Steamship Company case (United States of America/Venezuela)*, Award, PCA Case No. 1909-02, 25 October 1910, Permanent Court of Arbitration
6.	*Pious Fund Arbitration*	*The Pious Fund of the Californias (The United States of America/The United Mexican States)*, Award, PCA Case No. 1902-01, 14 October 1902, Permanent Court of Arbitration
7.	*Railway Land Arbitration*	*Railway Land Arbitration (Malaysia/Singapore)*, Award, PCA Case No. 2012-01, 30 October 2014, Permanent Court of Arbitration
8.	*Shufeldt*	*Shufeldt Claim (Guatemala v United States of America)* (1930) 2 RIAA 1079, 24 July 1930

9.	*Tinoco Concessions Arbitration*	*Arbitration between Great Britain and Costa Rica* [1924] 18 AJIL 147, 18 October 1923
10.	*Trail Smelter Case*	*Trail Smelter Case (United States v Canada)* (1941) 3 RIAA 1905, 11 March 1941

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1.	*Combe*	*Combe v Combe* [1951] 2 KB 215
2.	*Gleeson v J Wippell & Co Ltd*	*Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510
3.	*National Iranian Oil Company (NIOC) v Crescent Petroleum Company International Ltd (CP)*	*National Iranian Oil Company (NIOC) v Crescent Petroleum Company International Ltd (CP) & Crescent Gas Corporation Ltd (CG)* [2016] EWHC 1900 (Comm)
4.	*Province of Balochistan v Tethyan Copper Company*	*Province of Balochistan v Tethyan Copper Company Pty Ltd* [2021] EWHC 1884 (Comm)
5.	*Republic of Ecuador v. John A. Connor*	*Republic of Ecuador v. John A. Connor et. al.*, 2013 W1 539011 (C.A.5 (Tex.)) (5th Cir. 13 February 2013), RLA-432
6.	*Southern Pacific Railroad Co v United States*	*Southern Pacific Railroad Co v United States*, 168 U.S. 1, 48–49 (1897)
7.	*Waltons Stores*	*Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7

Treaties and declarations

1.	Australia-Indonesia BIT	Agreement between the Government of Australia and the Government of the Republic of Indonesia concerning the Promotion and Protection of Investments, 17 November 1992 (entry into force: 29 July 1993), [1993] ATS 19, 1770 UNTS 301
2.	Austria-Belize BIT	Agreement between the Government of the Republic of Austria and the Government of Belize for the Promotion and Protection of Investments, 17 July 2001 (entry into force: 1 February 2002)
3.	Austria-Croatia BIT	Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, 19 February 1997 (entry into force: 1 November 1999), BGBL No III 180/1999
4.	Belgium-Luxembourg Economic Union-Colombia BIT	Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and the Republic of Colombia, on the other hand, on the Reciprocal Promotion and Protection of Investments, 4 February 2009
5.	Belgium-Luxembourg Eco-	Agreement between the Belgo-Luxembourg Economic Union and the Government of Malaysia on Encouragement and

	nomic Union-Malaysia BIT	Reciprocal Protection of Investments, 22 November 1979 (entry into force: 8 February 1982), 1284 UNTS 121 (1991)
6.	Bulgaria-Cyprus BIT	Agreement between the Government of the People's Republic of Bulgaria and the Government of the Republic of Cyprus on Mutual Encouragement and Protection of Investments, 12 November 1987 (entry into force: 18 May 1988)
7.	Canada-Slovakia BIT	Agreement between the Government of Canada and the Slovak Republic for the Promotion and Protection of Investments, 20 July 2010 (entry into force: 14 March 2012)
8.	Chile-Malaysia BIT	Agreement between the Government of the Republic of Chile and the Government of Malaysia concerning the Encouragement and Promotion and Reciprocal Protection of Investments, 11 November 1992 (entry into force: 4 August 1995)
9.	China-Lebanon BIT	Agreement between the Government of the People's Republic of China and the Government of the Lebanese Republic concerning the Encouragement and Reciprocal Protection of Investments, 13 June 1996 (entry into force: 10 July 1997), MOFCOM, Collection of International Investment Treaties (Jingguan Jiaoyu Press 1998) 1077-1091
10.	Claims Settlement Declaration	Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 19 January 1981
11.	Colombia-India BIT	Agreement for the Promotion and Protection of Investment Between the Republic of Colombia and the Republic of India, 10 November 2009 (entry into force: 3 July 2013)
12.	Convention on the Continental Shelf	Convention on the Continental Shelf 499 UNTS 311 (entry into force: 10 June 1964)
13.	CPTPP	Comprehensive and Progressive Agreement for Trans-Pacific Partnership, 8 March 2018 (entry into force: 30 December 2018)
14.	Czechoslovakia-Germany BIT	Agreement between the Federal Republic of Germany and the Czech and Slovak Federal Republic on the Promotion and Reciprocal Protection of Investments, 2 October 1990 (entry into force: 2 August 1992), BGBl II 1992, 294
15.	Czech Republic-United Arab Emirates BIT	Agreement between the Government of the Czech Republic and the Government of the United Arab Emirates for the Promotion and Protection of Investments, 23 November 1994 (entry into force: 25 December 1995), Act No 69/1996
16.	ECHR	European Convention on Human Rights, 4 November 1950 (entry into force: 3 September 1953)
17.	Egypt-Mongolia BIT	The Agreement on the Promotion and Protection of Investments between the Government of the Arab Republic of Egypt and the Government of Mongolia, 27 April 2004 (entry into force: 25 January 2005)
18.	Energy Charter Treaty, ECT	Energy Charter Treaty, 17 December 1994 (entry into force: 16 April 1998), 2080 UNTS 100
19.	Ethiopia-Libya BIT	Agreement between the Government of the Federal Demo-

		cratic Republic of Ethiopia and the Great Socialist People's Libyan Arab Jamahiriya concerning the Encouragement and Reciprocal Protection of Investments, 27 January 2004 (entry into force: 25 June 2004)
20.	European Convention on International Commercial Arbitration	European Convention on International Commercial Arbitration 484 UNTS 364 (entry into force: 25 January 1965)
21.	France-Argentina BIT	Agreement between the Government of the French Republic and the Government of the Republic of Argentina on the Encouragement and Reciprocal Protection of Investments, 3 July 1991 (entry into force: 3 March 1993), 1728 UNTS 281
22.	Germany-Egypt BIT	Agreement between the Federal Republic of Germany and the Arab Republic of Egypt concerning the Encouragement and Reciprocal Protection of Investments, 16 June 2005 (entry into force: 22 November 2009), BGBl II 2007, 94
23.	Germany-Philippines-BIT	Agreement between the Federal Republic of Germany and the Republic of the Philippines on the Promotion and Reciprocal Protection of Investments, 18 April 1997 (entry into force: 2 February 2000), BGBl II 1998, 1448
24.	Greece-Albania BIT	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments, 1 August 1991 (entry into force: 4 January 1995), A 121 Greek Government Gazette 2307
25.	Greece-Georgia BIT	Agreement between the Government of the Hellenic Republic and the Government of the Republic of Georgia on the Promotion and Reciprocal Protection of Investments, 9 November 1994 (entry into force: 3 August 1996), A 35 Greek Government Gazette 368
26.	Greece-Jordan BIT	Agreement between the Government of the Hellenic Republic and the Hashemite Kingdom of Jordan on the Promotion and Reciprocal Protection of Investments, 21 December 2005 (entry into force: 8 February 2007), A 150 Greek Government Gazette 1607
27.	Hungary-Chile BIT	Agreement between the Republic of Hungary and the Republic of Chile on the Reciprocal Promotion and Protection of Investments, 10 March 1997
28.	ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965 (entry into force: 14 October 1966), UNTS Reg No 8359
29.	Iran-Venezuela BIT	Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Islamic Republic of Iran and the Government of the Bolivarian Republic of Venezuela, 11 March 2005 (entry into force: 7 June 2006)
30.	Israel-Uzbekistan BIT	Agreement between the Government of the State of Israel and the Government of the Republic of Uzbekistan for the Promotion and Reciprocal Protection of Investments, 4 July 1994 (entry into force: 18 February 1997)
31.	Italy-Argentina	Agreement between the Republic of Argentina and the Ital-

	BIT	ian Republic on the Promotion and Protection of Investments, 20 May 1990 (entry into force: 14 October 1993)
32.	Italy-Egypt BIT	Agreement for the Promotion of Investments between the Italian Republic and the Arab Republic of Egypt, 2 March 1989 (entry into force: 1 May 1994), G.U. 26.3.94 n.71 s.o. n.52
33.	Lithuania-Latvia BIT	Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Latvia on the Promotion and Protection of Investments, 7 February 1996 (entry into force: 23 July 1996)
34.	NAFTA	North American Free Trade Agreement (entry into force: 1 January 1994)
35.	Netherlands-Chile BIT	Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Chile, 30 November 1998, Trb. 1999, 7
36.	Netherlands-Pakistan BIT	Agreement on Economic Cooperation and Protection of Investments between the Kingdom of Netherlands and Islamic Republic of Pakistan, 4 October 1988 (entry into force: 1 October 1989)
37.	Oman-Yemen BIT	Agreement for the Reciprocal Promotion and Protection of Investments between the Government of the Sultanate of Oman and the Government of the Republic of Yemen, 20 September 1998 (entry into force: 1 April 2000)
38.	Poland-Latvia BIT	Agreement between the Government of the Republic of Poland and the Government of the Republic of Latvia on the Reciprocal Promotion and Protection of Investments, 26 April 1993 (entry into force: 19 July 1993), Dz. U. 1993, Nr 122, poz. 549
39.	Slovakia-Czech Republic BIT (1992)	Agreement between Slovakia and the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments, 23 November 1992
40.	South Africa-Mozambique BIT	Agreement between the Government of the Republic of South Africa and the Government of the Republic of Mozambique for the Promotion and Reciprocal Protection of Investments, 6 May 1997
41.	South Korea-El Salvador BIT	Agreement between the Government of the Republic of Korea and the Government of the Republic of El Salvador for the Reciprocal Promotion and Protection of Investments, 6 July 1998 (entry into force: 25 May 2002)
42.	South Korea-Guyana BIT	Agreement between the Government of the Republic of Korea and the Government of the Cooperative Republic of Guyana for the Promotion and Protection of Investments, 31 July 2006 (entry into force: 20 August 2006)
43.	Spain-Namibia BIT	Agreement between the Kingdom of Spain and the Republic of Namibia on the Promotion and Reciprocal Protection of Investments, 21 February 2003 (entry into force: 28 June 2004), BOE 2004 Nº 199 29308
44.	Sri Lanka-Egypt BIT	Agreement on the Promotion and Protection of Reciprocal Investments between the Government of the Democratic Socialist Republic of Sri Lanka and the Government of the

		Arab Republic of Egypt, 11 March 1996 (entry into force: 10 March 1998)
45.	Switzerland-Pakistan BIT	Agreement between the Swiss Confederation and the Islamic Republic of Pakistan concerning the Promotion and Reciprocal Protection of Investments, 11 July 1995 (entry into force: 6 May 1996), SR 0.975.262.3
46.	Switzerland-Philippines BIT	Agreement between the Swiss Confederation and the Republic of the Philippines concerning the Promotion and Reciprocal Protection of Investments, 31 March 1997 (entry into force: 23 April 1999), SR 0.975.264.5
47.	Switzerland-Zimbabwe BIT	Agreement between the Swiss Confederation and the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments, 15 August 1996 (entry into force: 9 February 2001), SR 0.975.282.7
48.	TFEU	Treaty on the Functioning of the European Union, 25 March 1957 (entry into force: 1 January 1958), consolidated text: Official Journal C 326 , 26/10/2012 P. 0001 - 0390
49.	TPP	Trans-Pacific Partnership, 4 February 2016
50.	Turkey-Pakistan BIT	Agreement between the Islamic Republic of Pakistan and the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments, 16 March 1995 (entry into force: 3 September 1997)
51.	Turkey-Philippines BIT	Agreement between the Republic of Turkey and the Republic of the Philippines concerning the Reciprocal Promotion and Protection of Investments, 22 February 1999 (entry into force: 17 February 2006), Turkish Official Gazette 25883
52.	Turkey-Romania BIT	Agreement between the Government of the Republic of Turkey and the Government of Romania on the Reciprocal Promotion and Protection of Investments, 3 March 2008 (entry into force: 8 July 2010), UNTS Reg No 48197, Turkish Official Gazette 27630
53.	Ukraine-Lithuania BIT	Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the Promotion and Reciprocal Protection of Investments, 8 February 1994 (entry into force: 6 March 1995)
54.	UN Charter	Charter of the United Nations (done at San Francisco, United States, on 26 June 1945) 1 UNTS XVI (entry into force: 24 October 1945)
55.	UNCLOS	UN General Assembly, Convention on the Law of the Sea, 10 December 1982 (entry into force: 16 November 1994)
56.	United Arab Emirates-Romania BIT	Agreement between the Government of the United Arab Emirates and the Government of Romania on the Promotion and Protection of Investments, 11 April 1993 (entry into force: 7 April 1996)
57.	United Arab Emirates-Ukraine BIT	Agreement between the Government of the United Arab Emirates and the Government of Ukraine on the Promotion and Protection of Investments, 21 January 2003 (entry into force: 28 February 2004)
58.	United Kingdom-Indonesia BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of

		the Republic of Indonesia for the Promotion and Protection of Investments, 27 April 1975 (entry into force: 24 March 1977), UKTS 62 (1977), 1074 UNTS 196, Cmnd 6858
59.	United Kingdom-Kenya BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Kenya for the Promotion and Protection of Investments, 13 September 1999 (entry into force: 13 September 1999), UKTS 8 (2000), Cm 4597
60.	United Kingdom-Venezuela BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Venezuela for the Promotion and Protection of Investments, 15 March 1995 (entry into force: 1 August 1996), UKTS 83 (1996), Cm 3423, 1957 UNTS 75, UNTS Reg No I-33501
61.	United Nations Charter	United Nations, Charter of the United Nations, 26 June 1945 (entry into force: 24 October 1945), 1 UNTS XVI, available at: https://bit.ly/2Yyatas
62.	United Nations Convention against Corruption	United Nations Convention against Corruption, 31 October 2003 (entry into force: 14 December 2005), 2349 UNTS 41
63.	United States-Argentina BIT	Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, 14 November 1991 (entry into force: 20 October 1994), S Treaty Doc No 103-2 (1993)
64.	United States-Ecuador BIT	Treaty between the United States of America and the Republic of Ecuador Concerning the Encouragement and Reciprocal Protection of Investment, 27 August 1993 (entry into force: 22 April 1997), S Treaty Doc No 103-15 (1993)
65.	United States-Egypt BIT	Treaty Between the United States of America and the Arab Republic of Egypt Concerning the Reciprocal Encouragement and Protection of Investments, 11 March 1986 (entry into force: 27 June 1992), S Treaty Doc No 99-24 (1986)
66.	United States-Grenada BIT	Treaty between the United States of America and Grenada Concerning the Reciprocal Encouragement and Protection of Investment, 2 May 1986 (entry into force: 3 March 1989), S Treaty Doc No 99-25 (1986)
67.	United States-Kazakhstan BIT	Treaty between the United States of America and the Republic of Kazakhstan Concerning the Reciprocal Encouragement and Protection of Investment, 19 May 1992 (entry into force: 12 January 1994), S Treaty Doc No 103-12 (1993)
68.	USMCA	United States–Mexico–Canada Agreement, 30 September 2018 (entry into force: 2 July 2020)
69.	VCLT	Vienna Convention on the Law of Treaties, 23 May 1969 (entry into force: 27 January 1980), 1155 UNTS 331
70.	Zimbabwe-Germany BIT	Agreement between the Republic of Zimbabwe and the Federal Republic of Germany concerning the Encouragement and Reciprocal Protection of Investments, 29 September 1995 (entry into force: 14 April 2000), BGBl II 1997, 1839

Other abbreviations

1.	DARSIWA	Draft Articles on Responsibility of States for Internationally Wrongful Acts
2.	BIT	Bilateral investment treaty
3.	CJEU	Court of Justice of the European Union
4.	DRC	Democratic Republic of the Congo
5.	FET	Fair and equitable treatment
6.	GPAUD	Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations
7.	ICC	International Chamber of Commerce
8.	ICJ	International Court of Justice
9.	ICJ Statute	Statute of the International Court of Justice, 26 June 1945
10.	ICSID	International Centre for Settlement of Investment Disputes
11.	ILA	International Law Association
12.	ILC	International Law Commission
13.	ITLOS	International Tribunal for the Law of the Sea
14.	LCIA	London Court of International Arbitration
15.	MIT	Multilateral investment treaty
16.	PCIJ	Permanent Court of International Justice
17.	PCIJ Statute	Statute of the Permanent Court of International Justice
18.	SCC	Stockholm Chamber of Commerce
19.	UNCITRAL	United Nations Commission on International Trade Law

INTRODUCTION

Subject of the dissertation

To fulfil their social and commercial functions, human relations must be grounded in mutual trust. Reliance upon declarations, promises and representations made between agents shall constitute a vital element of a properly functioning economic system. A liberal free market economy must be underpinned by an assumption that not only shall contracts freely entered into by market participants be performed, but also that unilateral representations, declarations and promises shall be kept. Representations entail statements expressed orally or in writing, and may also consist of conduct. Expectations one may have in respect of a representation made can only amplify in the face of expensive foreign investments that businesses may decide to make, often in unfamiliar economic, social and legal systems. A contentious situation may arise when the host state retracts a previous representation or intends to change its established course of conduct.

One legal instrument capable of preventing the state from changing its position is estoppel, defined by *Black's Law Dictionary* as a principle under which a party shall prevented by its own acts from claiming a right to detriment of other party who was entitled to rely on such conduct and has acted accordingly.[1] The legal effect of estoppel, termed "preclusion", is the deprivation of one party of the right to change its legally relevant position so that, as a consequence, the party barred by estoppel does not consent to the state of affairs brought about by the operation of estoppel, but instead it renounces its right to refuse to grant such a consent.[2] On another account, the representor is legally compelled to accept that the represented state of affairs were true, even if that does not reflect actual empirical reality.[3] Estoppel can attach to promises where the promisor intended to bind itself as well as to informal statements of fact and reflections of one's understanding of the law.

The subject of the dissertation, therefore, is the issue of estoppel understood as a general principle of law or general principle of international law in the specialized regime of international investment law.

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[1] "Estoppel" (in:) *Black's Law Dictionary*, West Publishing Company 1990. This formulation, heavily influenced by estoppel's domestic versions observable in American and English law, will, within the specific context of international law, be reclassified as the strict concept of estoppel. See further in Section 1.2.
[2] H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989: Part One", 60(1) British Yearbook of International Law 1989, p. 29.
[3] "Estoppel" (in:) *Black's Law Dictionary*, see note 1.

Originally a domestic law doctrine of equitable origins, which is traced back to English law, it has been invoked in the international context in two distinct forms: (1) generally, as an instrument of prohibition of inconsistent behaviour where it is sufficient to prove an attempt to deny a previous clear, consistent, unconditional and unambiguous statement or representation (broad view / broad concept / estoppel *sensu largo*); (2) in a more specialist sense, which makes the principle relational – on top of the requirements of the broad view, a claimant must show that the representor's sudden change of position generated a benefit for the same or a detriment for the representee (strict or narrow view / concept / estoppel *sensu stricto*). Attempts to backtrack or alter one's firm position represented to another party constitute an abuse of trust which estoppel helps to remedy. Understood in this way, estoppel is a conceptual device which balances the rights and obligations of parties engaging in dealings by resorting to the ideal of corrective justice. Estoppel performs the following functions within international investment law: (1) gap filling, i.e. estoppel can provide guidance where none of the other formal sources of international law (treaty and custom) furnish an answer, with a view to avoiding a situation of *non liquet*; (2) interpretation function, i.e. estoppel can aid in making sense of ambiguous or uncertain treaty language and determining the rights and duties of states and investors, particularly as against the background of the legitimate expectations prong of the fair and equitable treatment (FET) standard.

The scope of estoppel in international investment law covers representations which are liable to affect rights of investors protected by standards guaranteed in multilateral and bilateral investment treaties, the jurisdiction of international arbitral tribunals tasked with resolving investment disputes between investors and host states, admissibility of claims as well as various procedural questions that shall emerge during the course of arbitral proceedings proper (typically revolving around the procedural rights of parties).

Justification for choice of subject and research problem

The significance of estoppel within international investment law is borne out by the prevalence of references to estoppel, primarily in passing, in more than two hundred published arbitration awards and decisions. Instances of express application are also discernible, albeit rare and radically inconsistent, and it is apparent that there is general consensus among arbitrators that estoppel can serve as a basis for conclusions concerning the rights and obligations of subjects of international investment law. Despite the relatively high incidence of the principle in arbitral reasoning, tribunals have failed to delve into the discrepancies in the theo-

retical understanding and practical application of estoppel, at times conflating the broad and the strict views, or overlooking this differentiation altogether.

There are tangible consequences of such a haphazard approach – notably, the success rate of estoppel pleas has been extraordinarily low, at least partially due to the lack of consistency and rigour in, first, identifying, and, second, applying, the estoppel test. In practice, this could mean, for example, that a party (particularly the investor who often is at a disadvantaged bargaining position as against the host state) is deprived of legal protection where a previously made declaration or representation, one which prompted the investor to act in reliance thereupon, as a result of which a benefit accrued for the host state or a detriment was suffered by the investor, is gone back on. Where representations or conduct attach to the jurisdiction of a tribunal (*ratione materiae*, *ratione personae*, *ratione voluntatis* or *ratione temporis*), a failure to grant an estoppel claim under circumstances where an attempt to modify or deny the same is in some way unconscionable may strip a potential claimant from a possibility of having their grievances resolved altogether. More generally, arguments in favour of the application of a uniform test of estoppel fit neatly among appeals for a greater degree of consistency of outcomes in investment arbitration, often put forward as a foremost priority for the system going forward.[4]

The dissertation attempts to address this issue by offering a comprehensive overview of the principles which govern the operation of estoppel, with special emphasis on its practical ramifications as noted and applied by arbitral tribunals. The research problem can therefore be stated as follows: estoppel, albeit a principle well entrenched in general international law, has not been uniformly and consistently understood, conceptualized, interpreted and applied by arbitral tribunals seized of investor-host state disputes. For the avoidance of doubt, the substantive scope of the discussion shall at all times be limited to estoppel in international law, therefore those decisions which applied estoppel within the meaning of domestic law are largely irrelevant to my inquiry.[5]

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[4] See a 2018 report by the International Bar Association: International Bar Association Arbitration Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration*, 2018, available at: https://bit.ly/3xnrqo9 (accessed: 24.08.2021). See also: N. Butler, "Possible Improvements to the Framework of International Investment Arbitration", 14(4) Journal of World Investment & Trade 2013, p. 618 et seq. On wider inconsistency in the context of general principles see, *inter alia*: K. Diel-Gligor, *Towards Consistency in International Investment Jurisprudence. A Preliminary Ruling System for ICSID Arbitration*, Brill/Nijhoff 2017, pp. 177-178, 287-288; B. Gorence, "The Constructive Role of General Principles in International Arbitration", 17(3) The Law & Practice of International Courts and Tribunals 2018, pp. 481-486.

[5] Therefore, the following cases are not of interest: *Tanzania Electric Supply*, paras 98-108 (which scrutinized estoppel under the laws of Tanzania), *Dunkeld International*, para 222 (estoppel under the laws of Belize).

Estoppel as a precept of general international law has received a fair degree of doctrinal analysis,[6] a product of several ICJ decisions where the Court investigated the possibilities of applying estoppel, primarily in the sphere of territorial disputes and delimitation of boundaries. However, no comprehensive and structured inquiry has been made into estoppel specifically within international investment law. As a distinct focus, some of the questions signalled and considered herein have been analysed or, at a minimum, alluded to by Kulick in an incisive 2016 paper published in the European Journal of International Law.[7] The author offered a quantitative and qualitative analysis of investment arbitral case law, shedding light, *inter alia*, on the inconsistency of holdings in terms of expressing preference for any one of the two major concepts of estoppel. In addition, estoppel has been mentioned in passing by scholars who have discussed the procedural and substantive impact of general principles of law within international investment arbitration. Most of these accounts are, however, either too general or too specific. The first category consists of compendiums and works of an encyclopaedic nature. Of particular note in this connection is Dumberry's *A Guide to General Principles of Law in International Investment Arbitration*, published by Oxford University Press in 2020, which devotes a section to estoppel. In the second grouping one may find writings which attack estoppel from a utilitarian or otherwise incidental angle. A notable example shall be numerous papers which suggest estoppel as a suitable device to preclude a host state from raising objections to the jurisdiction of an arbitral tribunal based on the alleged procurement of the investment through corruption where the host state participated in it or otherwise condoned it or complied with it. These publications rarely discuss the specific parameters and

[6] Works on the subject include: A. Martin, *L'estoppel en droit international public: précédé d'un aperçu de la théorie de l'estoppel en droit anglaise*, Pedone Paris 1979; R. Kolb, *La bonne foi en droit international public: contribution à l'étude des principes généraux de droit*, Presses Universitaires de France 2000; D.W. Bowett, "Estoppel before International Tribunals and Its Relation to Acquiescence", 33 British Yearbook of International Law 1957, pp. 176-202; I.C. MacGibbon, "Estoppel in International Law", 7(3) International and Comparative Law Quarterly 1958, pp. 468-513; I. Sinclair, "Estoppel and Acquiescence" (in:) V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings*, Oxford University Press 1996, pp. 104-120; M.L. Wagner, "Jurisdiction by Estoppel in the International Court of Justice", 74(5) California Law Review 1986, pp. 1777-1804; C. Dominicé, "A Propos du principe de l'Estoppel en Droit des Gens" (in:) *Receuil d'Etudes de Droit International en Hommage a' Paul Guggenheim*, Institut universitaire de hautes études internationales 1968, pp. 327-365; J. Wass, "Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals", 86(1) British Yearbook of International Law 2015, pp. 155-195; N.S.M. Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, 2(8) Boundary & Territory Briefings 2000; P.C.W. Chan, "Acquiescence/Estoppel in International Boundaries: *Temple of Preah Vihear* Revisited", 3(2) Chinese Journal of International Law 2004, pp. 421-439; K. Pan, "A Re-Examination of Estoppel in International Jurisprudence", 16(4) Chinese Journal of International Law 2017, pp. 751-786. For Polish international law doctrine on estoppel, see: W. Czapliński, „Pojęcie estoppel w prawie międzynarodowym publicznym", 9 Sprawy Międzynarodowe 1984, pp. 119-126; A. Kozłowski, *Estoppel jako ogólna zasada prawa międzynarodowego*, Wydawnictwo Uniwersytetu Wrocławskiego 2009.

[7] A. Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel in the Jurisprudence of International Investment Arbitration Tribunals", 27(1) European Journal of International Law 2016, pp. 107-128.

implications of estoppel but instead take them for granted, narrowing the focus to the effect of preclusion. This and other comparably narrow perspectives leave a doctrinal gap which the dissertation aims to address by:

- expounding upon the axiological rationalizations of estoppel, with particular emphasis on the principle of good faith;
- classifying estoppel within the system of sources of international law;
- drawing parallels between the understanding of estoppel in general international law authorities and its arbitral applications in international investment law;
- offering an exposition of the principle in general international law from a historical perspective, outlining the watershed moment when the strict view of estoppel began to become prevalent in the jurisprudence of the ICJ;
- identifying legal bases upon which estoppel can be and is invoked by investment arbitral tribunals (deciding cases in accordance with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or otherwise) to draw conclusions concerning individual rights and obligations;
- fleshing out the requirements of the strict view of estoppel as interpreted and applied by investment arbitral tribunals;
- analysing estoppel against the constitutive elements of jurisdiction of an arbitral investment tribunal: three pre-conditions stipulated in Article 25 of the ICSID Convention (consent to arbitrate (jurisdiction *ratione voluntatis*), personal jurisdiction (jurisdiction *ratione personae*) and substantive jurisdiction (jurisdiction *ratione materiae*)) along with jurisdiction *ratione temporis*;
- identifying the boundaries of application of estoppel in respect of issues of arbitral jurisdiction;
- investigating the scope of influence of estoppel arguments to defeat objections to jurisdictions and admissibility lodged by host states which attack the legality of the investment, i.e. conformity of the investment with domestic laws of the host state, particularly where the host state is partially to blame for the investment's illegality or where the disputed illegality is two-sided, the most notable example being instances of corruption in procuring the underlying investment;
- reconceptualizing issue estoppel, a doctrine traditionally identified as a sub-species of res judicata, within the framework of the strict view of estoppel;

- exposing the role of estoppel in the context of defences to liability for breach of standards of investor and investment protection, as a means of acquisition of substantive rights and to enforce contractual stability commitments;
- sketching the inter-relations between estoppel and legitimate expectations within the fair and equitable treatment (FET) standard of investor (investment) protection.

Underlying thesis and research hypotheses

The underlying thesis of the dissertation purports to address the doctrinal gap noted above and can be summarized as follows: estoppel is a universal concept within international investment law which is capable of being applied to influence the shape and legal effect of many of its institutions, notably arbitral procedure, jurisdiction, re-arbitration of issues already decided, and substantive rights and obligations. Complementarily, these gap-filling functions are best performed by the strict concept of estoppel. Estoppel *sensu stricto* will therefore be argued to have a pronounced, yet properly delimited, role in international investment law, at a minimum in areas which are not codified in treaty nor derived from custom. Common acceptance of this approach would greatly conduce to the improved consistency of outcomes in international investment arbitration. On this account, the broad view should be subsumed under the general heading of good faith and utilized in adjudication under the guise of any one of the unilateral act doctrines. The primary objective of the dissertation, therefore, is to advocate a uniform (universal) concept of estoppel, represented by the strict view as analysed herein,[8] that could be (and in many cases already is) workable and applicable in most contexts present in the international investment law discourse and practice.

The following hypotheses will help verify the veracity of the thesis:

- the requirements of the strict concept, as established in the case law of the International Court of Justice and other courts and tribunals seized of disputes governed by international law, are specific enough to be applied both flexibly and consistently across a wide array of cases encompassing varying factual scenarios whilst achieving a sufficient degree of finality and certainty;
- the key objective of estoppel in international investment law is protection of detrimental reliance;

[8] One commentator has warned that "[t]here is no denying that an excessively broad notion of estoppel may result in an undesirable general doctrine of non-contradiction". See: L.C. Curzi, *General Principles for Business and Human Rights in International Law*, Brill/Nijhoff 2020, pp. 264-265.

- the functions of the broad view of estoppel should in practice, for most intents and purposes, be subsumed under the doctrine of unilateral acts, notably consent, recognition, unilateral state promises, waiver and acquiescence, whilst the strict view should stand as a fully autonomous doctrine;
- estoppel can assume a powerful role in balancing the relative bargaining powers of states and investors, particularly in connection with objections to jurisdiction and ensuring access to arbitration;
- a uniform strict concept of estoppel encompassing issue preclusion (current issue estoppel) could conduce towards consistency of outcomes in international investment arbitration;
- estoppel can have wide application in modifying, creating and denying substantive rights;
- estoppel and protection of legitimate expectations under the FET standard are to be distinguished on several grounds as means of affording protection against prejudicial conduct of subjects of international investment law.

Research methods

The dissertation is most fittingly situated within the doctrinal (dogmatic) school of research methods. Accordingly, the analysis will be angled towards exerting quality control over arbitral reasoning as it is manifested in a body of case law, and addressing contested matters on the exact normative scope of legal materials.[9] One commentator has distinguished two layers of dogmatics. The first layer entails and necessitates the processing of all relevant or available legal material. Insights flowing from this inquiry shall then be used to formulate, conceptually and systematically, value judgements and assessments concerning the state of the law.[10] Proceeding in this manner, I shall draw heavily from a textual interpretation of relevant legal sources, particularly bilateral and multilateral investment treaties, however, considering the nature of general principles of law and their indeterminate origin, recourse shall also be had to ancillary materials from where guidance shall be gleaned as to the content and implications of estoppel. These notably include reports by UN bodies (such as the International Law Commission), elucidations found in judicial and arbitral jurisprudence within general international law, investment arbitration case law, positions of states and investors adopted in

[9] M. Bodig, "Legal Doctrinal Scholarship and Interdisciplinary Engagement", 2 Erasmus Law Review 2015, pp. 45-46.
[10] R. Narits, "Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts", XII Juridica International 2007, p. 19.

the course of investment arbitration proceedings, and academic writings (doctrine).[11] Within this landscape, arbitral case law will form the nucleus of my analysis, the reason being that it is principally through arbitral determinations that estoppel has hitherto been introduced into international investment law. The principle has generally not been codified in treaty, and owes its largely nebulous character to inconsistent invocations in arbitral awards and decisions as well as pleadings submitted by parties to arbitration proceedings. In addition to the above, elements of comparative legal research shall also be prominent within the context of spelling out the character of estoppel as a source of international law.

As regards the temporal purview of the research, of interest shall be material encompassing the development of international investment law from the 1970s[12] until the present day. In addition, prior arbitral and judicial decisions within the field of general international law will be called upon to buttress a number of opening arguments. Observations made in the text are a product of critical analysis and constitute a synthesis of those findings regarding estoppel that, on the one hand, further the objectives embodied in the research hypotheses, and, on the other, meticulously and comprehensively illuminate the intricacies of the principle.

The bulk of decisions subjected to review were issued by ICSID tribunals, however regard shall also be had to the pronouncements of ad hoc tribunals constituted and working under the UNCITRAL Arbitration Rules,[13] tribunals operating under the auspices of the Arbitration Institute of the SCC and, if applicable, decisions issued by other bodies whose output is understood to contribute to the body of international investment law (including the LCIA and, to the extent that investor-state disputes are concerned, the ICC). As alluded to above when discussing my approach to estoppel under general international law, reference will be made to determinations made in inter-state disputes, that is ICJ judgments (and separate and dissenting opinions within those, as necessary), judgments of the PCIJ, the ICJ's predecessor, the ITLOS, and other relevant arbitration awards, primarily ad hoc arbitrations which occurred in the early days of the development of international arbitration.

A number of difficulties the research faced shall be discussed. To construct a cogent argument concerning the principle of estoppel within international investment law, one fundamental hurdle that has had to be overcome is that arbitral tribunals notoriously fail to identi-

[11] Within clearly defined bounds, "judicial decisions and the teachings of the most highly qualified publicists of the various nations" can be used, in accordance with Article 38(1)(d) of the ICJ Statute, as subsidiary means for the determination of rules of law.
[12] The first decision under the auspices of ICSID was issued in 1977. See: *Adriano Gardella*.
[13] United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, 2014, available at: https://bit.ly/2PpGZdB (accessed: 24.08.2021).

fy the type of concept they purport to apply. One discernible tendency, with rather rare exceptions where a panel has raised an estoppel argument *proprio motu*, is that arbitrators follow doctrinal propositions made by parties to the proceedings, by reference either to their pleadings or expert opinions, often penned by some of the foremost academic authorities in the field. This is perhaps unsurprising considering the fact that, typically, at least two out of three members of an arbitral tribunal are picked by the parties themselves (sometimes all three), however arbitrators are under no obligation to adopt the meanings and understandings of estoppel proffered by the parties. Parties are naturally interested in prevailing in an investment arbitration and, since estoppel can be usefully employed with a view to precluding an opponent from advancing an argument, sometimes a *prima facie* convincing one,[14] it will be had recourse to in a manner that suits a given party's immediate arbitral needs. On occasion, tribunals conclude with relief that since a given issue under their scrutiny appears to have been definitively decided by reference to other principles of law (or that the set of facts does not *prima facie* warrant a consideration of an estoppel plea), no need arises to consider estoppel-based claims.[15]

A related difficulty, which could also be traced back to a combination of, on the one hand, opportunism evinced in the conduct of the parties and, on the other, piecemeal treatment of estoppel by arbitral tribunals, is the fact that estoppel is frequently raised by parties to a dispute yet is subsequently omitted in the tribunal's reasoning.[16] Arguably, this does not exacerbate the problem related to the desperate want of consistency in the area as a failure to address an estoppel claim amounts to silence which does not add to the amount of material one has to grapple with to proffer a structurally sound conception of estoppel. Notwithstanding, it could mean a number of things. Perhaps arbitral tribunals perceive certain estoppel claims as frivolous and raised as a last resort where all other legal instruments have failed. A perusal of transcripts from hearings and pleadings in many arbitral proceedings lends some credence to this hypothesis – it is on occasion the case that counsel for either the investor or the host state calls upon estoppel in a fleeting fashion, even as an add-on to a seemingly unrelated argu-

[14] Or even a potentially decisive one, such as an objection to jurisdiction, which is liable to defeat an entire claim.

[15] See e.g.: *Urbaser (Jurisdiction)*, para 129 (consideration of estoppel as a possible objection of jurisdiction where under the applicable BIT the investor had to submit the dispute first to a local court of the host state for 18 months before submitting it to arbitration; the tribunal decided the issue based on an interpretation of the object and purpose of the provision and scathingly referred to estoppel and other principles derived from good faith as "misguided theoretical constructs"); *Aguas del Tunari*, para 191; *Siemens*, para 306; *Kim*, para 539; *Salini Impregilo*, para 150; *Inmaris Perestroika*, para 140.

[16] See e.g.: *Casinos Austria International* (estoppel raised by Respondent); *Flughafen Zürich* (estoppel raised by Claimant); *Al-Warraq* (estoppel advanced by both parties); *Total SA (Jurisdiction)* (estoppel advanced by both parties); *Silver Ridge Power* (estoppel advanced by Respondent).

ment. Another reason for why tribunals gloss over estoppel claims could be that the case or issue before them could be resolved on other grounds. Where a tribunal expressly says so, no reservations should be warranted, however such openness is exhibited by a minority of arbitral panels. The final, and probably most alarming reason, is that arbitral panels either appear to not fully comprehend the implications of the doctrine of estoppel as applied to the facts before them or struggle with making clear delineations between it and other related concepts, particularly acquiescence and waiver.

Outline of argument

The structure of my argument is determined by the primary research problems and questions referred to above. The objective is to follow the general-to-specific pattern. Consequently, the dissertation begins with setting the scene by describing the primary tenets of estoppel in general international law and sheds light on its historical evolution. The following chapters are then devoted to international investment law, again, by first discussing some fundamental issues (such as applicability, reception of the general international law standard of estoppel, general information pertaining to the elements of the test of the strict concept of estoppel, scope of permissible analogies with domestic versions of estoppel) to then move to specific aspects of investment arbitration. Towards the end of the dissertation I shall attempt to consolidate the observations made and offer *de lege ferenda* comments aimed at streamlining the treatment of estoppel in international investment law.

As the primary thesis of the dissertation argues for universal applicability of estoppel across several main junctures of investment arbitration proceedings, this is reflected in the dissertation's structure. Consequently, the consecutive chapters treat questions of jurisdiction, admissibility, issue estoppel (re-arbitration), procedure and substance.

Fleshing out the above, Chapter I begins with an exposition of the principle in general international law from a historical perspective. It is apparent that estoppel underwent an evolution – from a broadly understood extension of good faith eagerly applied by inter-state arbitral tribunals in the early days of modern international law (late 19th and early 20th century) to an endorsement of the strict view which embraces the detailed requirement of detrimental reliance. Then, estoppel is tied to its axiological rationale, the overarching principle of good faith. What follows is a practical analysis of the disparate requirements of the principle. It shall become evident in due course that the good faith foundation of estoppel, coupled with a refined test modelling the strict view, predetermines estoppel's role within international investment law. The chapter also addresses a number of other issues, notably the applicability

of estoppel as a general principle of law to jurisdiction of international courts and tribunals and the inter-relation between estoppel and unilateral acts, predominantly acquiescence and binding state promises. A separate section treats an important theoretical question of the situation of estoppel within the catalogue of sources of international law.

Chapter II tackles a number of preliminary issues related to the application of estoppel, in its form derived from general international law, in the specialized subsystem of international investment law. First, a doctrinal argument will be made as to the provenance and applicability of estoppel as a general principle of law within the investment arbitration regime. It is here that the dual role of estoppel, as a gap-filling legal instrument and an interpretative tool, shall be underscored. The core of the chapter shall revolve around a discussion of the transposition of the principle from general international law, particularly the reception of estoppel from the judgments of the International Court of Justice. Mindful of the peculiar character of international investment law, in which embroiled are interests of states and private investors against the background of cross-border economic factors, I will propose nevertheless that arbitral tribunals should uniformly accept the strict view of estoppel which has been solidified as the dominant approach in ICJ jurisprudence. To further the analytical ends of the dissertation, I shall consider the inter-connections between estoppel and other related principles in arbitral jurisprudence, particularly unilateral acts, in an effort to mirror the approach taken in Chapter I with regard to general international law. Moreover, the requirements of the strict view of estoppel as interpreted and applied by investment arbitral tribunals shall be fleshed out. Chapter II concludes with a handful of examples of analogies with domestic law concepts of estoppel and discusses its limits in international investment law.

A transition to specific controversies around the application of estoppel to arbitral jurisdiction and admissibility is made in Chapter III. There, estoppel is analysed against the constitutive elements of jurisdiction of an arbitral investment tribunal: three pre-conditions stipulated in Article 25 of the ICSID Convention (consent to arbitrate (jurisdiction *ratione voluntatis*), personal jurisdiction (jurisdiction *ratione personae*) and substantive jurisdiction (jurisdiction *ratione materiae*)) along with jurisdiction *ratione temporis*, which is regulated in a number of investment treaties, notably the NAFTA. Separately, the inter-relation between estoppel and admissibility is scrutinized. Views expressed in doctrine are engaged with (mainly in contradistinction) to suggest possible applications of the doctrine. The final section of the chapter then directs attention to the role of estoppel in the context of forum selection clauses.

Chapter IV is dedicated to preclusion of objections to jurisdictions and admissibility lodged by host states which attack the legality of the investment, i.e. conformity of the investment with domestic laws of the host state. A proliferation of such pleas is observable over the last 10 years or so, and arbitral tribunals have grappled with striking a balance between the respective interests of the investor and the host state (joint interest in having an investment dispute resolved, however diverging interests with respect to outcome), on the one hand, and broader interests of fairness and justice, on the other. By reference to a cross-section of cases, the argument advanced here is that estoppel should be available to investors to preclude host states from defeating the tribunal's jurisdiction in such cases, especially where the host state is partially to blame for the investment's illegality. The Chapter will address two broad categories of investment illegality - one-sided illegality (which shall be equated with "ordinary" illegality understood as a failure by the investor to observe domestic laws in obtaining the investment or, occasionally, illegality due to fraud perpetrated by the investor where no involvement of the host state, conceptualized as participation or condonation, is discernible on the facts) and two-sided illegality (corruption where, alongside the investor, also public officials (agents) of the host state are implicated).

Chapter V is devoted to issue estoppel and related procedural issues. Recent arbitral practice is a fertile ground for theorizing about the nature of issue preclusion, and an attempt is made here to fit the principle, traditionally perceived as a doctrine straddling the boundary between estoppel and res judicata, within the requirements of the strict concept of estoppel. The discussion is followed by a consideration of several examples illustrative of estoppel's operation as regards the exercise of procedural rights of parties to an arbitral proceeding.

Chapter VI analyses estoppel as conceptualized pertaining to substantive rights of investors and obligations of host states. In this connection, estoppel has been invoked in the context of defences to liability for breach of standards of investor and investment protection, as a means of acquisition of substantive rights and to enforce contractual stability commitments. A particularly pronounced and multi-faceted role estoppel should naturally assume in protecting legitimate expectations within the FET standard, and an analysis of these interconnections follows.

What concludes my inquiry are Concluding Remarks where I offer a synthesis of corollaries made throughout the argument and recapitulate the key takeaways.

One further clarification is warranted. On account of the complexity of the matters discussed herein, an explanation of the treatment of the broad and strict views of estoppel is in order. When discussing the principle of estoppel both within the context of general interna-

tional law and international investment law, both standpoints will be accounted for. It is an easier task to pinpoint the dominant school of thought within the former system, and this is properly reflected. Since the formulation of unequivocal conclusions within international investment law is difficult for reasons related to lack of arbitral clarity and consistency, the analysis has been divided. First, the contours of both concepts within the meaning contemplated in arbitral awards are delineated, subject to the caveat that, as explained above, the strict view is to be preferred (prescriptively). A divergent approach is adopted, however, at a later juncture when the operation of estoppel against the backdrop of specific aspects of an arbitral proceeding is considered, with both concepts[17] scrutinized together. It is in this way that an attempt is made to sketch a complex picture of the legal ramifications of estoppel, revealing in the process the discrepancies and inconsistencies in interpretations adopted by arbitral tribunals. Not only shall this achieve the objective of compiling a requisite volume of information to proffer cogent arguments, but also accentuate the fact that the requirements of estoppel pertaining to the characteristics of representations and the rules governing the authorization of a person or entity to represent on behalf of a host state are substantially the same for both concepts.

[17] See further in Section 1.2, where I discuss the historical evolution of estoppel and differentiate between the broad and the strict concept.

CHAPTER I. ESTOPPEL IN GENERAL INTERNATIONAL LAW

1.1. Introductory remarks

International estoppel is an equitable principle under which a subject of international law who has represented to another a state of facts or made an assurance to such an effect is to be precluded from changing its position where the representee has acted in reliance upon that representation to its detriment or to the benefit of the representor. The legal effect of estoppel is best defined as preclusion – a legally sanctioned impermissibility to argue a given issue during judicial or arbitral proceedings (immediate effect) which, in turn, is liable to induce legally relevant consequences within most areas, including jurisdiction, exercise of procedural rights, re-litigation and substantive rights (indirect effect). As put by the ITLOS in *Bangladesh v Myanmar*:

> "The effect of the notion of estoppel is that a State is precluded, by its conduct, from asserting that it did not agree to, or recognize, a certain situation".[18]

Estoppel, referred to as "one of the more mystical doctrines in international law",[19] is notorious for its unclear requirements (preconditions) and legal effects.[20] Two major concepts of estoppel have been propounded in both jurisprudence and doctrine. McNair, commenting on the broad understanding of the principle, remarked that "international jurisprudence has a place for some recognition of the principle that a State cannot blow hot and cold – *allegans contraria non audiendus est*".[21] Other Latin maxims are often called upon in this connection – *nemo potest mutare consilium suum in alterius injuriam*, which translates to "nobody can change his argument to the detriment of another",[22] and *venire contra factum proprium (non valet)* ("to come against one's own fact (is not allowed")).[23] Estoppel's essence can be summarized as follows: in certain circumstances, an agent was precluded from adopting a manifestly inconsistent position from that represented to another party in prior dealings. Cast in these terms, the broad notion of estoppel is referred to as estoppel *sensu largo*, and it was

[18] *Bangladesh v Myanmar*, p. 45, para 124.
[19] J. Klabbers, *The Concept of Treaty in International Law*, Brill/Nijhoff 1996, p. 93.
[20] C. Dominicé, "A Propos du principe de l'Estoppel…", see note 6, p. 329; J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press 2019, p. 407.
[21] A. McNair, "The Legality of the Occupation of the Ruhr", 5 British Yearbook of International Law 1924, p. 35.
[22] A.X. Fellmeth, M. Horwitz, *Guide to Latin in International Law*, Oxford University Press 2009, p. 195.
[23] Ibid, p. 290.

prevalent in the early days of the development of inter-state arbitration. It is generally accepted that the representation to which the preclusive effects of estoppel attach should possess certain characteristics evincing its firm character – a certain degree of consistency is necessary. Ideally, a steady course of conduct comprising a number of (repeated) actions would qualify, however the principle is taken to apply also where a one-off action is concerned, provided that it is sufficiently clear and unambiguous.

On the other side of spectrum, since the 1960s, at least since the 1964 ICJ's judgment in *Barcelona Traction (Preliminary Objections)*, we have seen the ascension of a specialized, strict (or narrow) concept of estoppel which builds upon the broad view.[24] The trend has been confirmed in recent international jurisprudence, with the latest ICJ *obiter dictum* on the matter, issued in 2018,[25] reiterating the tests previously formulated in the seminal cases of *El Salvador v Honduras* and *Cameroon v Nigeria*. The strict view is also the dominant approach as adopted by the ITLOS[26] and it has been reliably applied in major inter-state arbitrations decided under the auspices of the Permanent Court of Arbitration.[27] Specifically, the preclusive effect of estoppel is activated only where the requirements of the broad view are fulfilled, i.e. a party makes a clear, unambiguous, unconditional and voluntary representation in the form of a statement, silence (omission – under certain circumstances) or conduct, and, in addition, such a representation is relied upon by a representee (the intended recipient of the representation) to either its own detriment or to the benefit of the original representor.[28] The latter element (reliance + detriment/benefit) is in doctrine and arbitral case law alike referred to as detrimental reliance.[29] The dichotomy between the strict and the broad views will feature prominently throughout this dissertation and it will have profound impact upon the consistency of application of estoppel within international investment arbitration, a characteristic that is evidently wanting.

It is generally accepted that one of the rationales of estoppel, particularly the broad view (it could even be said to be the sole rationale of this concept), is the prohibition of incon-

[24] W. Czapliński, „Pojęcie estoppel w prawie…", see note 6, p. 122.
[25] *Bolivia v Chile*, pp. 558-559, paras 158-159.
[26] *Bangladesh v Myanmar*, p. 42, para 124; *"ARA Libertad"*, Joint separate opinion of Judges Wolfrum and Cot, pp. 376-381, paras 52-70; *Ghana v Côte d'Ivoire*, pp. 78-79, paras 241-246 (affirming the strict test adopted in *Bangladesh v Myanmar*).
[27] In recent history, see: *Chagos Marine Protected Area Arbitration*, paras 435-448; *Railway Land Arbitration*, paras 199-207.
[28] A. Martin, *L'Estoppel en droit international public…*, see note 6, pp. 259-260.
[29] C. Brown, "A Comparative and Critical Assessment of Estoppel in International Law", 50(2) University of Miami Law Review 1996, pp. 396-398.

sistent behaviour, a quality firmly embodied in the Latin maxims cited above.[30] On the narrow view, another rationale springs into relevance, i.e. the protection of detrimental reliance on the part of the representee.[31] This can also be reconceptualized as a requirement of generation of trust. In other words, a representor may be compelled to keep its promise or refrain from purporting to contest the truth of a given statement,[32] provided that its original outward appearance, reclassified using objective means as a representation for the purposes of estoppel, has engendered a degree of trust in its intended recipient, the representee. This trust shall manifest itself in the undertaking of actions (or omissions) by the representee which materially (or at least discernibly) alter or otherwise affect the position of the party in question. Such trust is reconstrued on the facts of any given case using objective means of interpretation as no inquiry is done (nor is one warranted) into the subjective state of mind of either the representor or the representee.

It is generally accepted that estoppel is either a general principle of law *pro foro domestico* within the meaning of Article 38(1)(c) of the ICJ Statute or a general principle of international law.[33] The balance of academic and judicial opinions appears to be in favour of the former proposition, and proponents of the latter classification tend to consider it a "back-up" theory to be relied on in the event the hypothesis assuming universal recognition of estoppel (or its underlying rationales) in domestic legal systems is to be rejected as part of given proceedings. I shall discuss both accounts and offer an inclusive, compromise view.

The discussion concerning the contours of estoppel's requirements will follow the strict view. Accordingly, the limits of such terms as "representation" and the attendant requirements of clarity and ambiguity, shall be considered, as shall questions pertaining to attribution of representations to states. Next, I shall analyse the element of detrimental reliance, with particular emphasis on the characteristics a representee's reaction must exhibit in order to ground a plea of estoppel, including such notions as good faith (reasonableness of) reliance, benefit and detriment.

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[30] R. Kolb, *La bonne foi en droit international public…*, see note 6, p. 349; C. Eckart, *Promises of States under International Law*, Hart Publishing 2012, p. 282.

[31] The provenance of estoppel will typically be bilateral relations, however one cannot rule out its applicability to multilateral configurations. At any rate, the class of addressees or recipients of a representation must be ascertainable. Estoppel will not, it is submitted, operate in the context of representations addressed to the international community as a whole within the meaning of Principle 6 of the GPAUD. See, to this effect: *Standard Chartered Bank*, para 99.

[32] Estoppel can attach to statements of fact and of one's understanding or perception of the law, as well as to forward-looking promises and commitments. See especially Sections 1.3.1 and 2.6.1.1.

[33] Note that the ITLOS has applied estoppel under Article 293(1) of the UNCLOS as a "rule of international law" to the extent that its operation is not incompatible with the Convention. See: *M/V 'Norstar' Case (Preliminary Objections)*, p. 69, para 301.

Finally, a cross-section of connections will be made between estoppel and other international legal precepts. As it is representations that are capable of triggering the preclusive effects of estoppel, natural parallels can be drawn with binding unilateral acts as understood in positive law and doctrine. In particular, it has been debated whether silence can form an actionable representation, a proposition which appears to straddle the already blurry line between estoppel and acquiescence. Throughout the argument, it will be suggested that the root of confusion in this regard lies in the persistent invocation and application of the broad notion of estoppel which, since it dispenses with the need to prove detrimental reliance, can be mistaken for acquiescence where a concession is made to classify silence or inaction as a representation. Nonetheless, guidance can be derived from certain rules governing unilateral acts, including from the Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (GPAUD) published by the International Law Commission in 2006, especially when it comes to the rules governing the attribution of representations to states. The inter-connections between estoppel and binding state promises constitute also a fertile ground for discussion and provide valuable content for propositions concerning the character and qualities of representations capable of giving rise to estoppel. As a separate issue, the effect of estoppel upon establishing jurisdiction of an international court of tribunal will be taken stock of before a transition is made to issues specific to international investment law. Although in public international law estoppel has been invoked numerous times within the context of boundary delimitation and territorial disputes, in investment arbitration, other than as a means of strengthening the protection of legitimate expectations, one of the primary uses for estoppel has been to prove or disprove jurisdiction of the arbitral tribunal.

One qualification is in order. Unless otherwise expressly stated, what follows is a discussion of estoppel in general international law exclusively in dealings between states. Availability of estoppel as between other subjects of international law, notably international organizations, is outside of the scope of this chapter.

1.2. Evolution of estoppel – towards a strict concept

Estoppel has undergone a progression in international law. In this section I shall sketch the contours of this evolution, stressing in particular that after the breakthrough judgment in *Temple of Preah Vihear* in the early 1960s, the strict concept of the principle has been gaining

gradually more support in the jurisprudence of international courts and tribunals.[34] Following this watershed moment, the primacy of the strict view has been confirmed on numerous occasions and there is little to no debate regarding the general character of the estoppel test, with the detrimental reliance element universally embraced. This only bolsters the argument that protection of reliance of the representee, who, in reaction to a discernible representation by way of words or conduct, has made decisions to act or refrain from acting, as a result of which benefit has obtained on the part of the representor or the representee has incurred a qualifiable detriment, is the ultimate objective of estoppel.

Early inter-state arbitrations eagerly had recourse to general principles, and arbitrators availed themselves of rather nebulous good faith-laden concepts of preclusion. In *Pious Fund Arbitration*, the United States, acting as claimant, demanded that Mexico pay certain amounts that had been granted by a U.S.-Mexico Mixed Commission in proceedings between the Archbishop of San Francisco and the Bishop of Monterrey. The Permanent Court of Arbitration based its decision upholding the previous award on res judicata, concluding that both cases share the same object and concern the same parties. The United States raised an estoppel argument, which was ultimately left unconsidered by the panel, under which Mexico was to be precluded from challenging the determinations of the Mixed Commission, established to decide upon claims brought by citizens of both states after New Mexico and California were ceded to the United States under the 1848 Treaty of Guadalupe Hidalgo. The claimant advanced that both before and after the issuance of the binding arbitration award in 1875 Mexico did not question the prerogatives of the Mixed Commission, which should have been considered, according to its pleadings, acquiescence. Moreover, Mexico on two occasions, in 1872 and 1874, ratified conventions which extended the Commission's mandate to decide on claims, and the state's international obligations were repeatedly confirmed by Mexican officials at various levels of seniority. The reasoning of the United States evinces the early development of a broad principle aimed at curbing inconsistency in the conduct of states. Aside from this aspect, the argumentation also touched upon the issue of attribution of statements and conduct of state officials to the state itself.[35]

Another early example of the use of the broad view of estoppel is *Shufeldt*, where the United States argued that Guatemala, having recognized for six years the validity of the

[34] For an overview of relevant ICJ case law, see: A. Ovchar, "Estoppel in the Jurisprudence of the ICJ: A Principle Promoting Stability Threatens to Undermine it", 21(1) Bond Law Review 2009, pp. 18-22, available at: https://bit.ly/3si9zvT (accessed: 24.08.2021)

[35] H. Lauterpacht, *Private Law Sources and Analogies of International Law*, Longmans 1927, p. 248; *Temple of Preah Vihear*, Separate Opinion of Vice-President Alfaro, pp. 44-45.

claimant's contract, which was performed in line with its terms and accordingly Guatemala derived a benefit thereunder, was precluded from denying its validity despite the fact that the contract had not been specifically approved by the state's legislature. The contention was assessed by the deciding arbitrator as "sound and in keeping with the principles of international law".[36] This line of reasoning will be echoed in international investment arbitration in arguments advanced by investors that host states should not be allowed to justify their failures to comply with its international obligations stemming from investment treaties by invoking non-compliance with its own domestic laws.

In *Chorzów Factory Case (Judgment)*, it was held that a state could be estopped from pleading that the PCIJ lacked jurisdiction in the case because:

> "it is (…) a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one party cannot avail itself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him".[37]

Moving on to narrower concepts of estoppel, one of the first allusions was made in the *Tinoco Concessions Arbitration*. Following the collapse of the short-lived dictatorship headed by Frederico Tinoco in Costa Rica, the new government issued a law under which all contracts entered into by the Tinoco regime were nullified. The United Kingdom challenged the validity of the domestic law to the extent that it affected the rights and property of the British companies operating in Costa Rica, which had entered into contracts with the Tinoco government. One objection considered by William R. Taft, the sole arbitrator, attached to the United Kingdom's refusal to recognize the Tinoco regime. Accordingly, it was argued that this estopped the state from advancing the claims of its subjects. The arbitrator concluded that non-recognition was without prejudice to the fact that Tinoco formed a *de facto* government capable of creating enforceable rights in British subjects. To the estoppel argument, it was inferred that the failure to recognize the *de facto* government did not lead the succeeding government to change its position in reliance thereupon.[38] The mere inconsistency in the United

[36] *Shufeldt*, p. 1094.
[37] *Chorzów Factory Case (Judgment)*, p. 31.
[38] *Tinoco Concessions Arbitration*, p. 156.

Kingdom's conduct was deemed insufficient to ground a plea of estoppel, and regard had to be had to Costa Rica's reliance (of which there was none on the facts).[39]

A culmination came when disparate views of estoppel were confronted in *Temple of Preah Vihear*. The judgment came shortly after the publication within the period of 1 year (1957-1958) of influential papers by Bowett and MacGibbon where they espoused substantively opposite views of estoppel, with the former author embracing a strict view and the latter stopping short, instead declaring his support for a broader formulation devoid of the detrimental reliance element.[40] *Nottebohm*, a case decided shortly before *Temple of Preah Vihear*, was the final reported ICJ case where the broad concept was endorsed.

Vice-President Alfaro in *Temple of Preah Vihear* advocated in favour of a broad, good-faith based view aimed at preventing inconsistency in conduct.[41] Judge Spender, however, proposed a formulation that to the highest extent resembles the strict view as it incorporates the element of detrimental reliance:

> "the principle [of estoppel] operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result the other State has been prejudiced or the State making it has secured some benefit or advantage for itself".[42]

The position of Judge Fitzmaurice was marginally more equivocal. He did, in fact, stress that a representation must bring about a change in the relative positions of the parties by virtue of either generating a detriment to the representee or a benefit to the representor. He added that this would normally cover factual contingencies where the representee might have detrimentally relied on a representation or held itself out as adopting a given attitude in response to the same. Although Judge Fitzmaurice admitted that these elements would be present in a typical

[39] R. Kolb, *Good Faith in International Law*, Hart Publishing 2017, p. 105. See also: A.M. Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction*, Springer 2013, pp. 211-213; N.D. Houghton, "The Responsibility of the States for the Acts and Obligations of General De Facto Governments – Importance of Recognition", 6(7) Indiana Law Journal 1931, pp. 428-431.
[40] D.W. Bowett, "Estoppel before International Tribunals…", see note 6, p. 202; I.C. MacGibbon, "Estoppel in International Law", see note 6, pp. 512-513.
[41] *Temple of Preah Vihear*, Separate Opinion of Vice-President Alfaro, p. 40.
[42] Ibid, Dissenting Opinion of Sir Percy Spender, pp. 143-144.

case, on his view it was sufficient that the representation itself brought about a detriment or benefit, which implied that the element of reliance was not necessary.[43]

Shortly after *Temple of Preah Vihear*, the strict view of estoppel was more decisively endorsed in *Barcelona Traction (Preliminary Objections)*.[44] The ICJ in subsequent cases embraced the strict view unanimously. In *North Sea Continental Shelf*, a dispute between the Federal Republic of Germany and the Kingdom of Denmark, the Court, analysing whether the 1958 Convention on the Continental Shelf could become binding on Germany without it expressing its formal consent, concluded that:

> "if the Federal Republic were now precluded from denying the applicability of the conventional regime, 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 (…)".[45]

This formulation has been recently endorsed in ITLOS jurisprudence[46] and in *Pulau Batu Puteh Case*.[47] It may be noted that in *North Sea Continental Shelf* estoppel was argued as a potential means of inferring consent to becoming bound by a treaty. It appears that the ICJ was open to this idea, one which has been recently rejected in the field of international investment law.[48]

The test proffered by the ICJ in *North Sea Continental Shelf* is also notable for its insistence upon the fact that the original representation, to generate the effect of preclusion, be "consistent". This, I submit, deserves a qualification and should be approached with caution. It will not be true in all cases that a representation, in order to generate preclusive effects, must be "consistent" in the sense that it shall be reiterated over an ascertainable period of time. One-off statements or actions/omissions (expressions of conduct) are also capable of grounding an estoppel claim.[49] The Court was dealing with a proposition effectively aimed at circumventing positive formalities related to the establishment of consent to become bound by a treaty. Whilst, somewhat controversially, implying openness in principle to such a contention, the ICJ could have been attempting to mitigate the potentially significant practical con-

[43] Ibid, Separate Opinion of Sir Gerald Fitzmaurice, pp. 63-64.
[44] *Barcelona Traction (Preliminary Objections)*, pp. 24-25.
[45] *North Sea Continental Shelf*, p. 26, para 30.
[46] *"ARA Libertad"*, Joint separate opinion of Judges Wolfrum and Cot, para 64.
[47] *Pulau Batu Puteh Case*, p. 81, para 228.
[48] See Section 3.2.1 *in principio* (*Besserglik*).
[49] I elaborate upon my position below in Section 1.3.1 and in Section 2.6.1.1 within the specific context of international investment law.

sequences of this inference, and so it imposed restrictions on the availability of this avenue, demanding that a representation be not only clear but also consistent. Further, the difference in meaning between "detrimentally changing position" and "suffering prejudice" is unclear – it is difficult to think of a scenario where an act of reliance is met with detriment or prejudice, even coming not from the representor, where that act has not forged a change of position of the relying state. Suppose state A, relying on a representation from state B, denounces a military intervention, as a result of which it is sanctioned by another state C, a section of the international community as a whole or an international organization. Provided that, for the sake of argument, such sanctions are qualifiable as external detriment or prejudice, upon which the representor has no bearing, it is impracticable to deny that there was no change of position of the representee.[50]

In *El Salvador v Honduras*, the formulation of the estoppel test was succinct and it omitted the requirement of consistency, however the pillars of the strict test were endorsed.[51] No material variations were proposed in *Gulf of Maine*. In *Cameroon v Nigeria*, restating the test for the strict view of estoppel, the ICJ proposed that:

> "[a]n estoppel would only arise if by its acts or declarations Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude, Nigeria had changed position to its own detriment or had suffered some prejudice".[52]

The tests enunciated in *El Salvador v Honduras* and in *Cameroon v Nigeria* were approved by the ICJ in the 2018 case of *Bolivia v Chile*.[53] In that case, Bolivia petitioned the ICJ to order Chile to enter into negotiations with Bolivia to restore the latter's access to the Pacific Ocean, which had been lost as a result of a 1883 war. In essence, reliance was placed on the general principle of international law, enunciated in prior ICJ jurisprudence, that once they agree to be bound by an obligation to negotiate, states are required under international law to enter into such negotiations and to pursue them in good faith.[54] One of the grounds of Bolivia's claim was based on estoppel – it was argued that Chile had made a number of declara-

[50] See also note 114.
[51] *El Salvador v Honduras*, pp. 118-119, para 63.
[52] *Cameroon v Nigeria*, p. 303, para 57.
[53] *Bolivia v Chile*, p. 558, para 158.
[54] C. Milo, "*Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile)*" (in:) Max Planck Encyclopedia of Public International Law, 2020, online, para 13, available at: https://bit.ly/3q1f5BB (accessed: 24.08.2021).

tions regarding Bolivia's access to the Pacific Ocean and, as a consequence, Chile was now to be estopped from denying its agreement to negotiate. The ICJ rejected this argument, inferring that the mere fact that Chile had repeatedly represented its willingness to negotiate Bolivia's access to the Pacific Ocean has not given rise to an obligation to negotiate and, crucially, the Court did not find the presence of detrimental reliance. For Bolivia was not determined to have changed its position to either its own detriment or to the benefit of Chile.[55]

1.3. Requirements of estoppel

The foregoing overview of estoppel's evolution in the jurisprudence of international courts of tribunals leads me to a discussion of the requirements for the principle to apply under public international law. It could be observed how the detrimental reliance element has gradually been making its way into the list of pre-conditions for the preclusive effects of estoppel to arise. Drawing upon the ICJ's formulations presented above, the following questions will be examined: (1) representations; (2) attribution; (3) detrimental reliance.

What follows will constitute a broad delineation of the most topical principles which should serve as directional context before the focus turns to international investment law. Unless otherwise stated, findings made by international investment tribunals should be considered *lex specialis,* however, due to the character of international investment law as a subsystem of public international law, an argument I pursue in this thesis is one of subordination. On this account, whilst it should be permissible for international investment arbitration to introduce its own distinctions, particularly where this is necessary to account for the economic and political contexts around investment disputes between sovereign states and private businesses, it shall be international courts and tribunals seized of general international law disputes, primarily the ICJ, that shall be tasked with setting out the overarching framework of binding estoppel requirements.

1.3.1. Representations

Representations can consist in statements and/or conduct. Within the former category, estoppel can attach to statements of fact, but also to statements reflecting a party's understanding of the law and forward-looking promises.[56] As regards conduct, estoppel will typi-

[55] *Bolivia v Chile*, pp. 558-559, para 159.
[56] *Chagos Marine Protected Area Arbitration,* para 437. For comments regarding estoppel within international investment law, see Sections 1.3.1, 2.6.1.1 and 6.5.4 (in juxtaposition with the principle of protection of legitimate expectations). See also: A. Martin, *L'Estoppel en droit international public…*, see note 6, p. 274.

cally operate to preclude states from denying a course of conduct but can also extend to cover one-off acts, omissions and silence.[57] In *Temple of Preah Vihear*, two opposing views were advanced as to the relevance of silence. Whilst Vice-President Alfaro contended that silence can create an irrefutable presumption that a state has waived a right legally vested therein,[58] Judge Spender posited that silence is only of evidentiary value and must be viewed in the context of the totality of the circumstances in which it was maintained.[59] It appears that the former view assimilates estoppel with acquiescence whereas Judge Spender's proposition is more consistent with the strict view of estoppel. Thereunder, silence is qualifiable as a representation. Once this has been established, the inquiry should move towards further questions of attribution and detrimental reliance. In this sense, therefore, silence does hold evidentiary value – once it has been established and confirmed as sufficiently clear, unconditional and unambiguous, the availability of estoppel needs to be verified by reference to the other requirements of the strict concept. The view permissive of treating silence as a qualifiable representation has been accepted in doctrine.[60]

It appears that the state making a representation potentially giving rise to estoppel need not hold an unequivocal intention to be bound.[61] This idea was expressed by Judge Fitzmaurice in *Temple of Preah Vihear* who saw the proper field of application of estoppel where:

> "it is possible that the party concerned did not give the undertaking or accept the obligation in question (or there is room for doubt whether it did), but where that party's subsequent conduct has been such, and has had such consequences, that it cannot be allowed to deny the existence of an undertaking, or that it is bound".[62]

Nonetheless, the representation must be clear and unambiguous, and be made known to its intended addressees or an ascertainable class of addressees. Further, in several judgments the PCIJ and ICJ alike have emphasized that the representation must be consistent, which suggests repetitions over time or continuous maintenance of a given position, opinion

[57] That estoppel can arise from silence or a failure to act, provided that the circumstances are clear and unambiguous, was permitted by the ICJ in *Elettronica Sicula*, p. 44, para 54. See also: P.C.W. Chan, "Acquiescence/Estoppel in International…", see note 6, pp. 432-433.
[58] *Temple of Preah Vihear*, Separate Opinion of Vice-President Alfaro, p. 44.
[59] Ibid, Dissenting Opinion of Sir Percy Spender, p. 131.
[60] N.S.M. Antunes, *Estoppel, Acquiescence and Recognition…*, see note 6, p. 8; H. Lauterpacht, „Sovereignty over Submarine Areas", 27 British Year Book of International Law 1950, p. 415.
[61] The relationship between estoppel and unilateral state promises is analysed further in Section 1.7.
[62] *Temple of Preah Vihear*, Separate Opinion of Sir Gerald Fitzmaurice, p. 63.

or conduct.[63] This will typically apply to conduct as courts and tribunals may be reluctant to infer estoppel on the basis of a one-off action or omission on account of its not being sufficiently clear.[64] Within the contexts where estoppel has been invoked in general international law (primarily boundary delimitation), the passage of time during which a representation was held to be continuing (even if by implication) has been of relevance, however not decisive. Notwithstanding, I submit that this requirement is not indispensable but has rather been a contingency resulting from the type of case that estoppel has been invoked in. The requirements for a representation to be binding on the strict view of estoppel (clarity, unconditionality, unambiguity) can be met also where a statement is made or certain action is performed once. This will become especially important in international investment law where representations will typically consist in one-off statements or a combination of a statement and a course of conduct (or a statement and one action or omission). The requirement of consistency could apply *mutatis mutandis* to one-off representations. For instance, a statement capable of giving rise to estoppel cannot be mutually exclusive or lead to conflicting inferences regarding fact or law. Similarly, actions which are immediately retracted or whose consequences are reversed will not be considered consistent.

Notably, the estoppel claim failed for want of clarity and unambiguity of the disputed representation in *El Salvador v Honduras*. The conclusion attached to statements made by El Salvador and Honduras towards Nicaragua, which were argued by the latter to constitute expressions of views regarding the existence, nature and binding character of Nicaraguan claims and interests in the Gulf of Fonseca. Nonetheless, the statements made in the parties' pleadings were to be discounted by the Court as having limited evidentiary value.[65] In *Legal Status of Eastern Greenland*, an official verbal declaration by the then-foreign minister of Norway

[63] *Cameroon v Nigeria*, p. 303, para 57; *North Sea Continental Shelf*, p. 26, para 30; *Serbian Loans*, p. 39. Questions regarding lapse of time have arisen frequently in cases that straddle the line between estoppel and acquiescence. In *Anglo-Norwegian Fisheries*, the ICJ pointed to the fact that the United Kingdom failed to lodge a protest against Norway's claims for over 60 years. See: *Anglo-Norwegian Fisheries*, p. 138; see also: S. Kopela, „The Legal Value of Silence as State Conduct in the Jurisprudence of International Tribunals", 29 Australian Year Book of International Law 2010, p. 107. A similar time period was in issue in *Temple of Preah Vihear*. In *Chagos Marine Protected Area Arbitration,* Mauritius relied on a series of consistent representations made by representatives of the United Kingdom over the course of more than 30 years. A period of 36 years lapsed between the making of the original representation and the resolution of the dispute between the parties by the ITLOS in *Bangladesh v Myanmar*. See: *Bangladesh v* Myanmar, p. 21, para 36. The same tribunal, however, in *Ghana v Côte d'Ivoire* thought that the lapse of 50 years was insufficient to ground an estoppel claim due to evidentiary issues related to the establishment of a consistent course of combined silence and actions. See: *Ghana v Côte d'Ivoire*, p. 78, para 243.

[64] It has been submitted in doctrine that the case law has seen an evolution of the requirement from "clear and unequivocal" to "clear and consistent". This has been taken to mean that the level of due care demanded from the representor in terms of formulating its representation has been lowered. See: K. Pan, "A Re-Examination of Estoppel…", see note 6, p. 765.

[65] *El Salvador v Honduras*, pp. 118-119, para 63.

(the 1919 Ihlen Declaration) made to its Danish counterpart, under the terms of which Danish sovereignty claims over the entirety of Greenland's territory were not to be confronted with protest or any other difficulties from Norway, was held by the PCIJ to be clear and consistent enough to ground an estoppel claim.[66]

A representation must be made voluntarily.[67] It will not be sufficient for a representation in the form of a statement to be made subject to a condition or during protracted negotiations where the objective of the same is ultimately not achieved.[68]

1.3.2. Attribution of representations to the state

For a representation to give rise to preclusive effects under estoppel it must be authorized by way of the rules of attribution. In other words, it must be objectively ascertainable that a given statement was indeed made or conduct performed by the state. It is only after a representation has been attributed to a state that the representee will be entitled to rely on it in good faith.

Attribution has not featured prominently in the reasoning of international courts and tribunals and, most importantly, where tribunals have devoted special attention to attribution, their determinations have been mostly fact-specific, without reference to any recognized body of international rules governing the issue.[69] By means of an example, in *Gulf of Maine*, the United States (acting as defendant) advanced that the author of a so-called Hoffman letter, which was argued by Canada to constitute putative consent to the delimitation of a median line in the Gulf of Maine, was a medium-ranked official of the United States Department of the Interior, who was not authorized to make statements of will binding upon the United States as regards the delimitation of maritime boundaries. The official whose signature was placed on the disputed document, a diplomatic note, Mr. Hoffman, admitted to not having such authority. The ICJ differentiated between two distinct levels of competence – one encompassing the delineation of a median line as a method of delimitation of a maritime boundary, thought to be a political choice reserved for the highest-ranked representatives of the state; the second level, a technical one, consisted in the implementation of such a political decision. Since the latter action is to be accorded a lower level of importance (as it is purely

[66] *Legal Status of Eastern Greenland*, pp. 64-66.
[67] K. O'Brien, "Representation in the Doctrine of Estoppel in International Law", 3 Irish Yearbook of International Law 2008, p. 85.
[68] D.W. Bowett, "Estoppel before International Tribunals…", see note 6, p. 191.
[69] A notable exception is found in: *"ARA Libertad"*, Joint separate opinion of Judges Wolfrum and Cot, p. 377, para 55, where the ITLOS judges made explicit reference to the DARSIWA.

executive), involvement of only lower-ranked officials is reasonable.[70] In another judgment the ICJ signalled, albeit not expressly, that when interpreting representations exchanged by parties a higher measure of significance shall be accorded to official diplomatic correspondence than to non-formal communications, especially where both modes are utilized concurrently.[71] The overall position has been largely clear – a representation is authorised only if it is made by an organ competent to bind the state.[72] In *Nottebohm*, for example, a representation made by the Consul-General of Guatemala was not authorised because the ICJ thought a consulate, as a non-competent entity in the matters in issue, was not capable of binding the state internationally.[73]

Whether attribution, i.e. the authorization of a given agent to bind the state by its representations, should be governed by domestic or international laws is a contentious issue. On one view, grounded in constitutionalist theories, only municipal laws can determine the scope of authorization of representatives of states and, consequently – their ability and authorization to incur international obligations in the name and on behalf of the state.[74] This account necessitates a peculiar incorporation of relevant norms of domestic law by reference (*renvoi*) into international law, to the extent delineated, on the one hand, by the representor and, on the other, by domestic laws, all of which is additionally circumscribed by the principle of state sovereignty. Of inherent value are democratic processes and the right of the electorate to vote for and elect persons representing the state internationally, and to shape the organizational and constitutional framework in accordance with domestic laws of a given state which, in turn, incurs international obligations.[75] The internationalist school of thought endorses the view that uniform principles governing the attribution of representations to states should be formed in international law. This approach is said to promote stability, legal security and validity and the binding character of treaty obligations. Judge Fitzmaurice has been a major proponent of such views. In his opinion, no state which has created an impression to be bound by an inter-

[70] *Gulf of Maine*, pp. 307-308, para 139.
[71] *Elettronica Sicula*, p. 44, para 54.
[72] *Barcelona Traction (Preliminary Objections)*, p. 23.
[73] *Nottebohm*, pp. 17-19.
[74] H. Wollaver, "From Joining to Leaving: Domestic Law's Role in the International Legal Validity of Treaty Withdrawal", 30(1) European Journal of International Law 2019, p. 85. Note that the PCIJ in *Legal Status of Eastern Greenland* rejected an argument advanced by the Kingdom of Norway alleging the invalidity of a declaration of the Foreign Minister on account of his lack of authority under domestic laws to make the disputed representation. See: E. Bjorge, C. Miles (red.), *Landmark Cases in Public International Law*, Oxford University Press 2017, p. 145.
[75] International Law Commission, *Report on the Law of Treaties by Mr. H. Lauterpacht, Special Rapporteur*, ILC Yearbook 1953, A/CN.4/63, p. 142, available at: https://bit.ly/2ZP6fft (accessed: 24.08.2021); M. Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", 15(5) European Journal of International Law 2004, pp. 915-917, 924.

national obligation, having fulfilled all of the attendant requirements mandated by international law to achieve that objective, should be allowed to challenge the validity or bindingness of such actions by relying on its internal constitutional laws.[76] Middle ground theories have also been put forward in recent years, particularly in the trend of "international constitutionalism" which accepts that rules on attribution derived from domestic law gradually pervade the international legal order.[77] An analogous compromise is enshrined in the VCLT as regards the rules for the conclusion of treaties.[78] Article 7(2) indicates persons and offices which are inherently authorized to represent the state, however this catalogue can be extended by reference to the provisions of a given domestic legal order.[79] The moderate character of the solution proffered by the VCLT becomes only more momentous when one realizes the consequences of an abuse of power. For, under Article 46, a state can avoid the consequences of a consent to be bound by a treaty granted by a person purporting to represent it in violation of an internal law provision governing competence only where there has been a manifest violation of a domestic law of fundamental importance, that is one which is objectively evident to any third party state conducting itself in accordance with normal practice and in good faith.[80]

Despite a dearth of references to international rules governing attribution of representations in the jurisprudence of international courts and tribunals seized of general international law disputes, I shall attempt to ground the discussion in recognized principles of international law governing state attribution. It appears that two principal collections of precepts could conceivably be had recourse to – (1) the DARSIWA pertaining to responsibility for internationally wrongful acts; (2) the GPAUD, dedicated to govern the operation of unilateral declarations. As noted above, also the VCLT contains provisions, particularly Article 7, constituting the authority of certain persons and offices to represent and bind states in respect of all

[76] G.G. Fitzmaurice, "Do Treaties Need Ratification?", 15 British Year Book of International Law 1934, pp. 132-133

[77] See e.g. A. O'Donoghue, "International Constitutionalism and the State", 11(4) International Journal of Constitutional Law 2013, p. 1028 et seq.

[78] See Article 46(1) for the general rule. Under Article 47, if the authority of a representative to express the consent of a state to be bound by a particular treaty has been made subject to a specific restriction, his omission to observe that restriction may not be invoked as invalidating the consent expressed by him unless the restriction was notified to the other negotiating states prior to his expressing such consent.

[79] Article 7(2) grants to the organs outlined therein, in the internationalist vein, the right to incur international obligations in the name and on behalf of the state even if its domestic law imposes additional limitations (such as parliamentary approval before treaty conclusion or countersignature by the chief minister). See: I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester University Press 1984, p. 32.

[80] The VCLT meticulously differentiates between the international and domestic implications of representations (statements and conduct) made with a view to entering into a treaty. Whilst Article 7 is limited to regulating risks related to a failure to prove authorization in line with norms of international law, Article 46 pertains to invalidity of powers or authorization to represent the state on account of a manifest violation of domestic law. Article 47 has a similarly "internal" character. See: M.E. Villiger, "Article 7: Full Powers" (in:) idem, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill/Nijhoff 2009, p. 145

acts related to the conclusion of a treaty, however the analogy between treaty-making and estoppel appears slightly far-fetched, at least in all cases where estoppel is not called upon to establish consent to become bound by a treaty.[81] Regrettably, no rules of attribution directly pertaining to representations other than binding unilateral declarations (which notably covers promises discussed in Section 1.7 below) have been codified.

1.3.2.1. Analogy with attribution for the purposes of determining state responsibility for internationally wrongful acts

The first analogy to be discussed is with the ILC's DARSIWA, adopted in 2001.[82] Under Draft Article 4(1), conduct of any state organ shall be qualifiable as an act under international law regardless of whether the organ in question exercises legislative, executive, judicial or any other functions. Further, of no consequence are the position of the organ within the internal organizational constitution of the state or its character as an organ of the central government or of a territorial unit of the state (local government). Draft Article 4(2) particularizes that by "organ" one shall understand any person or entity to whom this status is accorded under the domestic laws of the given state. The Draft Articles adopt a compromise position, elevating to the level of internationally recognized acts all conduct of organs purporting to act on behalf of the state, however the designation of an "organ" is left to the discretion of state parliaments and internal laws and regulations. The official Commentary to the DARSIWA clarifies that the provision in question, by referring to "any state organ", covers all of the individual or collective entities which make up the organization of the state and act on its behalf.[83] The generality here is intended, and the ICJ has opined that the rule enshrined in Draft Article 4 has ascended to the rank of custom.[84]

Further, under Draft Article 5, the conduct of a person or entity which is not to be classified as an organ within the meaning of Draft Article 4 but which nevertheless is empowered, under domestic laws of the state in question, to exercise elements of governmental authority (public functions), shall be qualifiable as an act under international law, provided the

[81] Notwithstanding, the investment tribunal in *Duke Energy* made an analogy with Article 46 of the VCLT to make inferences regarding attribution and the binding character of representations. See Section 2.6.2.3.4.
[82] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Report of the International Law Commission on the work of its fifty-third session*, available at: https://bit.ly/3nCE2ln (accessed: 24.08.2021). A discussion of the DARSIWA as applied to attribution to states can be found in Polish literature in: M. Jeżewski, *Międzynarodowe prawo inwestycyjne*, 2nd edition, C.H. Beck 2019, pp. 64-70.
[83] Ibid, p. 40, para 1.
[84] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, p. 87, para 62.

person or entity is acting in that capacity in the particular instance or, as the ICJ has proposed, in "complete dependence" on the state, of which they are ultimately merely an instrument.[85] Importantly, the provision does not seek to exhaustively define what "governmental authority" precisely denotes, acknowledging the differences in political and social traditions and custom among states. Of relevance in determining the function a person or entity is purporting to discharge shall be not just the content and implications of a given power, but also the manner in which it has been conferred on the entity, the purposes for which it is to be exercised and the extent to which the entity is accountable to the central government for its exercise.[86] The conduct authorized by internal law of the state must involve the exercise of public authority, and it is insufficient that it permits activity as part of the general regulation of the affairs of the community – the domestic authorization must be directed to an ascertainable person or entity.[87]

The analogy with the DARSIWA has been criticized in the literature as an unwarranted expansion of the purview of the Draft Articles onto areas that they were not supposed to govern.[88] Such reservations were also made by the ILC in the Commentaries to the DARSIWA. The ILC was careful to draw a distinction between rules of attribution for the purposes of establishing state responsibility and rules of attribution envisaged in the VCLT. The DARSIWA engage with conduct incompatible with a state's international obligations, irrespective of the level of administration or government that the given outward appearance is generated at. Therefore, the specificity and open-ended character of the rules was a reason for the ILC to proclaim that they are formulated for this particular purpose only.[89]

1.3.2.2. Analogy with attribution of unilateral declarations and promises

Alternatively to the DARSIWA, attribution of representations for the purposes of estoppel can be explained by reference to an analogy with the GPAUD, published by the ILC in 2006.[90] As is the case with the DARSIWA, the analogy is to be treated with caution and more as a *de lege ferenda* postulate as the Guiding Principles regulates binding, intentional state

[85] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, p. 205, para 392.
[86] International Law Commission, *Draft Articles on Responsibility of States…*, see note 82, p. 43, para 6.
[87] Ibid, p. 43, para 7.
[88] C. Annacker, "Role of Investors' Legitimate Expectations in Defense of Investment Treaty Claims" (in:) A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2013–2014*, Oxford University Press 2015, p. 238; S. Olleson, "Attribution in Investment Treaty Arbitration", 31(2) ICSID Review - Foreign Investment Law Journal 2016, pp. 457-460.
[89] International Law Commission, *Draft Articles on Responsibility of States…*, see note 82, p. 39, para 5.
[90] International Law Commission, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto*, available at: https://bit.ly/3c8h43e (accessed: 24.08.2021).

promises, which are to be differentiated from representations capable of giving rise to estoppel.[91] Under Principle 4, a unilateral declaration binds the state internationally only if it is made by an authority vested with the power to do so. Heads of state, heads of government and ministers for foreign affairs are inherently authorized to make unilateral declarations binding on their states by virtue of their functions.[92] Other persons purporting to represent their state may be authorized to bind it, through their declarations, in areas falling within their competence, as stipulated by domestic law.

This last precept warrants further elucidation. The rule is heavily inspired by the jurisprudence of the PCIJ and the ICJ concerning the capacity of state authorities to make internationally binding unilateral declarations on behalf of the state. Particular emphasis in this connection must be put on *Armed Activities on the Territory of the Congo*. There, the Court had to determine whether statements implying Rwanda's intention to withdraw its reservations to an international convention, made by the Rwandan Minister Justice, could be attributed to the state. The ICJ soundly rejected the submission that statements made by state officials other than a foreign minister or head of government are incapable of binding the state. A reference was made to Article 7(2) of the VCLT, this category was, however, purposively expanded by the Court to also cover holders of ministerial portfolios who happen to exercise powers falling within their competence or purview, and even certain other officials.[93] This does not necessarily mean that where an official makes a representation they are not competent to make under domestic law, this automatically renders the representation ineffective under international law. On the contrary, non-compliance with domestic laws should be generally of no consequence – for the ICJ in the referenced case relied on *Legal Status of Eastern Greenland* where the Court's predecessor expressly opined that a failure on the part of the state to comply with municipal law restrictions cannot be called upon to justify an invalidation of international obligations.[94] Such a representation shall be internationally recognized provided that the official making it acted within the scope of his official duties. In other words, acts which discharge duties assigned to an official by the state, under domestic law, can be attributed to the

[91] See also Section 1.7 on the inter-connections between estoppel and state promises.
[92] The enumeration is similar to that found in Article 7(2)(a) of the VCLT, and is a reflection of well-established and consistent jurisprudence of the PCIJ and the ICJ. See: *Legal Status of Eastern Greenland*, p. 71; *Nuclear Tests*, pp. 269-270, paras 49-51; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*, p. 622, para 44; *Arrest Warrant of 11 April 2000*, pp. 21-22, para 53.
[93] *Armed Activities on the Territory of the Congo*, p. 27, paras 46-47.
[94] Ibid, p. 27, para 46; *Legal Status of Eastern Greenland*, p. 71.

state and shall bind the same even where they are ultimately considered *ultra vires*.[95] Where the addressee of a declaration knows for a fact or should be deemed to know that the promisor is acting in violation of domestic laws, it has been insisted that Article 46 of the VCLT should apply by analogy, i.e. the declaration should not bind the state if the violation was objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.[96]

1.3.2.3. Comparison of the regimes

It is apposite to signal the key differences in the implications of both of the analysed sets of principles governing attribution. The first comparison pertains to Draft Article 4 of the DARSIWA and Principle 4 of the GPAUD. The former provision attributes to the state the conduct of any state organ "whatever position it holds in the organization of the state". Principle 4, inversely, embraces a more nuanced approach, expressly singling out heads of state, heads of government and foreign ministers, on the one hand, and lower-ranked officials (and this category is open-ended), on the other. It is a condition of the bindingness of acts of these lesser officials that they demonstrate to the addressee of a representation that they act within the general scope of the duties assigned to them by their state. Conduct which does not discharge the duties assigned to a given official by the state cannot be attributed to that state under international law.[97] Whether the promisor is empowered, under domestic law, to make a declaration (their authority or competence) is not relevant in determining the state's responsibility for an internationally wrongful act under Draft Article 4 of the DARSIWA. The tenor of the provision (and the presumption of authority it expresses) is typically explained by a policy objective whereby states should subject to strict supervision and control its constituent organs.[98]

Relatedly, the second material difference lies in the consequences of non-compliance with domestic law by the representing official. Under Principle 4 of the GPAUD, as noted

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[95] F. Capone, A. de Guttry, "An Analysis of the Diplomatic Crisis between Turkey and the Netherlands in light of the Existing International Legal Framework Governing Diplomatic and Consular Relations", 10(1) European Journal of Legal Studies 2017, pp. 74-75.

[96] International Law Commission, *Ninth Report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur*, Document A/CN.4/569 and Add.1, pp. 154-156, paras 22-30, available at: https://bit.ly/2O49ygg (accessed: 24.08.2021).

[97] K. Lim, "Upholding Corrupt Investors' Claims against Complicit or Compliant Host States – Where Angels should not Fear to Tread" (in:) K.P. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2011–2012*, Oxford University Press 2013, pp. 656-657.

[98] K.E. Boon, "Are Control Tests Fit for the Future? The Slippage Problem in Attribution Doctrines", 15(2) Melbourne Journal of International Law 2014, p. 16, available at: https://bit.ly/3svXTFW (accessed: 24.08.2021). See also: M. Jeżewski, *Międzynarodowe prawo inwestycyjne*, see note 82, pp. 374-378.

above, *ultra vires* conduct can be attributed to the state, but only provided that the representor acts within their general scope of duties as assigned thereto in accordance with the relevant domestic law by the state. Draft Article 7 of the DARSIWA is wider in that thereunder conduct purporting to constitute an internationally recognized act shall be attributable to the state "even if it exceeds its authority or contravenes instructions".

As demonstrated elsewhere in Section 1.3.2 and its subsections, no hard and fast rules have been expressly endorsed by international courts and tribunals when decoding the relevant rules of attribution of representations for the purposes of inferring estoppel. Representations within the estoppel context bear more resemblance to unilateral declarations within the meaning of the GPAUD than to wrongful acts prone to giving rise to international responsibility, therefore, with caution, an analogy with this body of rules appears more defensible. Nonetheless, the ICJ is yet to make a direct reference to the GPAUD when qualifying a representation within the bounds of an estoppel argument.[99] This means that, at least *de lege lata*, typically an indeterminate set of ad hoc rules is used on the specific facts of each case to render a desired outcome. The differentiations proposed in *Gulf of Maine* and discussed at the beginning of Section 1.3.2 appear to prove the reasonableness of this proposition. It shall be seen later on, in particular in Section 2.6.2.3, that a similarly instinctive approach is adopted by many an international investment tribunal, with references to either the DARSIWA or the GPAUD being rather rare, also in the pleadings and submissions of parties to the arbitral proceedings.

1.3.3. Detrimental reliance

Once a representation, which has been properly authorized and attributed, is held to have cleared the threshold of clarity and unambiguity, it is up to the intended representee(s) to react thereto or not. For preclusion to arise, the representee should rely in good faith upon the representation.[100] Such reliance should generate a detriment to the representee, understood broadly as a negative change of position, or bring about a benefit on the part of the representor. Reliance is assessed objectively and is subject to gradation depending on the attendant circumstances. What matters is the representee's outward appearances and not its psychological or emotional disposition towards the representation.[101]

[99] See also note 69 for a contrasting example from the ITLOS jurisprudence, where two judges analogized with the DARSIWA.
[100] *Bangladesh v Myanmar*, p. 45, para 124.
[101] K. O'Brien, "Representation in the Doctrine of Estoppel…", see note 67, p. 74.

Reliance can take several forms. Typically, the representee will act in reliance upon a representation to its detriment or to the benefit of the representor, however estoppel can also apply in situations where detriment or benefit is generated by virtue of an abstention or otherwise a failure to act.[102] The ICJ has opined that a party claiming it had relied on a representation will normally have to prove it took distinct acts.[103] This corollary should be extended *mutatis mutandis* to omissions – they should be distinct as in distinguishable as independent consequences of decisions made by the representee (more than mere inaction but rather a failure to act where an action was called for or otherwise anticipated). In *Cameroon v Nigeria*, the ICJ effectively required that the claimant prove the pursuit of alternative avenues with a view to finding a solution to the border problems existing between the two states. As no such efforts were made, and the Court satisfied itself that alternative procedures were available, there could be no reliance.[104] This implies a need for the existence on the facts of a given case of a causal link between a representation and actions or omissions undertaken by the representee in response thereto and in reliance thereupon.[105] In early case law it was opined that the representee should have been "entitled to" rely on a representation.[106] The exact implications of this adage are unclear. To the extent that it refers to something other than being able to rely only on those representations which are properly attributed to the representing state, or that representations can only be relied upon by its actual addressees and not by the international community as a whole (contrary to unilateral promises), this statement of principle does not appear to reflect the current state of the law.

Modern case law of international courts and tribunals is replete with references to the necessity of proving detriment by the putative representee(s). Judge Wellington Koo in *Temple of Preah Vihear* envisaged that either detriment or advantage must be proven to warrant an estoppel claim.[107] Also Judge Spender opined in the same case that he saw no estoppel on the facts as the element of detrimental reliance – of France upon any material conduct of Thailand in relation to the frontier maps – was wanting.[108] It appears that the lack of detriment was a reason why the ICJ in *Continental Shelf (Tunisia/Libya)* made an express reservation that it was not basing its holding on estoppel.[109] The Court in *North Sea Continental Shelf*

[102] *Bangladesh v Myanmar*, p. 45, para 124.
[103] *Pulau Batu Puteh Case*, p. 81, para 228.
[104] *Cameroon v Nigeria*, p. 303, para 57.
[105] *"ARA Libertad"*, Joint separate opinion of Judges Wolfrum and Cot, p. 380, para 67; *Arbitral Award made by the King of Spain on 23 December 1906*, p. 209.
[106] *Serbian Loans*, p. 39.
[107] *Temple of Preah Vihear*, Dissenting Opinion of Judge Wellington Koo, p. 97, para 47.
[108] Ibid, Dissenting Opinion of Sir Percy Spender, p. 145.
[109] *Continental Shelf (Tunisia/Libya)*, p. 84, para 117.

demanded that reliance of the representee result in a change of position to the same's detriment or suffering of some prejudice.[110] This element was reiterated verbatim in *Cameroon v Nigeria*.[111] In *El Salvador v Honduras*, detriment to the representee or advantage to the representor was held to be a requirement in the alternative.[112] This had been the position also in *Gulf of Maine*.[113]

Despite those enunciations, little evidence has been adduced as to the factors to be taken into account in deciding whether a given adverse consequence is qualifiable as detriment. Judging from the factual scenarios of cases where a party purported to invoke estoppel, it could be posited that detriment[114] entails, *inter alia*, an inability to avail oneself of an alternative dispute resolution avenue, to pursue further negotiations, to present oneself as the rightful owner of something or a person entitled to exercise a right, an inability to exercise a right, a duty to endure third party intrusion upon the exercise of a right. Kozłowski has proposed that the key factor should be the creation (loss) of material substantive rights on the side of natural or juridical persons or the obligation to incur significant monetary expenses.[115] This seems uncontroversial, as does the obligation to undertake significant diplomatic efforts.

It is probably reasonable to assume that international courts and tribunals adopt a holistic approach to inferring and quantifying the gravity of detriment or prejudice. An interesting case study in this respect is found in *Barcelona Traction (Preliminary Objections)*, where the ICJ, having performed a comparative exercise between the position of the representee before and after the representor has changed course, made a point that the former must be in some way discernibly worse off. In the proceedings before the Court, Spain alleged that Belgium should be estopped from pursuing further proceedings as this was said to be in contradiction with its previous representations, in reliance upon which Spain refrained from objecting to the discontinuance of earlier proceedings. The essence of the comparison to be made to infer detriment was captured as follows:

> "Without doubt, the Respondent is worse off now than if the present proceedings had not been brought. But that obviously is not the point, and it has never been clear why, had it known that these proceedings would be brought if the negotiations failed, the

[110] *North Sea Continental Shelf*, p. 26, para 30.
[111] *Cameroon v Nigeria*, p. 303, para 57.
[112] *El Salvador v Honduras*, pp. 118-119, para 63.
[113] *Gulf of Maine*, pp. 304-305, para 129.
[114] Although this has not been expounded in the case law, the difference between "detrimental change of position" and "suffering of prejudice" could be that the latter is in some connection with the acts or omissions undertaken in reliance upon the representation, however is ultimately external or staggered in time (i.e. it is not an immediate consequence of the representee's act or omission).
[115] A. Kozłowski, *Estoppel jako ogólna zasada…*, see note 6, p. 210.

Respondent would not have agreed to the discontinuance of the earlier proceedings in order to facilitate the negotiations (the professed object); since it must not be overlooked that if the Respondent had not so agreed, the previous proceedings would simply have continued, whereas negotiations offered a possibility of finally settling the whole dispute. Given that without the Respondent's consent to the discontinuance of the original proceedings, these would have continued, what has to be considered now is not the present position of the Respondent, as compared with what it would have been if the current proceedings had never been brought, but what its position is in the current proceedings, as compared with what it would have been in the event of a continuation of the old ones".[116]

1.4. Good faith rationale of estoppel

A concretization of the principle of good faith, which status has been well established in both case law[117] and doctrine,[118] estoppel is said to protect the legitimate expectations of states induced by statements or conduct of another state.[119] Good faith is itself considered a standalone principle of law[120] or, by a minority, a principle of customary law.[121] Kolb has defended the position that good faith is a peremptory norm (*jus cogens*).[122] Albeit somewhat

[116] *Barcelona Traction (Preliminary Objections)*, pp. 24-25.
[117] *Temple of Preah Vihear*, Separate Opinion of Sir Gerald Fitzmaurice, p. 65 (citing with approval: International Law Commission, *Report on the Law of Treaties by Mr. H. Lauterpacht,* see note 75); *Gulf of Maine*, p. 246, para 305; *Bangladesh v Myanmar*, p. 44, para 124; *Chagos Marine Protected Area Arbitration*, para 435, and Dissenting and Concurring Opinion of Judges Kateka and Wolfrum, para 89.
[118] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens & Sons 1953, pp. 141-149.
[119] T. Cottier, J.P. Müller, "Estoppel" (in:) Max Planck Encyclopedia of Public International Law, 2007, online, available at: https://bit.ly/39LgDcC (accessed: 24.08.2021), para 1; R. Kolb, *Good Faith in International Law*, note 39, p. 102; R. Ziegler, J. Baumgartner, "Good Faith as a General Principle of (International) Law" (in:) A.D. Mitchell, M Sornarajah, T. Voon (eds.), *Good Faith and International Economic Law*, Oxford University Press 2015, p. 20; D.W. Bowett, "Estoppel before International Tribunals…", see note 6, p. 176; M. Kałduński, *Zasada dobrej wiary w prawie międzynarodowym*, C.H. Beck 2017, pp. 203, 205; H. Lauterpacht, *The Development of International Law by the International Court*, Stevens & Sons 1958, pp. 168-172.
[120] See, *inter alia*: M. Panizzon, *Good Faith in the Jurisprudence of the WTO. The Protection of Legitimate Expectations, Good Faith Interpretation and Fair Dispute Settlement*, Hart Publishing 2006, p. 11; B. Cheng, *General Principles of Law…*, see note 118, p. 105 et seq.; J. Crawford, *Brownlie's Principles of Public International Law*, see note 20, p. 34. In Polish doctrine, see: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe*, 3rd edition, C.H. Beck 2014, p. 134; M. Kałduński, *Zasada dobrej wiary…*, see note 119, p. 115; E. Lis, "Zasada dobrej wiary w prawie międzynarodowym", 25(1) Studia Iuridica Lublinensia 2016, p. 40 (referring to good faith as a „fundamental" principle).
[121] See e.g. A. Mitchell, "Good Faith in WTO Dispute Settlement", 7(2) Melbourne Journal of International Law 2006, p. 345. Villiger has noted the norm-creating role of good faith, arguing that its operation and protection of legitimate expectations could lead to the creation of custom. See: M.E. Villiger, *Customary International Law and Treaties: A Study of Their Interactions and Interrelations, with Special Consideration of the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff 1985, p. 31
[122] R. Kolb, *Peremptory International Law – Jus Cogens: A General Inventory*, Hart Publishing 2015, pp. 56-58.

amorphous under many domestic laws, being classified often as a maxim, rule, principle, norm, standard of conduct, unwritten source of law or obligation, the universal recognition of good faith is not disputed.[123] In international law, even where good faith is not referred to by name, its elements are denoted by various concretizations and derivative concepts, including the autonomous, discrete principle of protection of legitimate expectations (which has received special prominence in international investment law as part of the FET standard) and abuse of rights or abuse of process as well as *pacta sunt servanda*, *acta sunt servanda* traditionally extended to unilateral acts, and estoppel, the subject of the dissertation.[124] Not only is good faith a fundamental axiological underpinning of estoppel, but also it permeates the practical assessment and application of its requirements. This aspect is prominently exposed in the detrimental reliance precondition, where it is generally required that the representee relies on the initial representation in good faith (or reasonably, which terms are synonymous in this context).[125] This, in turn, implies that good faith will be, at least to a significant degree, assessed in accordance with objective criteria.[126] Aside from good faith, the ICJ has also situated the principle of equity within the class of sources of estoppel.[127]

An important necessary corollary resulting from estoppel's connections with the principle of good faith is that its primary concern will not be the protection of objective, ascertainable truth about legal rights and obligations.[128] Rather, estoppel will take account of and reflect the relational dynamics between a given set of parties who are dealing with each other, and serve to alter the rights and obligations of one party as against another. Notwithstanding, estoppel has led, in the field of public international law, to the creation of *erga omnes* entitlements, in the form of gains and concessions within the context of territorial disputes. This proprietary character of estoppel will not be replicated, as we shall see below, in international investment law.[129] The good faith underpinning necessitates that estoppel, operating in legal relations involving a definite number of parties, will serve to protect detrimental reliance gen-

[123] M.W. Hesselink, "The Concept of Good Faith" (w:) A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Mak, C. E. du Perron (eds.), *Towards a European Civil Code*, Wolters Kluwer Law & Business 2011, p. 622
[124] R. Ziegler, J. Baumgartner, "Good Faith as a General Principle...", see note 119, p. 12; B. Cheng, *General Principles of Law…*, see note 118, p. 113.
[125] N.S.M. Antunes, *Estoppel, Acquiescence and Recognition…*, see note 6, p. 35.
[126] *Conditions of Admission of a State to Membership in the United Nations*, Individual Opinion by M. Azevedo, p. 80. In doctrine, see: K. O'Brien, "Representation in the Doctrine of Estoppel…", see note 67, p. 74.
[127] *Gulf of Maine*, p. 305, para 130. In academic literature, see: M. White, "Equity – A General Principle of Law Recognized by Civilized Nations?", 4(1) Queensland University of Technology Law and Justice Journal 2004, pp. 110-111.
[128] To this effect, see: *Temple of Preah Vihear*, Separate Opinion of Sir Gerald Fitzmaurice, p. 63, who termed estoppel "a plea [that] is essentially a means of excluding a denial that might be correct - irrespective of its correctness. It prevents the assertion of what might in fact be true".
[129] See Section 6.3 *in fine* (*Vestey Group Limited*).

erated as a result of one party's statements or conduct directed to or otherwise affecting another party(-ies). What is represented does not have to accord with legal or factual truth as it is precisely the purview of estoppel to creatively affect and alter the shape of the legal and factual reality in a concrete configuration of parties.[130] It is entirely plausible to maintain that in the absence of a clear and unambiguous representation, which could have been perceived as mistaken or misguided at the time of its making, relative rights and obligations would have stayed intact as regulated in an applicable governing instrument. This is perhaps most vivid in a case like *Temple of Preah Vihear*, where a representation effectively changed the shape of the boundary line in a manner that was *prima facie* inconsistent with prior agreements and what could have been reasonably relied on by third parties alien to the relation between Cambodia and Thailand as an objectively ascertainable state of legal relations between the parties. Attempts to backtrack or alter one's firm position represented to another party constitutes an abuse of trust which estoppel helps to remedy.[131] Understood in this way, estoppel is a conceptual device which balances the rights and obligations of parties engaging in dealings governed by international law by resorting to the ideal of corrective justice.

1.5. Estoppel as a general principle of (international) law

MacGibbon wrote in 1958 that "modern opinion is tending to elevate the concept of estoppel to the rank of one of 'the general principles of law recognised by civilised nations'".[132] The status of estoppel as a general principle of law[133] or general principle of international law has been declared and confirmed by international courts and tribunals as well as by representatives of academic doctrine on numerous occasions. Incidentally, estoppel has been posited to constitute a rule of custom, albeit typically as an alternative to general principle of law.[134] In the light of the foregoing, it is apposite to countenance estoppel's status as a general principle of law *pro foro domestico* within the meaning of Article 38(1)(c) of the ICJ Statute and, in the alternative, a general principle of international law. I shall be broadly aligned with Dumberry's view that it is of no consequence for our inquiry whether estoppel is

[130] See: *"ARA Libertad"*, Joint separate opinion of Judges Wolfrum and Cot, p. 381, para 69 (the judges, having found an estoppel precluding Ghana from objecting to the jurisdiction of the ITLOS, concluded that estoppel operated irrespective of the validity of arguments Ghana were to advance in support of its submissions).
[131] B. Cheng, *General Principles of Law…*, see note 118, pp. 143-144.
[132] I.C. MacGibbon, "The Scope of Acquiescence in International Law", 31 British Yearbook of International Law 1954, pp. 147-148. See also: M. Jeżewski, *Międzynarodowe prawo inwestycyjne*, see note 82, p. 110.
[133] To be sure, throughout the dissertation all references to "general principles of law", "general principles" or "general principles of law *pro foro domestico*" constitute references to "general principles of law recognized by civilized nations" within the meaning of Article 38(1)(c) of the ICJ Statute.
[134] *Libyan Arab Jamahiriya v Chad*, Separate Opinion of Judge Ajibola, p. 77.

grounded in that provision or as a general principle of *international* law,[135] and a sustainable argument can be mounted in favour of either classification.

As a preliminary point, the referenced provision of the ICJ Statute shall be particularized before we set out to fit estoppel within its ambit. Some weight in arguments against treatment of estoppel as a general principle of law could be accorded to the formulation "the general principles of law *recognized by civilized nations*". It could also be contended that estoppel as such is generally not recognized in civil law systems, which poses a serious obstacle to ever accepting it as a general principle of law under the ICJ Statute.

Above all, the significance of the reference to "civilized nations" in Article 38(1)(c) of the ICJ Statute has long been depreciated. The concept has been panned as "dated" and discriminatory, based on the notion that only certain nations deserve the status of "civilized".[136] Proposals have been floated within the international community to have the reference removed. In the early 1970s, Mexico and Guatemala voiced disquiet with the wording of Article 38(1)(c), vouching for its deletion, with the former referring to the notion of "civilized nations" as "a verbal relic of the old colonialism".[137] The concept has also been criticized on the forum of the ICJ. In *North Sea Continental Shelf*, Judge Ammoun in his Separate Opinion denied the applicability of the principle as worded in Article 38(1)(c), contending that the "civilized nations" reference constitutes "an ill-advised limitation of the notion of the general principles of law" and that it is incompatible with provisions of the United Nations Charter, which proclaim the principle of sovereign equality (Articles 2 and 78).[138] The term is generally considered obsolete.[139] It is accepted in doctrine that no state can be excluded from the purview of Article 38(1)(c) on account of not being a "civilised nation", and the formulation shall denote all members of the international community[140] or the international community as a

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[135] P. Dumberry, *A Guide to General Principles of Law in International Investment Arbitration*, Oxford University Press 2020, pp. 168-171. It is difficult to argue on the basis of case law available (both within general international law and international investment law) that classification of estoppel within any one of those categories has any bearing upon its application or availability.

[136] G. Gaja, "General Principles of Law" (in:) Max Planck Encyclopedia of Public International Law, 2020, online, available at: https://bit.ly/3tm6Se6 (accessed: 24.08.2021), para 2. Gaja supposes that this wording has prevented the Court from frequently resorting to principles found in domestic legal systems to enunciate general principles of law.

[137] United Nations General Assembly, *Review of the Role of the International Court of Justice*, Report by United Nations Secretary-General, UN Doc A/8382, 15 September 1971, available at: https://bit.ly/3oCsxee (accessed: 24.08.2021), pp. 24-25. See also: S. González Hauck, "'All nations must be considered to be civilized': General Principles of Law between Cosmetic Adjustments and Decolonization", Verfassungsblog, 21 July 2020, available at: https://bit.ly/36sGeq2 (accessed: 24.08.2021).

[138] *North Sea Continental Shelf*, Separate Opinion of Judge Fouad Ammoun, pp. 133-134.

[139] P.-H. Houben, "Principles of International Law Concerning Friendly Relations and Co-Operation Among States", 61(3) American Journal of International Law 1967, pp. 734-735.

[140] E. de Wet, "Judicial Review as an Emerging General Principle of Law and its Implications for the International Court of Justice", 47(2) Netherlands International Law Review 2000, p. 187.

whole.[141] In order to construct an argument in favour of recognizing estoppel as a general principle of law, regard may be had to a representative selection of domestic law systems, and one's opinion should not be clouded by judgmental assessments inherent in the "civilized nations" adage.[142] Estoppel does not aspire to the status of a peremptory norm which could invalidate other norms (see, for example, Article 53 of the VCLT).

To the second argument against recognition of estoppel as a general principle of law *pro foro domestico*, which hinges upon the alleged non-universal acceptance of the principle in domestic jurisdictions, I submit that, if the clear acceptance of estoppel in all common law jurisdictions as well as hybrid jurisdictions is not enough to pass the threshold of "recognition" under Article 38(1), it is not imperative to find in civil law systems a principle that mirrors all of the intricate requirements of estoppel as found in common law. This would probably be a futile task considering that no unitary theory of estoppel under English or American law has ever been universally accepted. It is thus more appropriate to refer to "estoppels" rather than estoppel. Further, there is no agreement under English or American law as to a clear cut typology of estoppels. My approach is based on the following passage from *Chagos Marine Arbitration*, handed down by an arbitral tribunal constituted under Annex VII of the UNCLOS:

> "Estoppel is a general principle of law (…). Estoppel in international law differs from "complicated classifications, modalities, species, sub-species and procedural features" of its municipal law counterpart (…) but its frequent invocation in international proceedings has added definition to the scope of the principle".[143]

The implications of this passage are twofold. First, international estoppel should be considered as little more than a generalization of the types of estoppel prominent in domestic legal systems, a generalization that is capable of assuaging the peculiar concerns of international law and catering to its needs. Second, international estoppel, throughout the evolution of ju-

[141] M.C. Bassiouni, "A Functional Approach to "General Principles of International Law"", 11(3) Michigan Journal of International Law 1990, p. 807; R. Yotova, "Challenges in the Identification of 'the General Principles of Law Recognized by Civilized Nations': the Approach of the International Court", 3 Canadian Journal of Comparative and Contemporary Law 2017, p. 282.

[142] It has been explained in doctrine that the use of the "civilized nations" notion was a result of a compromise between the drafters of the ICJ Statute. A particular concern voiced during the negotiations was that the Statute was purporting to impose uniform meanings upon concepts which are understood differently in different countries. See: G. Gaja, "General Principles of Law", see note 136, para 3.

[143] *Chagos Marine Protected Area Arbitration*, paras 435-436.

risprudence, has developed its own set of rules and contingencies which supplement and enrich the core of the principle derived from the totality of domestic systems.[144]

Estoppel incorporating the core elements of representation, attribution and detrimental reliance (mirroring, in all important respects, the strict concept of estoppel as laid out above by reference to pronouncements of international courts and tribunals) is recognized in all of the major common law jurisdictions: the United States,[145] Canada,[146] England and Wales,[147] Australia,[148] and New Zealand.[149] Estoppel in those jurisdictions functions primarily as a catch all umbrella term which encompasses a number of sub-species applicable in a myriad of different contexts, including: estoppel by representation, estoppel by conduct, estoppel in pais, promissory estoppel, proprietary estoppel, estoppel by record and estoppel by deed. These are not all recognized differentiations and there are overlaps between the different categories since, as signalled above, no consensus exists as to a settled typology.[150] Estoppel on the strict view is also commonly accepted in all of the so-called hybrid jurisdictions,[151] which combine elements of a civil law and a common law system – South Africa,[152] Scotland,[153] Israel,[154] and

[144] See also: T. Cottier, J.P. Müller, "Estoppel", see note 119, para 10, who, whilst classifying estoppel as a principle of customary law, note that international estoppel does incorporate certain elements of judge-made law and precedent.

[145] In lieu of many, see, as regards promissory estoppel: M.B. Metzger, M.J. Phillips, "Promissory Estoppel and Section 2-201 of the Uniform Commercial Code", 26(1) Villanova Law Review 1980, p. 63 et seq. On collateral/issue estoppel, see: H. Smit, "International Res Judicata and Collateral Estoppel in the United States", 9 UCLA Law Review 1962, p. 44 et seq.

[146] J.A. Manwaring, "Promissory Estoppel in the Supreme Court of Canada", 10(3) Dalhousie Law Journal 1987, p. 43 et seq. On issue estoppel in Canadian law, see: H. Stewart, "Issue Estoppel and Similar Facts", 53 Criminal Law Quarterly 2008, p. 382 et seq.

[147] In lieu of many, see, in respect of promissory estoppel: M. Barnes, *The Law of Estoppel*, Hart Publishing 2020, pp. 393-518. On proprietary estoppel: ibid, pp. 519-692; B. McFarlane, *The Law of Proprietary Estoppel*, 2nd edition, Oxford University Press 2020; B. Sloan, "Proprietary Estoppel: Recent Developments in England and Wales", 22 Singapore Academy of Law Journal 2010, pp. 110-135. On estoppel by convention: T.B. Dawson, "Estoppel and Obligation: the Modern Role of Estoppel by Convention", 9(1) Legal Studies 1989, p. 16 et seq. On issue estoppel: P. Barnett, "The Prevention of Abusive Cross-Border Re-Litigation", 51(4) International and Comparative Law Quarterly 2002, pp. 943-957. See also, for an account of Anglo-American estoppel in Polish doctrine: J. Halberda, *Estoppel w angloamerykańskim prawie prywatnym*, Wydawnictwo Księgarnia Akademicka 2020.

[148] See, *inter alia*: K.E. Lindgren, K.G. Nicholson, "Promissory Estoppel in Australia", 58 Australian Law Journal 1984, p. 249 et seq.

[149] M. Roberts, "Equitable Estoppel in New Zealand: *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd*", 27(2) King's Law Journal 2016, pp. 145-156; J. Taylor, "The Role of Estoppel as a Defence to Claims in Unjust Enrichment", 9(4) Auckland University Law Review 2003, p. 1208 et seq.

[150] Attempts to propose a unified concept of „equitable estoppel" or "judicial estoppel" have been made, however. See: M. Barnes, *The Law of Estoppel*, see note 147, pp. 119-136.

[151] For a broader review of implications related to promissory estoppel in hybrid jurisdictions, see: D.V. Snyder, "Comparative Law in Action: Promissory Estoppel, the Civil Law, and the Mixed Jurisdiction", 15(3) Arizona Journal of International and Comparative Law 1998, p. 695 et seq.

[152] F. Myburgh, "On Constitutive Formalities, Estoppel and Breaking the Rules", 27 Stellenbosch Law Review 2016, p. 254 et seq.; G. Lubbe, "Estoppel: South Africa", 14(5/6) European Review of Private Law 2006, p. 747 et seq.

Ireland.[155] To this pool one shall add formerly colonial jurisdictions of the British Empire, virtually all of which have retained common law-based systems, incorporating the principle of estoppel within its contract laws, such as Malawi,[156] Pakistan,[157] India,[158] Uganda,[159] Zimbabwe,[160] Belize,[161] and Tanzania.[162] Originally a private law doctrine, estoppel has been successfully invoked in dealings with public authorities.[163]

The objective that one party should not benefit from radically and suddenly changing its course to the detriment of another is enshrined in the laws of other jurisdictions beyond the common law world. The rule that a person may not contradict themselves to the detriment of another person was accepted as a general principle of French law in a 2011 judgment of the Court of Cassation.[164] In Germany, the basis for an estoppel-like principle, derived from a teleological interpretation of the umbrella concept of good faith, is rationalized as protection of legitimate expectations generated in the representee.[165] A related concept is *Verwirkung*, defined variously as the civil law iteration of forfeiture or laches, but capable of incorporating a detrimental reliance element.[166] Similar to *Verwirkung* is the principle of *passivitetsverkan*

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[153] E. Reid, "Protecting Legitimate Expectations and Estoppel in Scots Law: Report to the XVIIth International Congress of Comparative Law, July 2006 (Response to Questionnaire II.A.4)", 10(3) Electronic Journal of Comparative Law 2006, p. 1 et seq., available at: https://bit.ly/3pvODj6 (accessed: 24.08.2021).

[154] G. Kuehne, "'Reliance, Promissory Estoppel and Culpa in Contrahendo: a Comparative Analysis", 10 Tel Aviv University Studies in Law 1990, p. 279 et seq.; N. Cohen, "From the Common Law to the Civil Law: the Experience of Israel" (in:) J. Cartwright, M. Hesselink (eds.), *Precontractual Liability in European Private Law*, Cambridge University Press 2009, pp. 398-403, 414. Israeli law also recognizes the doctrine of issue estoppel. See: C.I. Goldwater, "Issue Estoppel by Foreign Judgment in Israeli Law", 25(4) International and Comparative Law Quarterly 1976, pp. 868-872.

[155] For an overview, see: J. Mee, "Lost in the Big House: Where Stands Irish Law on Equitable Estoppel?", 33 Irish Jurist 1998, p. 187 et seq.

[156] See e.g. judgment of the High Court of Malawi of 27 August 2020, civil cause no. 112 of 2018 (*Steve Banda & ors. v Makiyi, Kanyenda and Associates (a firm)*), available at: https://bit.ly/3taWq92 (accessed: 24.08.2021).

[157] M. Mumtaz, "Promissory Estoppel: Origin, Development and Applicability Against Governmental Actions", 5 Pakistan Law Journal 2016, available at: https://bit.ly/3cpHSwe (accessed: 24.08.2021).

[158] The principle is perhaps not as wide as in English law, however the binding character of promissory and proprietary estoppels has not been questioned. See: S. Dave, "The Doctrine of Promissory Estoppel", Manupatra Articles 2012, available at: https://bit.ly/3pyIdRe (accessed: 24.08.2021).

[159] Uganda Legal Information Institute, "Estoppel", available at: https://bit.ly/2YuYn22 (accessed: 24.08.2021).

[160] Zimbabwe Legal Information Institute, "Estoppel (Contract)", available at: https://bit.ly/3pAvJZj (accessed: 24.08.2021).

[161] *Dunkeld International*, para 222.

[162] *Tanzania Electric Supply*, paras 98-108.

[163] See also note 979.

[164] Judgment of the Commercial Chamber of the Court of Cassation of 20 September 2011, no. 10-22.888, available at: https://bit.ly/3j64Zxs (accessed: 24.08.2021). See also: P. Véron, "The Estoppel Recognised as a Principle of French Procedural Law" Kluwer Patent Blog, 7 November 2011, available at: https://bit.ly/2MA9eVH (accessed: 24.08.2021); J. Balmaceda, *The Harmonisation of the International Sale of Goods through Principles of Law and Uniform Rules*, Cambridge Scholars Publishing 2020, p. 173; V. Sélinsky, L.A. Lécuyer, "France" (in:) P. Kobel, P. Këllezi, B. Kilpatrick (eds.), *Antitrust in the Groceries Sector & Liability Issues in Relation to Corporate Social Responsibility*, Springer 2015, p. 499.

[165] J. P. Müller, *Vertrauensschutz im Volkerrecht*, Heymanns 1971, p. 11.

[166] A. Vaquer, "*Verwirkung* versus Laches: A Tale of Two Legal Transplants", 21 Tulane European and Civil Law Forum 2006, pp. 54-69.

found in the laws of Norway and Sweden. Spanish law appears to recognize, at a minimum, a form of issue estoppel under which an issue cannot be litigated if the party bringing it had failed to do so previously whilst having an opportunity.[167] Chinese contract law is also underpinned by the wider doctrine of *venire contra factum proprium*. It appears that good faith-laden considerations similar to estoppel are incorporated therein via the concept of a gratuitous contract known in German law.[168] Japanese civil procedure also prohibits changing course where another has acted in reliance upon a representation.[169] A rule similar to promissory estoppel within the meaning of U.S. law is also applied to contracts.[170] A procedural and substantive type of estoppel based on detrimental reliance are distinguished under Ukrainian law[171] and Russian law.[172] In Latin America, the doctrine of *actos propios* incorporates the estoppel test,[173] in addition to the fact that in certain states domestic courts have directly applied American jurisprudence on estoppel.[174] Parallels have been made in the literature between promissory estoppel and the doctrine of abuse of rights under Polish law.[175] One arbitral tribunal has opined that estoppel originated in the Islamic jurisprudence.[176]

In the alternative to general principle of law *pro foro domestico*, estoppel is to be classified as a general principle of international law.[177] In distinction with the former category, whose content is derived from the commonalities in theory and enforcement of a given principle in a mass of domestic legal systems, general principles of international law represent a grouping of rules of autonomous origin which are inherent to the international legal order.

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[167] M. Montañá, "Barcelona Court of Appeal Publishes Interesting Judgment Addressing the Scope of Estoppel", Kluwer Patent Blog, 11 July 2019, available at: https://bit.ly/2NIi6ZQ (accessed: 24.08.2021).
[168] G. Liu, "A Comparative Study of the Doctrine of Estoppel: a Civilian Contractarian Approach in China", 9 Canberra Law Review 2010, pp. 15-18.
[169] J. Koshikawa, "Principles of Equity in the Japanese Civil Law", 11(2) International Lawyer 1977, p. 317.
[170] K. Kuzuhara, "Contracting Between A Japanese Enterprise And An American Enterprise: The Differences In The Importance Of Written Documents As The Final Agreement In The United States And Japan", 3(1) ILSA Journal of International and Comparative Law 1996, pp. 71-72; V.L. Taylor, "Continuing Transactions and Persistent Myths: Contracts in Contemporary Japan", 19(2) Melbourne University Law Review 1993, pp. 392-393.
[171] A. Chornous, "Applicability of the Estoppel Principle by Ukrainian Courts", CIS Arbitration Forum, 15 October 2020, available at: https://bit.ly/3pAjMTo (accessed: 24.08.2021).
[172] E. Kurzynsky-Singer, "Estoppel in Russian Law", 3(2) German-Russian Law Review 2018, p. 128 et seq.
[173] *Duke Energy*, para 241.
[174] One prominent example is Chile. See: R.A. Padilla Parot, „Por Una Correcta Aplicación de la Doctrina de Los Actos Propios", 20 Revista Chilena de Derecho Privado 2013, p. 165 et seq.
[175] J. Halberda, "Angielska doktryna *promissory estoppel* a polska klauzula nadużycia prawa", 7(2) Krakowskie Studia z Historii Państwa i Prawa 2014, pp. 401-402.
[176] *Desert Line Projects*, para 207. See also: *RWE Innogy*, Separate Opinion of Mr. Judd L. Kessler, para 44, where the claim was reiterated.
[177] Early academic writers on the topic disputed the existence of any "general principles" other than general principles of law *pro foro domestico* within the meaning of Article 38(1)(c) of the ICJ Statute. See: H. Lauterpacht, *Private Law Sources and Analogies…*, see note 35, p. 85; W. Friedmann, "The Uses of "General Principles" in the Development of International Law", 57(2) American Journal of International Law 1963, pp. 279-283; H.C. Gutteridge, "The Meaning and Scope of Article 38 (1) (c) of the Statute of the International Court of Justice", 38 Transactions of the Grotius Society 1952, p. 127.

The source of their legitimacy has been argued to be the structure or character of international law which, in turn, generates the need to introduce thereinto such universal principles as justice, fairness, equity, *pacta sunt servanda*, state sovereignty, reciprocity and proportionality.[178] General principles of international law are, on another account, generalizations or abstractions created out of customary or positive, treaty rules.[179] Other writers propose that the normative basis for the category should be sought in the recognition of certain fundamental values honoured by the international community as a whole.[180]

Notably, the qualification of estoppel as a general principle of international law has been endorsed by Tomuschat[181] and Kozłowski who considers it as complementary to Article 38(1)(c) of the ICJ Statute within the systemic boundaries of the peculiar character of international law, conditioned by both theory and practice of the same.[182] On this view, the mechanism of estoppel is therefore unique, not derived directly from universal recognition by civilized nations. Normatively, the writer argues that estoppel should be considered as a method of reasoning which becomes effective under international law in the form of a general principle of international law which conduces, to the greatest extent possible, to the achievement of the objectives estoppel has in the sphere of values (axiological objectives grounded in good faith). In other words, reasoning peculiar or germane to estoppel, underpinned by a strong axiological component (justice-driven), is thus accorded normative relevance by the qualification as a general principle of international law.[183] The writer submits that international estoppel should be moulded as an autonomous principle,[184] stripped from its domestic modalities and distinctions – in his opinion, this requires that estoppel be considered a general principle of international law as otherwise there is a risk that the Anglo-Saxon origins of the principle may impede the development of its international counterpart, and thus hamper the realization of its axiological ambitions.[185]

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[178] V.D. Degan, *Sources of International Law*, Martinus Nijhoff 1997, pp. 72-89.
[179] J.G. Lammers, "General Principles of Law Recognized by Civilized Nations" (in:) F. Kalshoven, J. Kuyper, J.G. Lammers (eds.), *Essays on the Development of the International Legal Order: In Memory of Haro F. Van Panhuys*, Martinus Nijhoff 1980, pp. 66-69; R.P. Mazzeschi, A. Viviani, "General Principles of International Law: From Rules to Values?" (in:) R.P. Mazzeschi, P. De Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law*, Springer 2018, pp. 138-142.
[180] M.C. Bassiouni, "A Functional Approach…", see note 141, pp. 768-769. To a similar effect see: G. Gaja, "General Principles of Law", see note 136, paras 18-20.
[181] C. Tomuschat, "General International Law: A New Source of International Law?" (in:) R.P. Mazzeschi, P. De Sena (eds.), *Global Justice, Human Rights and the Modernization of International Law*, Springer 2018, p. 201.
[182] A. Kozłowski, *Estoppel jako ogólna zasada…*, see note 6, p. 111.
[183] Ibid, p. 110.
[184] On the autonomous character of general principles, see, *inter alia*: P. Saganek, "General Principles of Law in Public International Law" 37 Polish Yearbook of International Law 2017, p. 243 et seq.
[185] A. Kozłowski, *Estoppel jako ogólna zasada…*, see note 6, pp. 112-113.

It is warranted to note that some academic writers have argued that general principles of international law as described above fit within the purview of Article 38(1)(c) of the ICJ Statute. This was advanced notably by Lammers who contended that such a conclusion stems from the ordinary meaning of the terms used in said provision, particularly the notion of "law" which can plausibly refer to both domestic and international legal orders.[186] Other commentators have argued that the expression "recognised by civilized nations" could accommodate principles found both at the domestic and international level. Expansion of the scope of general principles under the ICJ Statute to cover principles found in international law at large would also enhance the gap-filling function of general principles as judges and arbitrators would be able to benefit from a larger pool of available precepts.[187] According to Bassiouni, a failure to read into Article 38(1) general principles of international law would fly in the face of the drafters' intentions and would go down as a lost opportunity to capitalize upon an important source of law.[188] Irrespective of the doctrinal correctness of these views, it is accepted that the ICJ has in its jurisprudence resorted to general principles of international law, derived from the international legal order as a whole and not as a generalization of domestic legal systems.[189]

It is beyond the scope of this dissertation to offer a synthesis of views on this point nor to propose my own theory. The crucial corollary is that estoppel, classified as either a general principle of law *pro foro domestico* or a general principle of international law, is recognized in both case law and jurisprudence. As such, it constitutes a source of law which is capable of serving as a normative basis for specialized rules and directives in international law. It can be had recourse to by courts and tribunals alike to decide cases by imposing obligations on parties, inferring failures to perform obligations, according rights or interpreting the same. The dissertation aimed at adducing evidence to countenance both accounts. Consequently, a num-

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[186] J.G. Lammers, "General Principles of Law Recognized by Civilized Nations", see note 179, p. 67.

[187] E. Carpanelli, "General Principles of International Law: Struggling with a Slippery Concept" (in:) L. Pineschi (ed.), *General Principles of Law - The Role of the Judiciary*, Springer 2015, p. 127. It is worth noting that Article 38 of the PCIJ Statute used a wording different than that employed in its successor, the ICJ Statute. The former provision proclaimed that the Court "shall apply" general principles of law recognized by civilized nations, whilst Article 38(1) of the ICJ Statute affirms that it is the function of the Court to decide "in accordance with international law", which is followed by a reference to general principles of law recognized by civilized nations in subsection (c). The ICJ is therefore obligated to apply general principles of law understood as part of international law.

[188] M.C. Bassiouni, "A Functional Approach…", see note 141, p. 772.

[189] Notably, in *Corfu Channel* the Court utilized the principle of freedom of maritime communications. See: *Corfu Channel*, p. 22. See also: *Western Sahara*, p. 33, para 59 (referring to the general principle of international law of self-determination); *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, p. 23 (where the Court opined that the Convention is underpinned by "principles which are recognized by civilized nations as binding on States"); *Burkina Faso v Mali*, pp. 565-569, paras 20-26, 30-32 (the principle of *uti possidetis juris*).

ber of major domestic systems have embedded therein rules and precepts which underlie international estoppel, even where, for the sake of argument, only the strict view of estoppel, its more specialized iteration, is considered. The general rule is that one cannot act inconsistently where such conduct has led to detrimental reliance on the part of another and, as a result of the same, either detriment has been sustained by the other party or unfair benefit has accrued for the representor. In the dissertation I shall avail myself of the term "general principle of law", however this is best interpreted as an endorsement of Lammers' view that Article 38(1)(c) has within its purview also general principles of international law in the sense discussed herein. On any account, my use of the term "general principle of law" is to signify the universal acceptance of estoppel as an operational principle, regardless of its exact qualification.

Turning to the practical implications of the principle, estoppel has a dual procedural-substantive legal effect and within this dichotomy it is possible to point to a direct and an indirect consequence of application of the principle. One classification proposed by the ICJ in this connection in *Gulf of Maine* was to treat preclusion as the procedural aspect and estoppel as the substantive aspect of one overarching principle.[190] The Court did not expound upon this tentative typology, however the following recasting captures, I submit, the reasoning alluded to. The procedural aspect consisting in preclusion would amount to a prohibition, applied to a specific party on account of its previous representations which met with detrimental reliance of another party, of asserting a position contrary to the one previously represented. In other words, such a party is forced to adopt and maintain a position consistent with the meaning of its original statement or conduct as exhibited towards the representee. This could be reconceptualized as a form of constructive waiver. The substantive prong of the principle (referred to as "estoppel" *sensu stricto* by the ICJ in its dictum) would denote the secondary legal consequences of preclusion, which may be various but could be broadly categorized as either a loss of a right or incurrence of an obligation. The burden of proof lies with the party alleging that an estoppel scenario has arisen and purporting to preclude another party from asserting a given position.

As a general principle of law, estoppel is capable of having a dual function in the way it is treated and applied by international courts and tribunals: (1) gap filling, i.e. estoppel can provide guidance where none of the other formal sources of international law (treaty and custom) furnish an answer, with a view to avoiding a situation of *non liquet*;[191] (2) important in-

[190] *Gulf of Maine*, p. 305, para 130.
[191] H. Thirlway, *The Sources of International Law*, Oxford University Press 2014, p. 98.

terpretation function, i.e. estoppel can aid in the identification of the applicable international law and, in particular, construction of other sources, primarily treaty and custom.[192] In this way, estoppel is capable of achieving the objectives of fostering coherence within the international legal system, as noted by a pair of commentators:

> "First, principles of law represent a central cohesive force, revealing and reinforcing the systemic nature of the system. Second, they operate as a tool for intra-systemic convergence in the constellation of international courts and tribunals, avoiding or reducing fragmentation in the approaches adopted in different sub-fields of international law by ensuring that they remain part of general international law. Third, principles of law promote inter-systemic coherence by bridging the gap between international law and domestic legal systems".[193]

In most cases analysed herein, it will be the gap-filling function of estoppel that shall be utilized by courts and tribunals, chiefly because the principle is uncodified and does not typically feature in treaties.[194] Therefore, estoppel will be used as an autonomous source of law to decide cases where no assistance is rendered in the letter of treaty or custom. As an interpretative tool, estoppel shall primarily help decode the content of an applicable rule from treaty and custom and help apply it in a fair manner to the facts of a specific case. Crawford has theorized that estoppel shall largely operate to resolve ambiguities and, more broadly, as a principle of equity and justice.[195] It is to be expected that the latter function will not always be performed by estoppel on the strict view, with all of its appendices. For the purposes of performing the interpretation function estoppel will have to be reduced to its underlying rationales and doctrinal objectives, i.e. prohibition of detrimental inconsistency of conduct, fairness and justice in dealings between agents under international law, need for clarity as regards the expression of manifestations of will, and keeping promises (*acta sunt servanda*).

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[192] M. Đorđeska, *General Principles of Law Recognized by Civilized Nations (1922-2018): The Evolution of the Third Source of International Law Through the Jurisprudence of the Permanent Court of International Justice and the International Court of Justice*, Brill/Nijhoff 2020, pp. 108-112; I. Skomerska-Muchowska, "Some Remarks on the Role of General Principles in the Interpretation and Application of International Customary and Treaty Law", 37 Polish Yearbook of International Law 2017, pp. 264-271.

[193] M. Andenas, L. Chiussi, "Cohesion, Convergence and Coherence of International Law" (in:) M. Andenas, M. Fitzmaurice, A. Tanzi, J. Wouters (eds.), *General Principles and the Coherence of International Law*, Brill/Nijhoff 2019, p. 10 (footnotes omitted).

[194] One notable example to the contrary, the CPTPP, is discussed in Section 2.2.2 *in fine*. Another example is Article VI(1) of the 1961 European Convention on International Commercial Arbitration.

[195] J. Crawford, *Brownlie's Principles of Public International Law*, see note 20, p. 407.

1.6. Estoppel and acquiescence

It was noted above in Section 1.2 that, especially in early case law, the broad concept of estoppel was assimilated with unilateral acts, particularly acquiescence, to the point where a clear differentiation between the two was difficult (as borne out in cases such as *Venezuelan Preferential Claims*, *Shufeldt*, *Anglo-Norwegian Fisheries*). As the ICJ remarked in *Gulf of Maine*, "the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principles of good faith and equity",[196] it is therefore not surprising that the concepts were employed virtually interchangeably in early jurisprudence to achieve the objectives of fairness and justice.[197] Echoes of such reasoning are to be found as recently as in the 1994 ICJ judgment in *Libyan Arab Jamahiriya v Chad*, where the Court was asked to examine whether a 1955 Franco-Libyan Treaty had or had not determined all of the frontiers between the territories of the two states, including the boundary with Chad (as successor state to France). Although an affirmative determination was made on the basis of an interpretation of the treaty, Judge Ajibola in his Separate Opinion was ready to accept the claim also on the basis of what he referred to as estoppel, noting Libya's "silence or acquiescence (…) from the date of signing the 1955 Treaty to the present time, without any protest whatsoever".[198]

These similarities are only apparent, however, to the extent that the broad view of estoppel is concerned.[199] The comment in *Gulf of Maine* cited in the preceding paragraph was quickly followed up by a reservation that it is the existence of detriment that distinguishes the concepts, thus adopting the strict view of estoppel.[200] Crawford has stated unequivocally that "an estoppel is precisely *not* a unilateral act" on account of the additional relative element of detrimental reliance.[201] The differences between the two categories are especially vivid when

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[196] *Gulf of Maine*, p. 305, para 130. That estoppel and acquiescence "are closely linked" was asserted in: *Pulau Batu Puteh Case*, Dissenting Opinion of Judge ad hoc Dugard, p. 147, para 34.

[197] Note also that acquiescence and estoppel are often treated jointly in doctrine, which is evident by reference to even the most cursory look at the titles of the topical papers: "Estoppel before International Tribunals and Its Relation to Acquiescence" (by Bowett), "Acquiescence/Estoppel in International Boundaries: Temple of Preah Vihear Revisited" (by Chan), "Jurisdiction by Estoppel and Acquiescence in International Courts and Tribunals" (by Wass), "Estoppel and Acquiescence" (by Sinclair), *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement* (by Antunes).

[198] *Libyan Arab Jamahiriya v Chad*, Separate Opinion of Judge Ajibola, p. 81.

[199] R.Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press 1963, pp. 44-45. Bowett has noted that the assimilation of estoppel and acquiescence was especially prevalent in early interstate arbitrations on account of the fact that arbitrators deciding those cases, in the wake of proliferation and development of general international law, had frequent recourse to the domestic laws of England and Wales, which domestic concepts were often extrapolated and imported onto international law. See: D.W. Bowett, "Estoppel before International Tribunals…", see note 6, pp. 198-199.

[200] *Gulf of Maine*, p. 305, para 130.

[201] J. Crawford, *Brownlie's Principles of Public International Law*, see note 20, p. 408.

estoppel is reconceptualized as the idea of preclusion – on this account, the essence of the principle can be limited to the inability of a party to adopt a position different from that represented earlier. A representation assumes here only an instrumental role, as a pre-condition for estoppel, i.e. the preclusive effect generated by an attempt to depart from that representation under conditions of detrimental reliance, to apply. In respect of unilateral acts, representations are be-all and end-all – it is the declaration of a sovereign state that creates obligations irrespective of the existence of detriment on the part of the representee or benefit of the representor.[202] Acquiescence is best understood as qualified silence, that is one-sided, unilateral expression of silent consent by a state in a situation where lodging of a protest or objection against the acts of another state is objectively warranted or otherwise called for.[203]

Judge Fitzmaurice in his Separate Opinion in *Temple of Preah Vihear* opined that although, in theory, estoppel is distinct from acquiescence, the latter concept can, under certain circumstances, give rise to the same legal ramifications as estoppel – where a state is silent in a situation where there was an obligation to make a statement or act, this implies consent or waiver of a right and may, as a consequence, be interpreted in essence as a representation to such an effect.[204] In the opinion of Sinclair, the circumstances under which the French government handed over frontier maps devised by the Mixed Delimitation Commission, drawn along the watershed line, to Thailand are better conceptualized as acquiescence rather than estoppel. For this scenario necessitated, Sinclair argues, that Thailand should have reacted by giving an outward appearance, within a reasonable time period, in the form of a protest against the delimitation of boundaries. Estoppel should not be in issue here as Cambodia did not argue before the ICJ that, in the years following the handing over of maps and in reliance upon Thailand's silence, it undertook actions which affected its position relative to the other states involved.[205] I submit that this view is to be preferred. Of crucial importance for the differentiation between acquiescence and the strict concept of estoppel is the identification of an event (qualifiable as a representation expressed as a statement or conduct) that initiates the

[202] Note that Principle 3 of the GPAUD stipulates that reactions to which unilateral acts give rise shall be taken account of when determining the legal effects of the latter, however this pertains only to the content and normative effects of a declaration and not its binding character. See: *Nuclear Tests*, p. 267, para 43:

> "In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made".

[203] N.S.M. Antunes, "Acquiescence" (in:) Max Planck Encyclopedia of Public International Law, 2006, online, para 2, available at: https://bit.ly/3pBJhmy (accessed: 24.08.2021). See also a statement to a similar effect in recent ICJ jurisprudence: *Pulau Batu Puteh Case*, p. 51, para 121.

[204] *Temple of Preah Vihear*, Separate Opinion of Sir Gerald Fitzmaurice, p. 62.

[205] I. Sinclair, "Estoppel and Acquiescence", see note 6, p. 105.

potential generation of preclusion. On the facts of *Temple of Preah Vihear*, it was not the act of handing over of the frontier maps to Thailand that was capable of giving rise to estoppel but the same's reaction in reliance upon the former event (which should be reconceptualized as a representation).[206]

Parallels between estoppel and acquiescence were particularly ubiquitous in early case law. *Venezuelan Preferential Claims* essentially equated estoppel with acquiescence and a failure to protest,[207] so did a PCA tribunal in the *Grisbadarna Arbitration*.[208] The ICJ in the 1951 judgment in *Anglo-Norwegian Fisheries*, despite not mentioning estoppel by name, availed itself of a number of terms which conjured up connections between estoppel and acquiescence, such as "prolonged abstention" and "toleration of the international community".[209] An absence of protest against Norway's territorial claims on the part of the United Kingdom effectively amounted to acquiescence.[210] The case also stands for the proposition that mere lapse of time can be interpreted as qualified silence and as such be capable of having the effect of implied consent.[211]

As noted above in Section 1.3.1 *in principio*, for the preclusive effect of estoppel to apply it is not necessary to discern an intention on the part of the representor to be bound (or, in other words, consent to be bound).[212] In fact, the rationale of estoppel in public international law, in practical terms, is to commit states to obligations and undertakings that they did not unequivocally assent to as such situations are consummated by unilateral acts such as consent and acquiescence. The reason for the binding character of representations under the principle of estoppel lies in the detrimental reliance of the representee.[213] Intention and consent are inter-related. Whilst the acquiescing party in fact grants consent to a given factual or legal state of affairs, no consent is discernible in an estoppel scenario. Preclusion necessarily imports an element of force in that due to previous statements or conduct a party is compelled to continue

[206] As Thirlway notes, it will be a common occurrence that a given set of facts can be understood as either showing a state's attitude that was in fact adopted or as estopping it from denying that it had adopted that attitude, even if in fact that had not been the case. See: H. Thirlway, "The Law and Procedure…", see note 2, p. 30.
[207] H. Lauterpacht, *Private Law Sources and Analogies…*, see note 35, pp. 205-206, 253-255.
[208] N.S.M. Antunes, *Estoppel, Acquiescence and Recognition…*, see note 6, p. 8.
[209] *Anglo-Norwegian Fisheries*, p. 139.
[210] C.R. Symmons, *Historic Waters and Historic Rights in the Law of the Sea*, Brill 2019, p. 359.
[211] I.C. MacGibbon, "The Scope of Acquiescence…", see note 132, p. 147; N.S.M. Antunes, *Estoppel, Acquiescence and Recognition…*, see note 6, p. 25.
[212] This argument was advanced by Bolivia in pleadings before the ICJ in its case against Chile. See: *Bolivia v Chile*, p. 557, para 154. For the avoidance of doubt, it must be noted that, *a fortiori*, estoppel can attach to intended statements. In such cases, however, it appears the principle is assimilated with the unilateral act and operates in concert therewith to prevent the promisor from going back on the promise.
[213] *Chagos Marine Protected Area Arbitration*, para 446.

to uphold its position, one that it currently probably disagrees with, considering the changed circumstances.

A test case which explored some of those considerations was *Arbitral Award made by the King of Spain on 23 December 1906* decided by the ICJ shortly before *Temple of Preah Vihear*. On the facts, Nicaragua argued, on a number of grounds, that the designation of the King of Spain as arbitrator in a frontier dispute with Honduras, pursuant to the Gámez-Bonilla Treaty of 7 October 1894, was invalid. Notably, one of those grounds involved an assertion that said Treaty had expired before the King of Spain officially signified his acceptance to become an arbitrator. The Treaty was intended, according to its terms, to remain in force for ten years, however the starting date was contentious. Having inferred, by reference to a systemic interpretation of the Treaty's provisions, that it was the common intention of the parties for the 10-year period to commence at the time of exchange of ratifications, the ICJ went on to posit 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 Gómez-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 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.[214]

The ICJ based its reasoning on a combination of Nicaragua's conduct validating the appointment and acquiescence which, ultimately, precluded it from relying on any of its objections to jurisdiction. Notably, Judge ad hoc Holguin in his Dissenting Opinion considered and rejected the strict concept of estoppel, underscoring that a successful finding of estoppel must be underpinned by the presence of reliance by one party on the apparent acquiescence of the other. The element of detrimental reliance was thought to be lacking on the facts; further, Judge Holguin appeared to delineate a boundary between reliance and detriment.[215] The element of detrimental reliance serves to preserve clear differentiations between the distinct doctrinal concepts and could be taken to constitute an important reason for upholding the primacy of the strict view of estoppel.

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[214] *Arbitral Award made by the King of Spain on 23 December 1906*, p. 208.
[215] Ibid, Dissenting Opinion of Judge Urrutia Holguin, pp. 222, 236.

1.7. Estoppel and state promises

State promises in international law should be understood as clear, unambiguous forward-looking statements or commitments,[216] made orally or in writing by a state and directed towards another subject of international law.[217] Promises may have a clearly defined addressee (or a class of addressees), however they may also be addressed *erga omnes* (to the international community as a whole) under the condition that it is evident, by reference to their content and circumstances in which they were made, that the promisor wished to make them binding on itself.[218] Eckart has proffered the following normative bases for the binding character of promises: the presumption of a promisor state's consent to become bound by the promise, sovereignty, the intention to become bound, good faith (both on the part of the promisor and the promisee), reliance (also conceptualized as trust) of the promisee upon the promise.[219] Another account contends that a promise constitutes a unilateral offer to self-limit one's rights and prerogatives recognized under international law.[220] Promises are to be considered unilateral acts of states, with their normative significance not resulting from agreement or another type of mutual engagement. In this sense they constitute an autonomous source of international obligations.[221]

As held by the ICJ in *Nuclear Tests*, for a promise to be binding two requirements must be met: a discernible intention (will) to make a promise (declaration) and its public character.[222] Under Principle 1 of the GPAUD, the binding character of promises is underpinned by the principle of good faith, just as estoppel. For a promise to be public, no special requirements are envisaged in international law.[223] It is necessary, however, for a promise (or, at a minimum, the most important tenets of its content which condition the character of the obliga-

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[216] Binding promises can be made, in the field of international law, also by other subjects of international law, notably international organizations, however attention will be limited in this dissertation, considering its ambit, to sovereign states. When discussing issues specific to international investment law, regard will also be had to the power to make binding promises vested in international corporations (private parties recognized in international law). See, *inter alia*, my comments regarding the attribution of representations to natural and juridical persons in Section 2.6.2.3.

[217] A. Cassese, *International Law*, 2nd edition, Oxford University Press 2005, p. 185; V.D. Degan, "Unilateral Act as a Source of Particular International Law", 5 Finnish Yearbook of International Law 1994, p. 188.

[218] E. Suy, N. Angelet, "Promise" (in:) Max Planck Encyclopedia of Public International Law, 2007, online, para 1, available at: https://bit.ly/3aCmRNG (accessed: 24.08.2021).

[219] C. Eckart, *Promises of States…*, see note 30, pp. 194-201.

[220] P. Saganek, *Unilateral Acts of States in Public International Law*, Brill/Nijhoff 2016, p. 83.

[221] V.R. Cedeño, M.I.T. Cazorla, "Unilateral Acts of States in International Law" (in:) Max Planck Encyclopedia of Public International Law, 2019, online, para 43, available at: https://bit.ly/3pCYZxQ (accessed: 24.08.2021).

[222] *Nuclear Tests*, p. 267, para 43.

[223] There is some disagreement, however, as to whether promises must be, in order to be held binding, transmitted to promisees through official, diplomatic channels. These diverging views are discussed in: P. Saganek, *Unilateral Acts of States…*, see note 220, pp. 384-385.

tion stemming therefrom) to reach the promisee in a manner that allows it to familiarize itself therewith.[224]

A view has been put forward in doctrine, notably by Schwarzenberger, that the binding character of unilateral acts, including promises, stems from estoppel.[225] This proposition has been countered by arguing that its logical consequence would be to declare promises irrevocable. Estoppel, understood as an all-or-nothing principle, would prohibit a promisor from subsequently changing its representation. When made, promises would *prima facie* be devoid of any legal significance. Only once the promisee has detrimentally relied (made a decision to act or omit in response to the initial representation) would the promise be actualized.[226] If estoppel were to be accepted as the basis for the legal character of unilateral promises, promises which were in fact made but were nevertheless never relied upon by any subject of international law, would have to be deemed legally non-existent. Therefore, estoppel, a concept whose legal effect is actualized in bilateral and multilateral relations (albeit within an ascertainable group or subjects) would defy the "unilateral" character of promises whose legal relevance must be sought in the sovereignty of the promisor state and, as a reflection, in their recognition by other states. It could be presumed that Schwarzenberger was basing his view on the broad concept of estoppel, in which case the assertion appears more defensible.

As was the case with acquiescence, the key difference between estoppel and promises for the purposes of this dissertation, other than that, within an estoppel scenario, no rights are immediately conferred upon the addressee of a representation, at least not before the representation is detrimentally relied upon, is the element of consent/intention to be bound, which is not necessary in the former scenario. A state will be held to a promise only if it was expressed in a manner where its content as well as the attendant circumstances made it clear the state intended to follow through.[227] In an estoppel scenario, proof of intention to be bound is not necessary and, to paraphrase the apposite observation by Judge Fitzmaurice in *Temple of Preah Vihear*, in practice it will be the very utility of estoppel to hold international agents to representations they, in the face of changed circumstances, would not have intended to commit to. That said, estoppel can also apply to unilateral promises. In this sense, the latter category is narrower. For *a fortiori*, since no intention to be bound must be shown in order for preclusion to be available, it will be all the more relevant in the case of intended unilateral

[224] Ibid, p. 384.
[225] G. Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, Stevens and Sons 1957, p. 553. To this effect, see also: M.L. Wagner, "Jurisdiction by Estoppel…", see note 6, p. 1788.
[226] C. Eckart, *Promises of States…*, see note 30, pp. 283-284.
[227] *Nuclear Tests*, p. 267, para 43.

promises. An attempt to retract or modify an intended promise may be prevented by the operation of estoppel.

Further, a promise will be binding even if it is not directed towards a specific subject of international law, contrary to estoppel which will only work in individualized bilateral and multilateral relations. The preclusive effects of estoppel can be generated in a setting involving a number of agents, however at least two conditions must be met – (1) that class of subjects must be definite and (2) ascertainable. It follows that estoppel will generally not arise where a representation/promise is proclaimed to the international community as a whole. Further, estoppel cannot arise where only one subject of international law is present in any given factual scenario. This was noted by Cedeño in his Second Report to the International Law Commission on unilateral acts, who, whilst admitting there was a degree of inter-connection between estoppel and state promises, stressed that the nature of the former is not based on the actual declaration of intent, as it is the case with promises. With the intention to be bound not constituting a condition *sine qua non* of estoppel, Cedeño opined that it is the secondary actions of a third state (representee) and the detrimental consequences which would flow for that state due to reliance upon the representation that better explain the rationale of the principle.[228] It follows, therefore, that, at least on the strict view, estoppel is not unilateral as it is necessary for the generation of preclusive effects that a representation be detrimentally relied upon.

Revocability is relevant both in the context of unilateral acts and representations qualifiable as giving rise to estoppel. It can be accepted that reliance upon a representation which had been revoked cannot be held to be in good faith or otherwise reasonable. On the other hand, a representor cannot be precluded, by virtue of estoppel, from denying a representation made a long time prior, where, presumably, the circumstances have markedly changed. As is the case with attribution, different analogies have been made in this connection. One refers to the circumstances under which a party can terminate a treaty before its term.[229] A similar view was expressed by the ICJ in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, where it was emphasized that a unilateral declaration should be withdrawn on reasonable notice, a requirement which is taken to be rooted in the principle of

[228] International Law Commission, *Second Report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño*, *Special Rapporteur*, Document A/CN.4/500 and Add.1, p. 197, para 13, available at: https://bit.ly/37xsLhe (accessed: 24.08.2021).
[229] E. Suy, N. Angelet, "Promise", see note 218, para 13; W. Czapliński, "Akty jednostronne w prawie międzynarodowym", 6 Sprawy Międzynarodowe 1988, p. 107.

good faith.[230] Taken to its logical conclusion, this view would imply that, in accordance and by analogy with Article 56(2) of the VCLT, a 12-month notice period should be observed.[231] Revocation is said to be possible where there has been a fundamental change of circumstances, especially where the object of a promise/representation has been destroyed or radically altered, to the extent that performance of a promise or, by analogy to estoppel, committing to a representation already made, shall become objectively impracticable or excessively difficult. An analogy with Article 62 of the VCLT is argued to provide substantiation for this claim.[232]

The 12-month notice period could appear as excessively onerous and, at any rate, not equipped to serve the objectives of estoppel, particularly within the field of international investment law which has to accommodate notoriously fast-developing economic relations between private parties and sovereign states. The fundamental principle should be, in my opinion, that a promise/representation is revocable unless and until its addressee has detrimentally relied thereupon.[233] Put in more general terms, revocation of any representation should not be made in bad faith, or with a view to misrepresenting or otherwise misleading the representee.[234] As representations giving rise to estoppel, contrary to promises, do not immediately generate rights in favour of the representee, the potential conferment of a right should not operate as a bar to revocation before the detrimental reliance element is present.[235] Also, it shall be noted that some commentators have been critical of the analogy made with the VCLT regime. Rubin has advocated wide permissibility of revocation, remarking, *inter alia*, that in principle it is *prima facie* not inconsistent with good faith, and that it need not be express – revocation need not be separately proclaimed as it can be, on the facts of a given case, inferred from a state's mere action or omission inconsistent with its prior unilateral declaration of intention.[236] A reservation for estoppel was made, however it appears that the writer was, in line with my argument advanced herein, proceeding upon the assumption of primacy of the strict concept. His view, therefore, appears to support my argument that revocation of a representation (without adverse consequences for the representor) should be permissible *prima*

[230] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Merits)*, pp. 419-420, para 63.
[231] C Eckart, *Promises of States…*, see note 30, pp. 271-273, 290, 294.
[232] P. Gragl, "Broken Promises or Fading Memories?: The Question of Unilateral Acts and Promises under International Law in the Context of NATO Enlargement", 50 George Washington International Law Review 2018, p. 283.
[233] P. Saganek, *Unilateral Acts of States…*, see note 220, p. 416.
[234] A. Kozłowski, *Estoppel jako ogólna zasada…*, see note 6, p. 280.
[235] Conferment of a right has been argued to constitute the threshold moment after which revocation of a unilateral promise should be prohibited. See: W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne…*, see note 120, p. 93.
[236] A.P. Rubin, "The International Legal Effects of Unilateral Declarations", 71(1) American Journal of International Law 1977, pp. 10-11.

facie, barring any extraordinary circumstances, before the representor has detrimentally relied. A middle ground has been proffered in the literature whereby whether a promise/representation shall be revocable should flow from an interpretation of the terms of the statement itself. Therefore, revocability shall depend on whether such an option was envisaged in the representation/promise or, at a minimum, the statement did not make it clear that it was meant to be irrevocable.[237] This corollary should be applicable within an estoppel scenario. Irrespective of the relatively insignificant role of intention to be bound, it should still be permissible for a subject of international law to self-limit itself further by inserting a non-revocation stipulation in its statement. The question would remain, however, whether, on the strict view of estoppel, there would be any detrimental reliance on the part of the representee at the moment of making an assessment.

Revocation cannot be arbitrary. In assessing arbitrariness, assistance should be sought in Principle 10 of the GPAUD. Accordingly, the following factors should be taken into account:

1. any specific terms of the declaration relating to revocation;
2. the extent to which those to whom the obligations are owed have relied on such obligations;
3. the extent to which there has been a fundamental change in the circumstances.

The GPAUD, therefore, permit recourse to the terms of the representation/promise, the reliance element (but not expressly detrimental reliance) and confirm the application of the broad *rebus sic stantibus* principle. One commentator has proposed that another instance of non-arbitrary revocability would be where a promisee breaches an international legal obligation it owes towards the promisor.[238] This corollary can be applied *mutatis mutandis* to estoppel-inducing representations.

The differences between state promises and estoppel discussed in this Section notwithstanding, there are certain inferences which can validly be made, by analogy, with the law on state promises. Above, in Sections 1.3.1 and 1.3.2, I relied on the GPAUD and relevant jurisprudence related thereto to help elucidate the requirements a representation should meet to generate the preclusive effects of estoppel, on the hand, and, on the other, the conditions for successful attribution of a representation. On occasion, I shall revert to the GPAUD and the law on unilateral acts, particularly state promises and acquiescence, where helpful analogies

[237] W. Fiedler, "Zur Verbindlichkeit einseitiger Versprechen im Völkerrecht", 19 German Yearbook of International Law 1976, p. 58, cited per: P. Saganek, *Unilateral Acts of States…*, see note 220, p. 417.
[238] P. Saganek, *Unilateral Acts of States…*, see note 220, p. 420.

can be made. This logical device shall prove particularly helpful considering the nascent state of jurisprudence on estoppel in international investment law and the dearth of academic sources as well as authoritative judicial and arbitral explanations.

1.8. Estoppel and jurisdiction of an international court/tribunal

To properly guide the direction of the argument advanced in this dissertation, it is indispensable to consider the impact of estoppel on the jurisdiction of international courts and tribunals. It will become apparent that within international investment law, estoppel's purview shall be concerned primarily with matters of procedure, with jurisdiction (competence) occupying the most prominent role. Therefore, it is necessary to establish whether general international law offers any concrete normative basis or, at a minimum, precedent for the interference of estoppel with the question of jurisdiction.

It is within the context of jurisdiction (competence) of international courts and tribunals that the consensual character of international law becomes particularly prominent. That jurisdiction is to be based upon state consent, termed a cliché in academic writing,[239] is expressed in Article 36 of the ICJ Statute. This provision, read in conjunction with Article 33(1) of the UN Charter, is taken to mean that states can choose a dispute resolution forum and cannot be forced to submit them to the jurisdiction of the ICJ.[240] Two types of consent are envisaged in Article 36. For it can be expressed ad hoc, with reference to a concrete dispute, or more generally, by having it incorporated in a treaty. Article 36(2) (so-called "optional clause") allows for the *a priori* grant of consent to the ICJ's jurisdiction by virtue of a unilateral act. Consent can be externalized in any of the forms permitted in the Statute and it need not be expressed simultaneously by all of the parties to a dispute. It is for the Court to investigate any and all claims and objections relating to jurisdiction. It is a requirement, however, that consent be clear and unequivocal.[241]

The ICJ held in *Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction)* that an independent basis for its jurisdiction could be found in the conduct of the parties even where the express requirements of Article 36 were not met.[242]

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[239] H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence Volume I*, Oxford University Press 2013, p. 690.
[240] C. Tomuschat, "Article 36" (in:) A. Zimmermann, C.J. Tams, K. Oellers-Frahm, C. Tomuschat (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd edition, Oxford University Press 2019, p. 728, para 19.
[241] *Certain Questions of Mutual Assistance in Criminal Matters*, p. 204, para 62; *Armed Activities on the Territory of the Congo*, pp. 18-19, para 21.
[242] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction)*, pp. 410-411, paras 43-47.

Nicaragua had granted unconditional consent to the jurisdiction of the PCIJ in 1929 (under Article 36 of its Statute) and despite completion of the domestic constitutional requirements for ratification, the state failed to deposit an instrument of ratification with the Court. The ICJ was asked to decide whether the subsequent ratification by Nicaragua of the ICJ Statute activated the optional clause (Article 36(2)) in respect of the new court, by virtue of Article 36(5).[243] It was an argument advanced by the United States, the defendant in the present proceedings, that Nicaragua failed to grant consent to the compulsory jurisdiction of the Court, and was therefore estopped from pursuing its claim. The ICJ held that Nicaragua's consent was valid and in effect. Nicaragua's 1929 acceptance of jurisdiction was held to have had a "potential effect" which was subsequently actualized (activated) by Article 36(5), by its reference to declarations that "are still in force". This holding has been criticized in the literature as it contains a controversial proposition that a "potential" acceptance of jurisdiction can be activated and given legal effect in international law by the ratification of another standalone instrument, here the UN Charter.[244] Nominally, it appeared that the ICJ based its decision on acquiescence,[245] noting that Nicaragua's acceptance of compulsory jurisdiction was on numerous occasions emphasized in yearbooks and other materials published by the Court, a fact which Nicaragua never contested.[246] In the alternative, the approach has been classified by one commentator as a possible application of estoppel. On this analysis, although it based its own objection partly on estoppel, the United States was actually estopped from objecting to Nicaragua's acceptance of compulsory jurisdiction. Nonetheless, the Court failed to invoke the constitutive elements of the principle and did not apply them methodically to the facts.[247] I submit that Nicaragua's acquiescence (qualified silence) could be qualified as an estoppel-inducing representation, however it is debatable whether the detrimental reliance requirement was made out. On any account, it appears that it would be hardly tenable for the United States to argue that it suffered a detriment by proceeding upon the footing that Nicaragua shall not submit their dispute to the ICJ as the right to have a dispute resolved by a court or tribunal

[243] Under Article 36(5) of the ICJ Statute, declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the ICJ Statute, to be acceptances of the compulsory jurisdiction of the ICJ for the period which they still have to run and in accordance with their terms.

[244] J.R. Crawford, "*Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*" (in:) Max Planck Encyclopedia of Public International Law, 2019, online, para 9, available at: https://bit.ly/3uOkYpp (accessed: 24.08.2021).

[245] That acquiescence can ground the ICJ's jurisdiction is relatively uncontroversial. See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, p. 85, para 102.

[246] *Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction)*, p. 441, para 109.

[247] M.L. Wagner, "Jurisdiction by Estoppel…", see note 6, pp. 1795-1796.

must be considered one of the fundamental prerogatives of a subject of international law. Further, it is difficult to argue that Nicaragua's representation on non-acceptance of compulsory jurisdiction was clear and unambiguous. The good faith of the United States' reliance could also be put into question.

In the doctrine, it has been argued that estoppel constitutes a guarantee that consent to jurisdiction, regardless of its form, will preserve its substantive character. Flexibility in this context is said to conduce to giving effect to consent actually granted. Further, estoppel shall legitimize and uphold the consensual nature of jurisdiction by reinforcing in subjects of international law the conviction that they may organize their dealings in reliance upon third party outward expressions of consent. Estoppel also serves to prevent instances of abuse of consent, particularly its sudden and unreasonable revocations where the consent's addressee has in the meantime detrimentally relied.[248] It could be contended that estoppel is incompatible with the commonly accepted cliché that grant of consent to jurisdiction constitutes an expression of state sovereignty, which bolsters the importance of the requirements of clarity and unambiguity. This contention is typically countered by a view which relativizes the notion of sovereignty. For when state A makes a decision which has legal ramifications in international law, this intrinsically impacts the scope of available decisions open to state B. On this account, estoppel is therefore merely an instrument for the regulation of the scope of permissible acts that each state can undertake, and it prevents exercises of sovereignty at the expense or to the detriment of other states (for such conduct is abusive and it defies the concept of state sovereignty).[249]

In addition to *Case concerning Military and Paramilitary Activities in and against Nicaragua (Jurisdiction)*, whose ratio on the applicability of estoppel to jurisdiction is unclear, several other cases can be argued to provide stronger evidence in support of the same. Estoppel-like reasoning was applied in *Temple of Preah Vihear (Preliminary Objections)* to preclude Thailand from denying that its submission to jurisdiction (under the optional clause) was binding and effective.[250] The broad concept of estoppel, albeit not by name, was conflated, it appears, with the unilateral act of consent in *Qatar v Bahrain*:

> "The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a

[248] J. Wass, "Jurisdiction by Estoppel and Acquiescence…", see note 6, p. 172; M.L. Wagner, "Jurisdiction by Estoppel…", see note 6, p. 1789; S. Rosenne, *The Law and Practice of the International Court 1920-2005,* vol. 2, Brill/Nijhoff 2006, p. 567.
[249] J. Wass, "Jurisdiction by Estoppel and Acquiescence…", see note 6, p. 175.
[250] *Temple of Preah Vihear (Preliminary Objections)*, p. 34.

text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a "statement recording a political understanding", and not to an international agreement".[251]

In another case, the ICJ proclaimed that a state may, through its conduct or representations, waive an objection to jurisdiction which it might otherwise have been entitled to raise.[252] Finally, in *"ARA Libertad"*, an Argentine vessel, ARA Libertad, was ordered by a Ghanaian court to be detained in the port as security for an outstanding judgment on defaulted bonds. Argentina petitioned to the ITLOS for the issuance of provisional measures aimed at the vessel's release under Article 32 of the UNCLOS, which request was granted by the Tribunal. In their Dissenting Opinion, Judges Wolfrum and Cot disagreed in principle, they concluded nonetheless that Ghana was on any account estopped from denying the jurisdiction of the ITLOS in its dispute with Argentina as it had allowed the vessel to visit the port in the first place, expressly allowing it to dock there for a period of 4 days. Accordingly, the preclusive effect of estoppel was to prevent Ghana from contesting a procedure angled at resolving a dispute which arose out of Argentina's reliance upon Ghana's implied representations through conduct.[253] The judges were very careful in their enunciation of estoppel's constitutive requirements, and referenced a number of authoritative restatements of the strict concept, relying ultimately, it appeared, on *Bangladesh v Myanmar* and *North Sea Continental Shelf*.[254] This holding has been criticized in academic literature as Ghana's representations did not go directly to jurisdiction, and Judges Wolfrum and Cot had to make a logical, purposive leap from substantive assurances to an inference regarding the availability of the ITLOS as a dispute resolution forum.[255]

Whilst the foregoing inquiry attempted to show that no clear-cut application of the strict concept of estoppel has been offered in the jurisprudence of international courts and tribunals in relation to jurisdiction, it is evident that in no case or decision has the availability of estoppel to establish, modify or deny jurisdiction been directly challenged. On the contrary, courts have considered and successfully applied concepts which appear to straddle the line between estoppel and a related doctrine (notably waiver and consent) and, at the same time, they have confirmed the applicability of acquiescence which could point towards a favourable disposition towards estoppel. What appears to lend support to estoppel's function in this con-

[251] *Qatar v Bahrain*, pp. 121-122, para 27.
[252] *Continental Shelf (Tunisia/Libya) (Revision and Interpretation)*, p. 216, para 43.
[253] *"ARA Libertad"*, Joint separate opinion of Judges Wolfrum and Cot, pp. 380-381, para 68.
[254] Ibid, pp. 378-380, paras 62-65.
[255] J. Wass, "Jurisdiction by Estoppel and Acquiescence…", see note 6, pp. 169-170.

text is the lack of requirements as to the form of expression of consent written into the ICJ Statute. Estoppel cannot typically serve to override formal requirements as, for instance, it appears *prima facie* untenable to argue that conduct can supersede the official form of ratification or even the plain written form reserved in Article 25(1) of the ICSID Convention.

1.9. Chapter summary

An equitable principle, estoppel in general international law operates to preclude a state, on account of its prior representations consisting in statements and/or conduct, from asserting that it did not agree to, or recognize, a certain factual or legal situation. Estoppel has undergone a long history of evolution, with the crucial breakthrough occurring in the 1960s, where the ICJ made a transition in the way it understood estoppel, from a broad, good faith-laden concept sanctioning inconsistency of conduct, to a narrower, stricter version where the preclusive effect would only be activated where the representor's statements or conduct was detrimentally relied upon by its addressee(s). For over 50 years this strict concept of estoppel, which embraces detrimental reliance as a constitutive element, has been the dominant account of the principle in the jurisprudence and case law of international courts and tribunals alike.

Estoppel is to be treated as either a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute (general principle of law *pro foro domestico*) or, more broadly, as a general principle of international law – a sustainable argument can be mounted as to either classification. On any account, international estoppel will inevitably be stripped of the various distinctions and modalities of its domestic counterpart, and it is more appropriate to talk about "estoppels" rather than "estoppel" as no typology of domestic iterations of the principle has garnered common acceptance. The dissertation's preference towards the term "general principle of law", is best interpreted as an endorsement of the view that Article 38(1)(c) has within its purview also general principles of international law in the sense discussed herein. At any rate, it serves to signify the universal acceptance of estoppel as an operational principle, regardless of its exact qualification.

The requirements attaching to the qualities of representations that make them susceptible to estoppel are shared between the broad and the strict concept. Therefore, a representation must generally be clear and unambiguous, made voluntarily, and, according to some authorities, consistent. Further, for a representation to become binding on the representor via estoppel it must be properly attributed thereto. The ICJ has hitherto decided the issue of attribution rather instinctively, without extensive recourse to the established collections of rules governing attribution in other areas of international law, notably state responsibility (the

DARSIWA) or unilateral declarations (the GPAUD). From those enunciations it can be deciphered that, broadly put, a representation is authorized (and therefore capable of being attributed) only where it is made by an organ competent to bind the state. More significance shall be accorded to official diplomatic correspondence than to unofficial communications, especially where, as it is often the case in modern diplomacy, both channels are used interchangeably. Although neither set of rules noted above can be applied in a hard and fast manner to representations capable of giving rise to estoppel (the DARSIWA should be confined to governing issues of state responsibility and the GPAUD pertain to unilateral declarations and promises binding on states where it was the intention of the state in the first place to become bound), it is preferable, if at all, to draw analogies with the latter. Accordingly, as a general proposition, heads of state, heads of government and ministers for foreign affairs should be considered inherently authorized to make representations in the name and on behalf of the state. Other persons or entities purporting to represent the state may be authorized to bind it through their representations, in areas within their competence, as delineated by domestic law. As explained further in the ICJ case law, where a person or entity has acted in contravention of its mandate, this will not serve the representing state as a defence to an estoppel claim so long as the representor (the official making a statement or engaging in some conduct) acted within the scope of their official duties.

The detrimental reliance element could be considered the core of the strict concept of estoppel, a key distinguishing feature not only from the broad concept, but also from unilateral acts, notably consent, waiver and acquiescence. The reference to "detriment" does not exhaust all of the possibilities contained within the purview of "detrimental reliance" understood as a legal term of art. For under the umbrella of detrimental reliance are both acts and omissions which generate a detriment on the part of the representee, but also such that bring about a benefit for the representor. Some judicial and arbitral decisions refer to this situation more broadly as a "change of position", as a result of which either a detriment or a benefit is created. Notably, it is generally accepted that in response to and in reliance upon a representation its addressee(s) must undertake distinct acts or omissions for such conduct to meet the criteria of detrimental reliance and, by extension, ground a successful estoppel claim. It is presumed that a holistic approach is taken to infer the presence of detriment and, save for self-evident cases where on the facts the representee has incurred significant financial loss or, by the same token, a windfall has materialized for the benefit of the representor, detriment is understood broadly and could cover such aspects as inability to exercise a right, imposition of

limits on the exercise of a right or the duty to endure or perform a distinct legal obligation, as well as adverse organizational and reputational consequences.

Axiologically, estoppel is grounded in the principle of good faith, albeit jurisprudence and case law knows of other propositions, notably equity. As a good faith-based principle, estoppel is said to protect the legitimate expectations of states induced by statements or conduct of another state.[256] An important corollary flowing from the good faith underpinning of estoppel is that the principle's primary concern shall not be the protection of objective truth about legal rights and obligations of subjects of international law. Rather, the principle will work according to the needs of corrective justice even where this happens to diverge from ascertainable reality. In doing so, estoppel will take account of and reflect the relational dynamics between a given set of parties who are dealing with each other, and serve to alter the rights and obligations of one party as against another.

Inter-connections can be drawn between estoppel and unilateral acts, notably acquiescence and state promises. As for acquiescence, its relative closeness to the broad concept of estoppel is reflected in the fact that the two principles were assimilated to a large degree in early case law, on any account before *Temple of Preah Vihear* where the strict concept embracing detrimental reliance started to gain prominence. Acquiescence, which is best understood as qualified silence amounting to an expression of consent where lodging of a protest or objection against the acts of another state is objectively warranted or otherwise called for, is different from estoppel as its operation does not require the presence of detrimental reliance, stemming from its one-sided, unilateral nature. The primary difference between representations given within the context of estoppel and explicit state promises is that in the former case there need not be any evident intention on the part of the representing state to become bound. In fact, estoppel could be posited to constitute a legal device by virtue of which states (and, as it shall be demonstrated against the background of international investment law, also other subjects of international law, including private companies) can be committed to their original representations even where it may be, in the face of changed circumstances, expedient to opportunistically alter their position. In other words, state promises would be held to be binding at the moment they are granted, whilst with estoppel the binding character of a representation is derived from preclusion, i.e. the ultimate legal effect of the principle, and is activated only where the representor seeks to modify its position, one which has in the meantime been det-

[256] Protection of legitimate expectations has a specific meaning in international investment law as a standard of investor protection under the fair and equitable treatment (FET) clause inserted routinely into investment treaties. The inter-connections between estoppel and legitimate expectations understood in this sense are investigated in Section 6.5.

rimentally relied upon by its represente(s). Further, representations capable of giving rise to estoppel can constitute a wider spectrum of statements than promises perceived as forward-looking commitments.[257]

Finally, there is limited evidence that estoppel could operate to establish jurisdiction of an international court or tribunal or preclude a state from denying that they did or did not grant consent to jurisdiction. Contrary to the ICSID Convention,[258] the ICJ Statute does not envisage strict formal requirements for consent, which leaves more latitude to the deciding body in determining its jurisdiction to have regard to estoppel. No major international court or tribunal has flatly rejected the availability of estoppel within the context of jurisdiction and it could be cautiously assumed that there is a good argument for estoppel claims where the requirements of the strict concept are made out on the facts of a particular case.

[257] Representations can also be sheer statements of fact or the representor's understanding of the law. This is discussed in Section 2.6.1.1 in the context of arbitral case law. See also Section 6.5.4 where this point is elaborated upon in juxtaposition with forward-looking commitments and inducements which trigger rights under the legitimate expectations standard.
[258] See Sections 3.1 and 3.2.1.

CHAPTER II. RECEPTION OF ESTOPPEL IN INTERNATIONAL INVESTMENT LAW

2.1. Introductory remarks

Having considered the rationale, requirements, and the scope of applicability of estoppel as propounded in general international law, the focus is now turned to international investment law, often noted for its hybrid character, which stems from the fact that, *inter alia*, the choice of applicable law be left to the parties to a dispute (if the dispute arises pursuant to an investment contract concluded between a host state and an investor) or to a host state and the home state of the investor if applicable law is to be ascertained by reference to a relevant BIT.[259] It shall be seen that arbitral tribunals tend to rely broadly on the jurisprudence of major international courts and tribunals, notably the ICJ, however the approach is far from consistent. This could be viewed as alarming considering the fact that adherence to the broad or strict concept of estoppel can render divergent outcomes on the facts of a particular case.

The lack of consistency mentioned in the preceding paragraph can be illustrated by reference to two examples illustrating the respective approaches taken by arbitral tribunals in applying estoppel on each view. The awards were handed down within 5 months of each other.

Karkey Karadeniz, a case commenced under the 1995 Turkey-Pakistan BIT, concerned actions of Pakistani authorities aimed at blocking the investor's electricity-generating powerships from exiting Pakistan's territorial waters. The host state objected to the jurisdiction of the tribunal and alleged the investment was illegal under domestic public procurement laws. The investor countered that Pakistan's claims should be estopped given the fact that for years the host state acknowledged the legality of the investment in question, encouraged Karkey first to make and then to maintain the investment, and issued an administrative certificate confirming its legality. The tribunal applied the broad notion of estoppel:

> "Karkey rejects the occurrence of any breaches of Pakistani procurement laws and sustains, inter alia that, in any event the principle of estoppel bars Pakistan from asserting that any *alleged inconsistencies* with Pakistani procurement rules in the bidding pro-

[259] See e.g.: Z. Douglas, „The Hybrid Foundations of Investment Treaty Arbitration", 74(1) British Yearbook of International Law 2003, pp. 194-213; G. van Harten, "The Public-Private Distinction in the International Arbitration of Individual Claims against the State", 56(2) International and Comparative Law Quarterly 2007, p. 371 et seq.

> cess deprives the Tribunal of jurisdiction over Karkey's claims. (…) Pakistan is actually maintaining before the [Pakistani] Supreme Court that Karkey's Contract was procured in compliance with Pakistani procurement laws. (…) Moreover, throughout the (…) bid process Pakistan represented to Karkey that the procurement was being conducted, and would continue to be conducted, in accordance with law, principles of transparency, and international bidding standards. Pakistan also represented in the [contract] itself that the terms thereof were legally binding and valid. (…) In view of the foregoing, the Tribunal finds that Pakistan *has consistently maintained* that Karkey's investment was established in accordance with Pakistani laws, and it is now *estopped from arguing that the investment must be deemed invalid on the basis of a breach of those laws*".[260]

The tribunal orientated its inquiry towards the form and quality of the representations made as well as the consistency of the host state's course of conduct. Estoppel was justified by virtue of the fact that Pakistan represented, on different occasions and at different fora, both directly to the investor and publicly, that the bidding process in which Karkey ultimately won an investment contract was compliant with domestic laws. An attempt to contradict this representation during international arbitral proceedings in order to attack the jurisdiction of the tribunal was unsuccessful as the purported retraction was considered sufficient to trigger the preclusive effect of estoppel. No mention is made of the investor's reliance on the representations made nor of any expectations that could have been engendered by Pakistan's assurances.

In contrast, in *UAB Energija*, an arbitration initiated under the Lithuania-Latvia BIT, the claimant investor sought to challenge regulatory decisions denying its request to increase tariffs for heating services provided. The host state raised a number of objections to jurisdiction, including that there was no arbitrable "dispute" between the parties as the investor had represented that the investment claims would not be pursued beyond negotiations. The tribunal embraced the strict view. Having set out the requirements, the tribunal relied on the following reasoning:

> "The Tribunal has reviewed the Parties' correspondence relating to their negotiations subsequent to the Notice of Dispute. The Respondent *relies* on the Claimant's alleged "voluntary and unconditional conduct" which is said to be "*of such a nature as to*

[260] *Karkey Karadeniz*, paras 622, 626-628 (emphasis added). The case is explored further in Section 4.2.

cause a reasonable reliance in Latvia that the investment claims, as outlined in the Request, will not be pursued beyond negotiations (…)". However, *no relevant conduct or statement by the Claimant has been shown to exist*. To the contrary, the communication sent by the Claimant to the Respondent immediately prior to the Parties' last meeting to discuss settlement opportunities expressly mentioned the "potential international arbitration". Reliance on a mere lapse of time is insufficient to give rise to a preclusion based on estoppel. The Respondent *has failed to discharge its burden of proof with respect to the first factual requirement of an estoppel defence*. The Respondent has also failed to show its *reliance on the Claimant's alleged conduct or statement* that the investment claims would not be pursued beyond negotiations. The Tribunal therefore finds that no issue of estoppel arises on the facts of this case".[261]

The difference in approaches is striking as the latter analysis goes beyond the construction of the parties' mutual communications. The tribunal attempts an evaluation, based on the parties' relative conduct borne out in the evidence available, whether the investor in fact relied on the host state's representations. The inquiry is fact-specific, it incorporates, however, elements of objective inquiry as the tribunal assesses whether the reliance in question was reasonable or otherwise in good faith.

Specific representations will often be given by host states outside of existing legislation governing foreign investment. Host states may opt for making assurances to induce investment conscious of the fact that statutes could be subject to dynamic changes whilst potential investors may expect representations to hold throughout the duration of an investment.[262] However, the preclusive effect of estoppel may be given rise to by virtually any representation, irrespective of its substance, subject to parameters fixed in treaty and custom. In fact, the traditional formulation limits estoppel's operation to statements of fact, however jurisprudence has expanded the purview of the concept, extending it to, on the one hand, conduct (on the same conditions as words), and, on the other, to statements of law, albeit understood peculiarly as statements reflecting one's understanding of the law (*ratio decidendi* of a case or interpretation of domestic statute or international treaty).

[261] *UAB Energija*, paras 532-533 (emphasis added).
[262] *Cube Infrastructure Fund*, para 275.

Estoppel can be a double-edged sword in that it can be invoked by the investor against the host state and *vice versa*.[263] This characteristic differentiates estoppel from treaty-derived investor protection standards which cut only one way and can only be invoked against host states. Estoppel can also be raised by the arbitral tribunal *proprio motu*.[264] Veritably, estoppel will find almost universal application throughout international investment law, with the most commonly raised objections revolving around questions of jurisdiction. Estoppel's wide availability is testament to the status of international investment law as a hybrid system whose important objective is to "level the playing field" between private parties (investors) and host states – estoppel fulfils those objectives by protecting good faith and preventing instances of abuse of trust in investment dealings.

My argument in this Chapter will begin with an analysis of applicability of estoppel within international investment law. I will venture to explain how estoppel can find its way into the body of applicable law which an arbitral tribunal seized of a dispute shall resort to. A differentiation will be made according to the instrument which serves as a basis for a given arbitration – an investment contract (state contract), international investment treaty or host state law. The picture will be complemented by reference to a selection of arbitration rules which typically create or, at a minimum, co-create the legal landscape which a tribunal shall use to resolve a dispute. Next, I shall expound upon the interpretative function of estoppel, with the primary observations being twofold: (1) the function is not commonly utilized in international investment law, at least not expressly; (2) where arbitral tribunals draw upon estoppel in its interpretation of an investment treaty, they rely upon the broad axiological rationales and undertones which underpin the principle. Thus, the interpretative function will be primarily performed by the (often generalized) broad concept or particular tenets thereof. What follows is a comprehensive breakdown of the requirements of the strict view of estoppel as applied within the context of state-investor disputes. As background and an overarching contention, I argue that there appears to be no cogent argument, especially by reference to the putative peculiarities regarding the substance or nature of disputes concerning foreign investment, that would justify a refusal to adhere to and follow the estoppel jurisprudence of the ICJ. To do so would, inevitably, mean that the strict concept of estoppel would be accorded primacy. The Chapter is concluded with a selection of examples from arbitral practice where

[263] In most cases it will be the claimant investor that shall seek to rely on estoppel against the host state. For examples of situations to the contrary, see: *Binder*, para 79; *Pan American Energy*, para 144; *SGS v Pakistan*, para 118; *Getma International*, paras 126-128; *Perenco*, para 466; *Aguas del Tunari*, paras 188-192.
[264] See e.g. *Rumeli*, para 335; *Middle East Cement*, para 135; *Urbaser (Jurisdiction)*, paras 109-110.

tribunals directly resorted to municipal concepts of estoppel, particularly within U.S. law, with a view to discerning the limits of permissible analogies with domestic laws.

2.2. Applicability of estoppel in international investment law

Before the analysis moves to specific manifestations of use of estoppel in relation to the critical junctures of international investment law, in this section I shall first, as a preliminary point, discuss the normative basis upon which estoppel can be invoked within the confines of an investment arbitration proceeding. Investment arbitration is, by its nature, based upon the assent of all of the parties involved. For general principles of law to apply, the arbitral process must incorporate international law as the sole applicable law or at least a co-governing law,[265] typically together with the host state's domestic law and/or provisions of the relevant BIT. In practice, owing to the construction of most international investment treaties, international law will in most cases at least co-create the set of rules to be applied by an arbitral tribunal to the facts before it. The cornerstones of investor protection (the key standards of FET, most favoured nation, non-discrimination, expropriation subject to just compensation, etc.) are intrinsically creations of international law. Notwithstanding, depending on the instrument under which an arbitration is launched and conducted, the choice of applicable law is subject to the autonomy of the parties,[266] and investment tribunals instituted under rules of international arbitration are on occasion asked to apply domestic law.[267]

Three broad types of arbitration can be differentiated depending on the type of instrument in which the host state expresses its consent to arbitration of investment disputes: arbitrations under an investment contract; arbitrations under an international investment treaty (bilateral investment treaty – BIT; multilateral investment treaty – MIT); arbitrations under the law of the host state. Separately, additional relevant provisions under the leading sets of arbitration rules applicable to investment arbitration (ICSID, UNCITRAL, SCC) shall be expounded. Further, some tribunals have applied estoppel not as a general principle of law under

[265] I have noted in Section 1.5 that estoppel is recognized by many domestic legislations. However, the ambit of this statement is limited to estoppel's meaning and implications as generalized within international law. This necessitates that international law be designated as the governing set of rules in respect of a given investment dispute. Consequently, what shall be applied in such a context is estoppel in its international sense, i.e. stripped of some of the detailed modalities or variations germane to its domestic iterations.

[266] Despite the common emphasis on party autonomy, it is relevant to note that there is a degree of dissociation in time between the consent formally granted by contracting states entering into an investment treaty and the common consent to arbitration at the time the investor accepts the host state's general consent by filing a request for arbitration. See: *Goetz*, para 94.

[267] Within the scope of this dissertation, see: *Pac Rim Cayman*, paras 8.45-8.68 (where international estoppel and estoppel under Salvadoran law were applied separately); *Vestey Group Limited*, paras 255-261 (international law and Venezuelan law); *Dunkeld International*, para 22 (laws of Belize); *Tanzania Electric Supply*, paras 98-108 (Tanzanian law).

Article 38(1)(c) of the ICJ Statute or, alternatively, as a general principle of international law, but derived it from internationally accepted collections of fundamental principles, notably the UNIDROIT Principles of International Commercial Contracts.

2.2.1. Arbitrations under an investment contract

In international investment law, concern lies with international investment contracts, which are often grouped under an umbrella of so-called state contracts, that is contracts concluded between a state or an authorized entity/organ of the same and a foreign national or juridical person of foreign nationality.[268] Generally, in line with the principle of party autonomy, the parties have the right to select the law applicable to the contract. The prevalent choice observable in the field of foreign investment is domestic law of the host state, to the exclusion of any international rules. Inversely, where a reference to general principles of law is inserted, it is accepted that the parties wish to incorporate specific, commonly recognized principles, capable of being dispositive of the merits of their dispute.[269]

Arbitral tribunals have considered cases concerning state contracts which contained express references to either international law as a whole or directly to general principles,[270] however the tide appears to be swerving in the direction of domestic law, particularly among developing countries.[271] As regards contracts which subject dispute resolution only to domestic law,[272] in early arbitrations arbitrators were ready to nonetheless apply general principles of international law where, in their estimation, the domestic law to be applied was deemed "primitive" or otherwise inapposite, an approach which has been harshly criticized by a host of commentators.[273] Such controversies can be avoided where the domestic legal system referred to in the contractual choice of law clause points to a system which has incorporated international law within its framework and guiding principles.

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[268] United Nations Conference on Trade and Development (UNCTAD), *State Contracts*, UNCTAD series on issues in international investment agreements, United Nations 2004, p. 3, available at: https://bit.ly/3a3vvDt (accessed: 24.08.2021).
[269] C.T. Kotuby, S.A. Sobota, *General Principles of Law and International Due Process: Principles and Norms Applicable in Transnational Disputes*, Oxford University Press 2017, p. 30.
[270] A selection of such cases is discussed in: N. Nassar, "Internationalization of State Contracts: ICSID, the Last Citadel", 14(3) Journal of International Arbitration 1997, pp. 186-206.
[271] A.F.M. Maniruzzaman, "State Contracts in Contemporary International Law: Monist versus Dualist Controversies", 12(2) European Journal of International Law 2001, pp. 308-311.
[272] See e.g. *Maritime International Nominees Establishment* (the laws of Guinea).
[273] An overview of scholarly opinions and relevant cases can be found in: P. Dumberry, *A Guide to General Principles of Law…*, see note 135, pp. 78-80.

2.2.2. Arbitrations under an international investment treaty

Investment treaties shall either point to international law directly[274] or indirectly, by means of a reference to the arbitral rules under the auspices of which a given treaty-based arbitration takes place.[275] References exclusively to international law are in treaty practice quite rare, however provisions envisaging a combination of domestic and international law are relatively common. Article 8(4) of the France-Argentina BIT can serve as a model example:

> "The arbitration body shall rule, pursuant to the provisions of this Agreement, according to the law of the contracting Party that is a party to the dispute, including the rules governing conflicts of law, according to the terms of specific agreements, if any, that may have been entered into with regard to the investment, and according to applicable principles of international law".

The fact that the controlling legal source of law applicable to the substance of the dispute is the relevant treaty, supplemented, as necessary, by general international law and the domestic law of the host state, reflects the hybrid character of international investment law.[276]

A number of investment treaties refer to general principles of law directly in the context of the substantive law applicable to the dispute, with some containing a qualifier limiting the substantive impact to principles recognized by the contracting states.[277] A noticeably wider formulation was adopted in Article 9(7) of the China-Lebanon BIT:

> "The tribunal shall issue its decision on the basis of respect for the general principles of law, the provisions of this Agreement, as well as the generally accepted principles of international law".

[274] A reference within a treaty to "international law" is to be interpreted to encompass general principles of law, by analogy to the purposive interpretation applied to "such rules of international law as may be applicable" in Article 42(1) of the ICSID Convention. See: T. Gazzini, "General Principles of Law in the Field of Foreign Investment", 10(1) Journal of World Investment & Trade 2009, pp. 112-113.

[275] J.O. Voss, *The Impact of Investment Treaties on Contracts between Host States and Foreign Investors*, Brill/Nijhoff 2010, p. 104. As for an example of an implicit choice of international law by reference to the ICSID Rules of Arbitration, see Article 9(2)(a) of the Austria-Croatia BIT.

[276] A.R. Parra, "Applicable Substantive Law in ICSID Arbitrations Initiated Under Investment Treaties", 16(1) ICSID Review - Foreign Investment Law Journal 2001, pp. 20-21; Z. Douglas, "The Hybrid Foundations…", see note 259, p. 195; D. Atanasova, "Applicable Law Provisions in Investment Treaties: Forever Midnight Clauses?", 10(3) Journal of International Dispute Settlement 2019, p. 400.

[277] See: Article 9(6) of the Hungary-Chile BIT; Article 10(5) of the South Korea-El Salvador BIT; Article IX(6) of the Turkey-Philippines BIT; Article 12(5) of the Netherlands-Chile BIT.

A similar, open-ended clause is envisaged in the Colombia-India BIT.[278] Other clauses accord to a party to a dispute an effective choice of substantive law depending on the circumstances, whichever rules are more favourable to their case.[279] Such a formulation would permit a party to invoke estoppel in response to a claim brought on the basis of a domestic statute, the BIT or other rules of international law. Another device used is to incorporate general principles of law, including estoppel, into the definition of specific investor protection standards.[280] Less exact formulations, notably "principles of international law", are ubiquitous.[281] The term "general principles of international law" is also used.[282]

An interesting example is found in the CPTPP, which incorporates a substantial part of the text of the now-defunct TPP. Article 9.25(2) provides for a choice of law clause in respect of claims brought under Article 9.19.1(a)(i)(B) (Submission of a Claim to Arbitration), Article 9.19.1(a)(i)(C), Article 9.19.1(b)(i)(B) or Article 9.19.1(b)(i)(C). In the absence of a binding interpretation of the CPTPP Commission, and if in the pertinent investment agreement the rules of law have not been specified or otherwise agreed, a tribunal seized of a dispute shall resort to the laws of the respondent, and footnote 35 expressly mentions the law on estoppel. The CPTPP is therefore the first major investment treaty (MIT) which directly makes estoppel part of the laws applicable to the resolution of disputes thereunder. The reference to estoppel in the CPTPP is all the more inspiring on account of the fact that several of the signatories of the CPTPP are not common law jurisdictions where estoppel in its most developed form has been recognized (notably Vietnam, Mexico or Japan).

2.2.3. Arbitrations under the law of the host state

International investment arbitrations may be conducted on the basis of consent to arbitrate expressed by the host state in its domestic law. Where a clear indication of choice of law is made, the arbitral tribunal should apply that law. This will normally be domestic law, however, as noted above in Section 2.2.1 when discussing contractual choice of law clauses, general principles of law could be applicable on account of international law being incorporated into the domestic law of the host state. It has been argued that ICSID tribunals should be re-

[278] Article 9(10) of the Colombia-India BIT.
[279] Article 13(1) of the Czech Republic-United Arab Emirates BIT, the United Arab Emirates-Romania BIT and the United Arab Emirates-Ukraine BIT.
[280] Article III(4) of the Belgium-Luxembourg Economic Union-Colombia BIT.
[281] See e.g.: Article 8(3) of the Sri Lanka-Egypt BIT; Article 4(3) of the Bulgaria-Cyprus BIT; Article 8(5) of the Ethiopia-Libya BIT; Article 10(5) of the Spain-Namibia BIT; Article 8(6) of the Poland-Latvia BIT; Article 16(1) of the Austria-Belize BIT; Article 8(5) of the Greece-Jordan BIT.
[282] See e.g.: Article 11(4) of the Iran-Venezuela BIT; Article 10(1) of the South Korea-Guyana BIT; Article 6(5) of the Turkey-Romania BIT; Article 10(1) of the Egypt-Mongolia BIT.

ceptive to such an argument.[283] By extension, Schreuer et al. have contended that the same conclusion should apply even where such incorporation is not apparent.[284]

When a dispute is determined by an ICSID tribunal and no indication is made in the host state's domestic law as to the choice of law, the tribunal, under Article 42(1) of the ICSID Convention, will be able to draw upon both domestic and international law. This aspect is further elaborated upon in Section 2.2.4 below.

2.2.4. Selected arbitration rules

Where the parties have not indicated the law applicable to their dispute in the instrument forming the basis for arbitration, or referred vaguely to a given set of rules (a reference can be made, for instance, to "UNCITRAL" or "ICSID Convention" or "arbitration in Stockholm" and the like), guidance can be sought in the rules governing the arbitration proceedings in issue. Article 42(1) of the ICSID Convention is instructive in this respect. Thereunder, whilst, in the first place, choice of applicable law is left to the parties, in the absence of any consensus, the tribunal shall apply the law of the state party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable. The final passage contains an express reference to international law which creates a gateway for estoppel to be applied, whilst at the same time striking a balance between flexibility and predictability as well as between the interests of the host state and the investor by providing for a combination of domestic and international rules to apply.[285] In *Duke Energy*, the tribunal, resolving a dispute brought to ICSID arbitration on the basis of an investment contract which did not contain a choice of law clause, applied, in addition to the domestic laws of Peru, rules of attribution of representations to the host state derived from international law as well as international estoppel on the basis of the authorization contained in Article 42(1).[286]

Importantly, Article 42(1) can be invoked purposively to apply international law even where *prima facie* there was an agreement on the applicable law between the parties. It has been held that initiation of an international arbitral proceeding on the basis of a provision of domestic law cannot automatically be taken to denote a choice of domestic law as applicable to the resolution of the dispute. In *Southern Pacific Properties*, the tribunal expressly noted

[283] C. Schreuer, L. Malintoppi, A. Reinisch, A. Sinclair, *The ICSID Convention: A Commentary*, 2nd edition, Cambridge University Press 2009, p. 582.
[284] Ibid, pp. 570, 583.
[285] E. Gaillard, Y. Banifatemi, "The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process", 18(2) ICSID Review - Foreign Investment Law Journal 2003, pp. 389-393.
[286] *Duke Energy*, para 241.

that international law (and, by extension, estoppel) preserves its gap-filling role even in the face of an express choice of domestic law:

> "Even accepting the Respondent's view that the Parties have implicitly agreed to apply Egyptian law, such an agreement cannot entirely exclude the direct applicability of international law in certain situations. The law of the [host state, Egypt], like all municipal legal systems, is not complete or exhaustive, and where a *lacuna* occurs it cannot be said that there is agreement as to the application of a rule of law which, *ex hypothesi*, does not exist. In such case, it must be said that there is 'absence of agreement' and, consequently, the second sentence of Article 42(1) would come into play".[287]

Article 35(1) of the UNCITRAL Arbitration Rules grants a mandate to the arbitral tribunal to apply, where no agreement between the parties is discernible, "the law which it determines to be appropriate". Here, there is no express reference to international law – this has been explained on the basis that the Rules are primarily geared to serve commercial arbitrations without a sovereign state element, thus giving more latitude to arbitrators as regards the choice of law.[288] A similar rule is stipulated in Article 27(1) of the Arbitration Rules of the SCC.[289]

As evidence suggests that arbitrations are reasonably often initiated on the basis of investment treaties and contracts which do not incorporate a choice of law clause,[290] Article 42(1) of the ICSID Convention will assume a powerful role as a conduit through which general principles of law could be applied. The drafters of the ICSID Convention had initially intended to incorporate a direct reference to Article 38(1)(c) of the ICJ Statute, but this idea was later abandoned.[291] Although the catalogue of sources of law envisaged in Article 38(1)(c) was originally designed to apply to inter-state disputes, the dominant view among investment law scholars appears to be that the reference to "such rules of international law as

[287] *Southern Pacific Properties*, para 80.
[288] B. Sabahi, N. Rubins, D. Wallace, Jr., *Investor-State Arbitration*, 2nd edition, Oxford University Press 2019, p. 87.
[289] As a side note, potential differences in the outcomes of application of Article 42(1) of the ICSID Convention as opposed to the more permissive standards of the UNCITRAL and the SCC rules were signalled in *Addiko Bank*, para 258, footnote 346.
[290] Y. Banifatemi, "The Law Applicable in Investment Treaty Arbitration" (in:) K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd edition, Oxford University Press 2018, p. 493; A.R. Parra, "Applicable Law In Investor-State Arbitration" (in:) A.W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2007*, Brill/Nijhoff 2008, pp. 7-8.
[291] C. Schreuer, "Article 42", 12(2) ICSID Review - Foreign Investment Law Journal 1997, pp. 464-465.

may be applicable" pertains to international law as a whole, including general principles of law *pro foro domestico* and general principles of international law.[292]

Another reason for the application of international law, and estoppel as a general principle of law, in the absence of a treaty choice of law clause, can be proffered. It has been established in arbitral case law that questions going to liability of host states must inherently be governed by international law.[293]

2.2.5. Principle of systemic integration under Article 31(3)(c) of the VCLT

A further systemic rationale for the application of general principles of law as part of international law to investment disputes was offered in *MTD Equity* – BITs and all issues arising thereunder must be governed, as pertaining to interpretation of treaties, by international law pursuant to the provisions of the VCLT.[294] This precept, an extension of a purposive interpretation of the "such rules of international law as may be applicable" fragment of Article 42(1) of the ICSID Convention, serves to incorporate the rules of interpretation envisaged in Articles 31 and 32 of the VCLT. Accordingly, in an ICSID arbitration, an exclusive choice by the parties of domestic law as applicable does not exclude the operation of international law rules on treaty interpretation in construing the ICSID Convention.[295] Of particular importance is Article 31(3)(c) under which, as part of the context within which a treaty shall be interpreted, account shall be taken of any relevant rules of international law applicable in the relations between the parties. McLachlan has posited that there is a negative and a positive aspect of the principle. As part of the former, the parties, when entering into treaty obligations, express thereby their intention to refrain from acting in discordance with, *inter alia*, generally recognized principles of international law. The positive obligation, in turn, consists in having regard to general principles of international law when it comes to issues not provided for in the treaty.[296] It has been claimed in the literature, accepting the customary status of the rule enshrined in Article 31(3)(c) of the VCLT, that:

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[292] C. McLachlan, "Investment Treaties and General International Law", 57(2) International and Comparative Law Quarterly 2008, p. 399; F.M. Palombino, *Fair and Equitable Treatment and the Fabric of General Principles*, T.M.C. Asser Press 2018, p. 48; O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals - An Empirical Analysis", 19(2) European Journal of International Law 2008, p. 310; S.W. Schill, "General Principles of Law and International Investment Law" (in:) T. Gazzini, E. De Brabandere (eds.), *International Investment Law: The Sources of Rights and Obligations*, Brill/Nijhoff 2012, p. 142.
[293] *Vivendi (Annulment)*, para 102.
[294] *MTD Equity*, paras 86-87.
[295] *Waste Management I*, para 9; J.R. Weeramantry, *Treaty Interpretation in Investment Arbitration*, Oxford University Press 2012, p. 14.
[296] C. McLachlan, "Investment Treaties and General…", see note 292, pp. 372-373.

"[u]nder customary principles of treaty interpretation, tribunals routinely resort to rules of international law whose normative validity is grounded in a source outside of the treaty that is the subject of interpretation".[297]

It is universally accepted that Article 31(3)(c) imports a duty to have regard to general principles of law, therefore also estoppel.[298] This process, often referred to as systemic integration, found its fullest exposition in the field of general international law in the ICJ's *Oil Platforms* case where the Court invoked customary law on the use of force as a supplement to the interpretation of a non-precluded measures clause inside a treaty between Iran and the United States. In international investment law, the principle of systemic integration has been applied in several cases to rely specifically upon general principles of law as a subsidiary argument that strengthens or justifies an interpretation of an investment treaty.[299] In *El Paso Energy*, it was established that general principles of law may be "channelled into" a treaty interpretation through Article 31(3)(c) of the VCLT to achieve any of 3 broad goals: (1) to establish a special meaning; (2) to confirm or invalidate interpretations obtained by applying the elements listed in Article 31 of the VCLT; (3) to correct results so obtained if they are ambiguous, obscure, manifestly absurd or unreasonable.[300]

2.2.6. UNIDROIT Principles of International Commercial Contracts

Estoppel can be imported into the regime of international investment law by reference to internationally accepted collections of fundamental principles, notably the UNIDROIT Principles of International Commercial Contracts. Some arbitral tribunals have referenced the Principles to buttress their arguments concerning the interpretation of investment contracts and BITs.[301] This trend was noted by the ILA in a 2018 report where it was acknowledged

[297] B. Simma, T. Kill, "Harmonizing Investment Protection and International Human Rights: First Steps Towards a Methodology" (in:) C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer*, Oxford University Press 2009, p. 681.
[298] M.E. Villiger, "Article 31: General Rule Of Interpretation" (in:) idem, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill/Nijhoff 2009, p. 433; J. Pauwelyn, *Conflict of Norms in Public International Law*, Cambridge University Press 2003, pp. 254-255; C. McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", 54(2) International and Comparative Law Quarterly 2005, p. 290; A. van Aaken, "Defragmentation of Public International Law Through Interpretation: A Methodological Proposal", 16(2) Indiana Journal of Global legal Studies 2009, pp. 497-498.
[299] *Renco Group*, para 236; *Al-Warraq*, para 203; *Tulip Real Estate (Annulment)*, paras 87-89; *Ambiente Ufficio*, paras 603-607.
[300] *El Paso Energy*, para 606.
[301] For a comprehensive overview of the practice, see: P. Bernardini, "UNIDROIT Principles and International Investment Arbitration", 19 Uniform Law Review 2014, pp. 561-569; G. Cordero-Moss, D. Behn, "The Relevance of the UNIDROIT Principles in Investment Arbitration", 19 Uniform Law Review 2014, pp. 570-608; A. Reinisch, "The Relevance of the UNIDROIT Principles of International Commercial Contracts in International Investment Arbitration", 19 Uniform Law Review 2014, pp. 609-622.

that the UNIDROIT Principles have been invoked to justify the injection of general principles of contract law in a number of contexts, including interpretation of contracts, interest, the application of the *exceptio non adimpleti contractus*, validity of contracts, and non-performance and conclusion of contracts.[302]

In this context, attention should be drawn primarily to Article 1.8 of the Principles, which stipulates that a party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment. In the commentary to the Principles, it is further explained that the prohibition can result in the creation of rights and in the loss, suspension or modification of rights otherwise than by agreement of the parties.[303] Article 1.8 was expressly relied on by the arbitral tribunal in *Lemire* to prohibit the investor from changing its position where that was detrimentally relied on by the host state.[304] In this context, Hepburn noted that the tribunal in substance applied the principle of estoppel.[305] Another commentator has noted that reliance on the UNIDROIT Principles could potentially extend the application of estoppel to the sphere of renegotiations of international investment contracts.[306]

2.3. Interpretative function of estoppel

As noted in the Introduction, estoppel shall within our scope of inquiry have two predominant functions as a general principle of law: (1) gap filling, i.e. estoppel can provide guidance where none of the other formal sources of international law (treaty and custom) furnish an answer, with a view to avoiding a situation of *non liquet*; (2) important interpretation function, i.e. estoppel can aid in making sense of ambiguous or uncertain treaty language and determining the rights and duties of states and investors, particularly as against the background of the legitimate expectations prong of the FET standard.

In almost all cases discussed in the thesis arbitral tribunals shall utilize the gap-filling function of estoppel and accordingly treat it as a directly applicable principle whose aim is to preclude a party from maintaining a position that is manifestly inconsistent with a representation made beforehand. Tribunals following this general reasoning would apply estoppel di-

[302] International Law Association, 'The Use of Domestic Law Principles in the Development of International Law', Report of the Sidney Conference (2018), p. 28, available at: https://bit.ly/3bg4aA2 (accessed: 24.08.2021).
[303] UNIDROIT (International Institute for the Unification of Private Law), *UNIDROIT Principles of International Commercial Contracts 2016*, p. 21, available at: https://bit.ly/3oniBGf (accessed: 24.08.2021).
[304] *Lemire*, paras 134-135.
[305] J. Hepburn, "The UNIDROIT Principles of International Commercial Contracts and Investment Treaty Arbitration: a Limited Relationship", 64(4) International & Comparative Law Quarterly 2015, p. 920.
[306] A. Florou, *Contractual Renegotiations and International Investment Arbitration*, Brill/Nijhoff 2020, p. 141.

rectly to the facts before them with a view to determining the respective rights and obligations of the parties. On occasion, however, estoppel would be stripped of its technical requirements and invoked as a device strengthening the tribunal's interpretation of a given right or obligation stemming from another source of international law, such as a treaty or an international investment contract.

In doctrine, it has been observed that general principles such as estoppel have the potential of informing and supplementing the interpretation and application of investor protection standards, predominantly the FET standard.[307] More generally, general principles can be used to interpret ambiguous or uncertain language in customary law and in treaty, and aid in resolving overlaps or conflicts between norms found in treaties or custom.[308] In international investment law, we shall be primarily preoccupied with the interaction between treaty, as the primary carrier of rights and obligations, in juxtaposition with custom and, secondarily, with general principles of law. Schill has argued that the increased "treatification" of international investment law (proliferation of treaties) creates a perfect ground for the operation of general principles of law, whose function shall be to concretize the letter of treaties to distil the rights and obligations of the parties to a dispute in a manner that takes account of protection of the investor and the investment as well as the countervailing public interests.[309] As shall be seen below, the good faith underpinnings of estoppel are well suited to perform these functions which will be, nonetheless, more of a persuasive and not normative nature. As illustrated throughout the course of my argument when discussing cases in other contexts, arbitrators engage in such intellectual exercises impliedly by making connections between the good faith underpinnings of estoppel and the intricacies of the content of duties of one agent relative to another. What follows is an illustrative example where this type of reasoning was more vivid, and arbitrators drew upon estoppel to add weight to their arguments and determinations regarding the respective rights and obligations of parties to a dispute.

In *Chevron Corporation (2018 Second Partial Award)*, the tribunal resorted to the notion of estoppel when interpreting the parties' obligations stemming from a BIT and Article 26 of the VCLT, which requires parties to a treaty in force to act in good faith in the performance of their obligations. The host state, Ecuador, alleged that Chevron did not have any assets in the state and therefore there was no "investment" within the meaning of the United

[307] M. Potestà, "Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept", 28(1) ICSID Review - Foreign Investment Law Journal 2013, p. 92.
[308] M.C. Bassiouni, "A Functional Approach…", see note 141, p. 776; E. Snodgrass, "Protecting Investors' Legitimate Expectations - Recognizing and Delimiting a General Principle", 21(1) ICSID Review - Foreign Investment Law Journal 2006, p. 14.
[309] S.W. Schill, "General Principles of Law and International Investment Law", see note 292, pp. 139, 157.

States-Ecuador BIT. As a result, the arbitral tribunal was claimed to lack jurisdiction under Article 21 of the UNCITRAL Arbitration Rules. The investor countered that a contrary finding was made in a previous judgment by a local court in Ecuador (referred to by the tribunal as the Lago Agrio Litigation) and, alleging that the judicial conduct should be attributed to the host state, attempted to preclude it from denying jurisdiction.[310] The tribunal began its inquiry by looking at the legal basis for the submission of the dispute at hand to arbitration. This was ascertained to be Article VI of the BIT, subject to international law. One specific principle of international law the tribunal drew attention to was embedded in Article 26 of the VCLT.[311] Next, noting that the arbitration agreement between the parties does not constitute a treaty, the tribunal nonetheless imported into it the VCLT-derived obligation for the parties to exercise their rights and to perform their obligations in good faith in the conduct of the present arbitration. The tribunal relied, *inter alia*, on the consensual nature of the agreement (offer and acceptance), and the fact that the ICJ (i.a. in *Nuclear Tests*) purported to universalize the principle stipulated in Article 26 to cover all legal obligations, irrespective of their source.[312]

At first glance, the content of the principle of good faith the tribunal applied aligns with the broad view of estoppel. The tribunal invoked the maxim of *allegans contraria non audiendus est* and referred to a number of academic authorities, including McNair, MacGibbon and Cheng, to espouse the principle militating against inconsistency of conduct where a clear representation can be discerned.[313] The tribunal ultimately concluded that the broad view of estoppel thus formulated precluded Ecuador from "blowing hot and cold" and denying the existence of an arbitrable "investment" within the meaning of the BIT.[314] Reconstruction of the full meaning of *Chevron Corporation (2018 Second Partial Award)* is difficult, however, because, regrettably, the tribunal was not entirely consistent in its reasoning and at time made forays into the strict view of estoppel, referring to detrimental reliance,[315] before turning its attention again towards the broad view, supported by recourse to U.S. municipal jurisprudence.[316] Further, the tribunal used legal terminology rather loosely, referring to good faith and estoppel virtually interchangeably,[317] and nominally based its holding on good faith. The following passage illustrates the tribunal's approach:

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[310] *Chevron Corporation (2018 Second Partial Award)*, para 7.79.
[311] Ibid, para 7.83.
[312] Ibid, paras 7.84-7.86.
[313] Ibid, paras 7.88-7.89.
[314] Ibid, para 7.115.
[315] Ibid, para 7.95.
[316] This part of the tribunal's reasoning is analysed in Section 2.7 below concerning the phenomenon of analogies between domestic and international concepts of estoppel in international investment law.
[317] *Chevron Corporation (2018 Second Partial Award)*, paras 7.89, 7.91, 7.95, 7.105, 7.107.

> "Applying the principle of good faith under international law to the exercise of rights and the performance of obligations under the Arbitration Agreement, the Tribunal decides that it is impermissible for the Respondent to 'blow hot and cold' or to 'have it both ways', to Chevron's detriment and to the Respondent's benefit. In other words, the Respondent cannot now defeat, under the principle of good faith, the object and purpose of the Arbitration Agreement derived from Article VI of the Treaty with a jurisdictional objection under Article 21 of the UNCITRAL Arbitration Rules treating Chevron so differently from [the other two claimants] as regards assets and, therefore, "investments" in Ecuador from 1964 onwards. The Tribunal concludes that the Respondent is required in this arbitration, as a matter of good faith, to treat Chevron as 'standing in the shoes' of TexPet (with Texaco), consistently with the statements made and acted upon by the Respondent's judicial branch in the Lago Agrio Litigation".[318]

All in all, whilst it is difficult to discern exactly which view of estoppel the tribunal availed itself of as an interpretative tool (possibly both), this role should be performed, I submit, by the key underlying objectives and rationales of estoppel, which afford a degree of flexibility, i.e. prohibition of inconsistency of conduct, fairness and justice in dealings between investors and host states, need for clarity as regards the expression of manifestations of will, and keeping promises (*acta sunt servanda*). The reasoning will differ from that employed where estoppel is applied directly as a general principle of law under the gap-filling function, because the strict view can be considered too specific and encompassing a number of concretized requirements which are flexible only to a limited extent. As a general proposition, I submit that the ambitions for the interpretation function of estoppel will be relatively modest in comparison with its gap-filling function, which is consumed by direct application of the principle.

2.4. Estoppel and related principles

The scope of the thesis is limited to estoppel on the broad and strict views (with the prescriptive part of my argument orientated towards the latter) as well as related permutations of estoppel which, I contend, are capable of being conceptualized as species of estoppel proper (in particular issue estoppel). A perusal of investment arbitral decisions reveals a degree of confusion as regards the proper identification of the general principles a given tribunal uti-

[318] Ibid, para 7.112.

lized to resolve a dispute.[319] The decentralized character of investment arbitration, with no overarching instance overseeing the consistency of decisions reached,[320] has given rise to disparate interpretations of both estoppel and related principles of law which may have similar functions, yet their detailed requirements are decidedly different. Particularly, tribunals tend to conflate estoppel with unilateral acts.[321]

In *Feldman Karpa*, a case discussed in more detail in Section 3.2.4 *in fine*, the tribunal assimilated, to a degree, estoppel, recognition and acquiescence, acknowledging that the NAFTA's provisions governing jurisdiction *ratione temporis* of an arbitral tribunal can be modified by means of a formal recognition of a claim brought after the lapse of a limitation period or, in exceptional circumstances, "long, uniform, consistent and effective behavior" implying such recognition. Latitude was accorded to the host state as regards the form of such "recognition" which suggests room for application of acquiescence, and, at the same time, the tribunal availed itself of terms like "stopped" to refer to the effect such an acknowledgment would have on the host state's ability to contest a claim in the presence of such a recognition or, conceivably, acquiescence.[322]

Two other examples concern waiver. In *Champion Trading*, in response to an objection to jurisdiction raised by the host state, challenging *ius standi* of a number of claimants on the basis of their dual Egyptian and American nationality, the investors contended that they had no real ties with Egypt, and so that nationality, as it had been conferred upon them at birth involuntarily (by operation of mandatory statutory law), should be disregarded for the purposes of establishing jurisdiction under Article 25(2)(a) of the ICSID Convention. The tribunal concluded that in setting up the investment in dispute the claimants availed themselves exclusively of their Egyptian nationalities, without a mention of American citizenship.[323] Therefore, they were considered dual nationals, and jurisdiction was accordingly rejected. The tribunal did not name nor classify the principle it was applying, however no reference was made

[319] See, *inter alia*: *ADC Affiliate Limited*, para 475 (waiver and estoppel); *Siemens*, para 282 (estoppel and acquiescence); *Sociedad Anónima Eduardo Vieira*, paras 196-197 (estoppel and waiver); *Standard Chartered Bank*, para 99 (estoppel, waiver and consent).
[320] Annulment ad hoc committees under Article 52(3) of the ICSID Convention perform a very limited function and their purview is confined to the grounds of annulment enumerated in Article 52(1). For more, see: P. Pinsolle, "The Annulment of ICSID Arbitral Awards", 1(1) Journal of World Investment & Trade 2000, pp. 243-257.
[321] Please also refer to my discussion of the inter-relations between estoppel and acquiescence under general international law in Section 1.6 and between estoppel and binding state promises in Section 1.7. These corollaries are applicable *mutatis mutandis* to investment arbitration. See also: *Thunderbird Gaming Corporation*, Separate Opinion of Thomas W. Wälde, para 27, footnote 32, where a link is made between all three notions – estoppel, waiver and acquiescence (referred to, I submit erroneously, as laches).
[322] *Feldman Karpa*, para 63.
[323] *Champion Trading*, para 64.

to reliance, trust or indeed any conduct on the part of Egypt in response to the investors' actions. This would suggest a slight preference towards waiver – the investors should be taken to have made a unilateral act (a binding declaration) in writing having listed only their Egyptian nationalities in documents necessary for the establishment of the investment, thus impliedly waiving their right to plead otherwise. Alternatively, this could be the application of the broad notion of estoppel, sanctioning mere inconsistency of conduct.[324]

In *ICW Europe Investments*,[325] the host state objected to jurisdiction on the grounds that the 2018 judgment of the CJEU in *Achmea* ruled arbitration clauses in international investment treaties between EU Member States as incompatible with Articles 267 and 344 TFEU. As a result, the tribunal was argued to lack jurisdiction as the dispute arose between a British investor and the Czech Republic. The claimant brought a number of counterclaims, including in relation to waiver and estoppel.[326] The tribunal, in dismissing the objection and accepting jurisdiction, based its reasoning in part on an assessment of the host state's conduct in raising its jurisdictional objection based upon the *Achmea* judgment.[327] By admitting upfront that it sided with the claimant,[328] the tribunal failed to differentiate between waiver and estoppel, although both heads of claim were advanced by the claimant. Nominally, references to waiver were dominant:

> "In the Tribunal's view, none of the Respondent's referenced qualifications changes the nature of its representations, and indeed undertakings, repeated at different stages throughout these proceedings, that no jurisdictional objection would be raised with respect to the intra-EU issue (i.e., the same issue that has now been decided in *Achmea*). In all the circumstances, the Tribunal therefore concludes that the Respondent waived any intra-EU Investment Treaty jurisdictional objection. Had the Respondent intended to reserve its rights, it could have done so by including express language to this effect".[329]

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[324] The approach utilized by the tribunal in that case has been termed an "estoppel-waiver principle". See: C. Marian, "Who is Afraid of *Nottebohm*? Reconciling the ICSID Nationality Requirement for Natural Persons with *Nottebohm*'s "Effective Nationality" Test", 28(4) Journal of International Arbitration 2011, p. 323

[325] Note that three other cases, *Photovoltaik Knopf*, *Voltaic Network*, and *WA Investments-Europa*, were disposed of on the same day on the same grounds. Therefore, whilst what follows is a discussion of *ICW Europe Investments Limited*, my corollaries are applicable by extension to all of those cases.

[326] *ICW Europe Investments*, paras 389-393.

[327] Ibid, para 399.

[328] Ibid, para 396.

[329] Ibid, para 407.

The language used by the tribunal bears strong resemblance to that typically employed in favour of the broad notion of estoppel. Reliance or detriment were not drawn upon. Noting this striking similarity between the concepts, and regretting that the tribunal did not address the claimant's estoppel arguments (or at least not nominally), it is commendable that the doctrine of waiver was applied to the facts with relative scrupulousness.

On the other end of the spectrum are cases such as *UAB Energija*, where the tribunal clearly differentiated between estoppel, acquiescence and extinctive prescription, and devoted a separate section of its award to each basis of claim.[330]

2.5. Reception of the notion of estoppel as established in general international law

In Section 1.5, I discussed the two primary legal qualifications of estoppel in general international law – either as a general principle of law *pro foro domestico* within the meaning of Article 38(1)(c) of the ICJ Statute or as a general principle of international law. The question, whilst its importance should not be discounted, is predominantly academic as international courts and tribunals have not devoted a considerable time and space to proffer unambiguous statements of guidance. This state of affairs appears to be mirrored in international investment law, however, but only as a tentative proposition, it appears that some tribunals have indeed viewed estoppel as a general principle of law *pro foro domestico*. The tribunal in *ADC Affiliate Limited* remarked generally that the precept prohibiting blowing hot and cold is known in "all systems of law".[331] The universal recognition of the underlying principle behind estoppel was emphasized in the early case of *Amco (Jurisdiction)*, where the tribunal, whilst conceding that estoppel originated in common law systems, insisted that it must be broadly assimilated with some of the concretizations flowing from the principle of good faith, which is commonly embraced by all domestic legal systems.[332] In essence, a similar inference was made in *Duke Energy*, where estoppel was thought to have derived from domestic law (and constitute a concretization of maxims such as ve*nire contra factum proprium*), yet be applicable internationally.[333] Other tribunals have referred to estoppel as a "principle of international law" without delving further into the intricacies of its sourcing,[334] or have simply discussed the principle within the context of international law or otherwise placed estoppel within the

[330] *UAB Energija*, paras 531-552.
[331] *ADC Affiliate Limited*, para 475.
[332] *Amco (Jurisdiction)*, para 47.
[333] *Duke Energy*, para 231.
[334] See e.g. *Pac Rim Cayman*, para 8.46; *Mamidoil Jetoil*, para 469.

context of principles, precepts or dogmas germane to international law.[335] Issue/collateral estoppel has been proclaimed, with some hesitation signalled in later case law, as a general principle of law.[336] In other cases, the opinion of the tribunal as to the qualification of estoppel is unclear.[337] In *Pan American Energy*, estoppel was declared to constitute *prima facie* a general principle of law derived from domestic laws, yet to elucidate the content of the principle reference only to international authorities was made.[338] In *Desert Line Projects*, the tribunal appeared to have traced back the origins of estoppel to Islamic jurisprudence, however no authorities were called upon in support of this assertion.[339] Little guidance, I submit, is to be inferred from cases where analogies were made with one specific domestic legal system,[340] as an assertion proclaiming a principle's status as a general principle of law should be grounded in a representative selection of legislations. Notwithstanding, in *Chevron Corporation (2018 Second Partial Award)*, an attempt was made by the tribunal to cast judicial estoppel as imported from domestic U.S. law in terms of a general principle of law *pro foro domestico*.[341]

As I laid out in Section 1.5, it is not an objective of this dissertation to adopt an unequivocal position on the legal qualification of estoppel. I would limit myself to observing that, as noted in *Chagos Marine Protected Area Arbitration*, estoppel in international law will inevitably be stripped from the detailed modalities of the myriad variations of estoppel subsisting under the many domestic legal systems where the general contours of the principle are accepted. In Section 1.5, I attempted to offer an enumeration (which is far from exhaustive) of domestic jurisdictions where the strict concept of estoppel is recognized at least in one distinguishable area of law, primarily in contract. Whilst this question is ultimately to be left open it could be that there are strong arguments in support of the classification of estoppel as a general principle of law within the meaning proffered by the ICJ Statute and, as a consequence, there is no imperative to have recourse to the concept of general principle of international law. Alternatively, it could be posited that the very fact described above, i.e. that international es-

[335] See e.g. *Pope & Talbot*, para 111; *Chevron Corporation (2010 Partial Award)*, para 350 (declaring that the operation of estoppel shall be governed by "the rules and principles of international law"); *Gruslin*, para 20.2 (referring to estoppel "expressed in an international law context"); *HICEE*, Dissenting Opinion of Judge Charles N. Brower, para 36.
[336] *RSM Production*, para 7.1.2. Cf. *Caratube II*, para 464. In *Mobil Investments Canada*, issue estoppel was classified as a branch of the overarching principle of res judicata, whose character as a general principle of international law was proclaimed. See: *Mobil Investments Canada*, paras 206, 209-211.
[337] See: *Aguas del Tunari*, para 191, footnote 161; *Siag (Award)*, paras 482-483; *CSOB*, para 47.
[338] *Pan American Energy*, para 159.
[339] *Desert Line Projects*, para 207.
[340] Analogies are analysed further in Section 2.7.
[341] *Chevron Corporation (2018 Second Partial Award)*, para 7.99.

toppel is less specialized and detailed than its domestic prototype, is evidence that the general principle of international law qualification is more appropriate. As demonstrated above and, more broadly, throughout the dissertation, there is no evidence in arbitral practice that would expressly exclude estoppel from the orbit of any of the two concepts. Further, the qualification within any of the two categories is not bound to affect in any discernible manner the operation of estoppel as a largely universal precept capable of modifying legal relations (by injecting a measure of corrective justice) at virtually all of the major stages of an international investment arbitration proceeding.

As a second point, it is important to stress that estoppel as a general principle of law is not endemic to international investment law. In fact, as discussed in Chapter I, particularly in Section 1.2, its roots can be traced back to early inter-state arbitrations and cases before the ICJ which concerned maritime boundary and other territorial disputes. Considering the well-entrenched character of the strict concept of estoppel in the jurisprudence of the ICJ since, at a minimum, the mid-1960s, it is an important submission made in this thesis that international investment law should apply the model of estoppel espoused and developed in general public international law.

These problems have been quantified by Kulick and summarized as follows:

> "Interestingly, despite the rather clear preference in ICJ case law and scholarly writings for the strict view of estoppel, as described above, only 15 decisions could be categorized as following the strict view. Thirteen decisions endorsed the broad view instead – almost the same amount. In 15 further instances, it remained opaque which doctrinal approach the tribunal/arbitrator took, while in 10 instances the tribunal/arbitrator appears to have blurred the doctrinal lines to other concepts, in particular, unilateral acts.
>
> Taking a closer look at those 28 decisions that could be categorized following either the broad (13) or the strict view (15), an interesting pattern emerges. Obviously, the tribunal/arbitrator did not explicitly identify the approach employed to decide the matter in every decision and/or reiterated the requirements for the one view or the other. However, while 13 of the total 15 decisions endorsing the strict view clearly revealed their approach and/or recited the requirements and supporting authorities, the figures are almost in exact reverse with regard to the broad approach. Only three decisions out of a total of 13 clearly revealed that they took the broad approach, whereas in 10 in-

stances the approach may be inferred merely from the application by the tribunal/arbitrator who often does not cite any authority".[342]

It is not a contention of this dissertation, however, that general international law with regard to estoppel as interpreted within the context of general international law by the International Court of Justice should be applied without any adaptation (however, only if necessary)[343] to the peculiar circumstances of foreign investment by arbitral tribunals.[344] Rather, it is limited to asserting that arbitrators seized of investment disputes should defer to the overall tenor of the ICJ's jurisprudence[345] and derive therefrom a direction as to how the law should develop.[346] This is precisely why the failure of the mass of investment tribunals to accept, as the Court consistently has for several decades, the strict view of estoppel as the prevailing formulation, with detrimental reliance being the primary differentiating factor between estoppel and unilateral acts, operates as an insurmountable obstacle to achieving meaningful clarity and consistency. Inconsistent application of law in investor-state arbitration hampers the predictability of the investment regime and the credibility of the dispute resolution system, thus undermining the legitimacy of awards and the system as a whole.[347] A certain overlap of expertise between the two regimes (public international law and international investment arbitration) should be conducive to improving the degree of mutual coherence.[348] A quantitative analysis of available precedents suggests that in 67% of the cases citing ICJ decisions a degree of deference was discernible in the essential part of the argument.[349] This limited deference, as opined by one commentator, is especially prudent where a tribunal seized of a dispute has to decide upon matters of general international law. It is then a commendable practice to

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[342] A Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel…", see note 7, pp. 113-114 (footnotes omitted).
[343] My argument is very permissive. It shall be seen further in the dissertation, however, that no such adaptations have been convincingly proffered in the case law.
[344] In *Feldman Karpa*, Mexico argued that as estoppel, referred to as an "underdeveloped and peripheral principle", has been applied by the ICJ predominantly in relation to boundary disputes, it should not be transposed verbatim to the sphere of international investment (see para 62). The argument was not directly addressed by the tribunal.
[345] The ICJ's case law is proffered as an illustrative example (as the Court's jurisprudence is most authoritative), however the corollaries reached could be extended to other dispute resolution forums where general international law is interpreted and applied, particularly the ITLOS.
[346] A. Pellet, "The Case Law of the ICJ in Investment Arbitration", 28(2) ICSID Review - Foreign Investment Law Journal 2013, p. 231.
[347] G. Zarra, "The Issue of Incoherence in Investment Arbitration: Is There Need for a Systemic Reform?", 17 Chinese Journal of International Law 2018, p. 158.
[348] As a side note, a 2017 study revealed that ICJ judges have sat as arbitrators in roughly 10 per cent of all known investment treaty cases during their tenure. On one occasion, an arbitral tribunal was composed of two incumbent ICJ judges. N. Bernasconi-Osterwalder, M.D. Brauch, *Is "Moonlighting" a Problem? The role of ICJ judges in ISDS*, International Institute for Sustainable Development 2017, available at https://www.iisd.org/system/files/publications/icj-judges-isds-commentary.pdf (accessed: 24.08.2021)
[349] O.K. Fauchald, "The Legal Reasoning of ICSID Tribunals…", see note 292, p. 342.

have regard to the pronouncements of the ICJ as an authoritative interpreter of international custom and general principles of law.[350] The proposition has found approval in arbitral case law. For example, in *Empresas Lucchetti (Jurisdiction)*, the tribunal acknowledged that the term "dispute" has an "accepted meaning" in international law and that it has been "authoritatively defined" by the ICJ.[351] Statements to a similar effect have been made by arbitral tribunals with regard to estoppel itself, proclaiming that the content of the principle should be transposed from general international law.[352] Notably, in *Gruslin* the tribunal expressly explained that it adopted the strict test of estoppel as outlined in *El Salvador v Honduras*.[353] Direct references are also made to the *Temple of Preah Vihear* case[354] and *North Sea Continental Shelf*.[355] Seminal inter-state arbitrations under the auspices of the Permanent Court of Arbitration are also called upon to strengthen estoppel-based arguments.[356] One tribunal has asserted that the existence of the doctrine is consolidated in public international law, that there is consensus about the origin of the doctrine, which should be identified within good faith, and conducted an exhaustive overview of all of the ICJ's pronouncements on estoppel.[357] These practices are commendable.[358] What is wanting is, first, a degree of consistency that would manifest itself in a more methodical recourse to ICJ materials, and second, a more universal recognition that there is a clearly dominant thread in the ICJ's jurisprudence.[359] In this way, arbitral tribunals would naturally drift towards the strict view of estoppel.

Notwithstanding, that many investment tribunals have failed to follow the guidance enunciated in the contemporary case law of international courts and tribunals is evinced in the divergent application of estoppel tests. Kulick has demonstrated that the incidence of the strict and broad concepts is almost equal, and that tribunals do not proffer any reasons for opting for a particular view.[360] It has been an observable trend that arbitrators are swayed by the con-

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[350] J. Zrilič, "Jurisprudential Interaction between ICSID Tribunals and the International Court of Justice" (in:) A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2013–2014*, Oxford University Press 2015, p. 320.
[351] *Empresas Lucchetti (Jurisdiction)*, para 48.
[352] *Pope & Talbot*, para 111; *RSM Production*, para 7.1.2;
[353] *Gruslin*, para 20.2.
[354] *Pan American Energy*, paras 151, 160.
[355] *Hulley Enterprises (Jurisdiction)*, para 287; *Yukos Universal Limited (Award)*, para 1322.
[356] *Pac Rim Cayman*, para 8.47 (referring to *Railway Land Arbitration*).
[357] *Nova Scotia Power*, paras 141-146.
[358] Other examples include: *ATA Construction*, para 122; *Chevron Corporation (2010 Partial Award)*, para 350; *HICEE*, Dissenting Opinion of Judge Charles N. Brower, para 36.
[359] In *Duke Energy*, for example, the tribunal made a sweeping reference to "principles of international law" (at para 241), without citing any ICJ jurisprudence, and then conflated both concepts of estoppel, espousing, it appeared, the strict view in its statement of applicable law but subsequently undermining the detrimental reliance requirement when applying its own test to the facts. The confusion could have been avoided, it is submitted, by having recourse to authoritative restatements of the principle found in the ICJ's case law.
[360] A Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel…", see note 7, pp. 113-114.

cepts of estoppel argued for by the parties to given proceedings.[361] Further, tribunals on occasion are quick to accept a precept solely, it appears, on the basis that either both parties agreed to it or that one party made a proposition which was subsequently left unchallenged by its opponent.[362]

Where the strict view is embraced, tribunals are relatively reliable as regards the explanation of the constituent requirements. The same cannot be said for the broad view where arbitrators routinely have recourse to related concepts, such as *venire contra factum proprium, allegans contraria non audiendus est*, abuse of process, abuse of rights or good faith. In general international law, even on the broad view it is necessary to prove the existence on the facts of a clear and unambiguous representation (plus, depending on the preferences of a court or tribunal, unconditionality and continuity), and that it was authorized, which necessitates the application of rules governing the attribution of statements or conduct to the state. This is virtually never articulated in the case law of international investment arbitral tribunals. Further, on occasion a tribunal seized of an estoppel claim will conflate both concepts and either proclaim its own hybrid formulation of estoppel or seemingly side with one of the competing views.[363] One can speculate that a tribunal's preference towards the broad or the strict view is correlated with its own preconceptions regarding the projected outcome of the case. It appears that a tribunal's sense of fairness influences, at least to some extent, the choice of concept to apply. This is borne out in the results of Kulick's quantitative analysis which showed that in most cases where the broad view was applied, sometimes *proprio motu*, an estoppel claim would be decided in favour of the representee.[364] The contrary was true for the strict view which effectively, in most cases, doomed an estoppel plea to fail, especially on the detrimental reliance prong of the test. However, even this corollary is contestable as tribunals rarely explain that a specific requirement is wanting on the facts, adopting instead a broad-brush approach, often limiting itself to a conclusion that the requirements of the strict view have not been made out.

One of the pillars of the dissertation is the endorsement of the strict view of estoppel in international investment law which incorporates the following requirements:

- a representation (statement of fact or law or conduct) which is clear and unambiguous;

[361] See e.g. *Cambodia Power*, para 261; *Caratube II*, para 307 (burden of proof in cases of estoppel). On other occasions, the tribunal will choose an argument proffered by one of the parties. See, for instance: *Siag (Award)*, para 483. In *Pac Rim Cayman*, the tribunal borrowed from material submitted by both parties, drawing upon the academic writings of Brownlie and *Duke Energy*. See: *Pac Rim Cayman*, paras 8.47-8.48.
[362] Notably, see: *RSM Production*, paras 7.1.1-7.1.2.
[363] See e.g. *Duke Energy*, paras 241-251, 431-442 (see also Section 6.3); *Chevron Corporation (2018 Second Partial Award)*, paras 7.88-7.114 (see also Section 2.7).
[364] A Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel…", see note 7, pp. 114-115.

- this representation must be voluntary, unconditional, and authorised;
- there must be reliance in good faith upon the representation either to the detriment of the party so relying on the representation or to the advantage of the party making the representation.[365]

The analysis will now turn to a discussion of these requirements as enunciated in the case law of investment arbitral tribunals.

2.6. Requirements of estoppel in the practice of investment tribunals

2.6.1. A representation (statement of fact or conduct) which is clear and unambiguous

2.6.1.1. A statement of fact or conduct

A statement of fact can be made by a representor to a representee in several ways, including via words, writings or conduct, as well as a combination of all three.[366] The conduct from which reliance originates need not necessarily be legal – the host state cannot hide itself behind supposed breaches of its own municipal law,[367] especially where it knowingly glossed over them and endorsed an investment that was incompliant[368] or where it is not illegality under domestic law that is the problem but "the failure to accomplish a formality foreseen by law, and not even required by it except as a condition of obtaining benefits unconnected with those of the BIT itself".[369] The burden of proof rests with the party raising an estoppel claim. This will typically be the alleged representee.[370]

On occasion, tribunals posit that a finding of estoppel necessitates that there be a "misrepresentation" of the existence of facts[371] or that the representee must necessarily be "misled" by the initial action of the representor.[372] To the extent that such propositions import a

[365] This is a slightly modified test of the one cited in *Pope & Talbot*, para 111. Allowance was made for "conduct" as a possible basis for estoppel.
[366] *Pac Rim Cayman*, para 8.47. See also: *Pope & Talbot*, paras 107 and 110, where a representation appeared to have been inferred from a combination of statements and actions.
[367] *Duke Energy*, para 245.
[368] *Fraport (Award)*, para 346. For more, see Section 4.2.
[369] *Desert Line Projects*, para 120.
[370] *Chevron Corporation (2010 Partial Award)*, para 348; *Siag (Award)*, para 320;
[371] See e.g.: *SGS v Pakistan*, para 122.
[372] *Siag (Award)*, paras 482-483. The tribunal cited Lauterpacht who, in defining estoppel, referred to a wilful causing of another to believe in the existence of a certain state of things. It is submitted that this does not necessarily imply a representation which deviates from objective truth or reality – it could well be a truthful representation of a party's understanding of an actual or legal fact, albeit mistaken or misguided. At any rate, I submit that the element of misleading will normally come into the fold at a later stage, when the representor attempts to change its course by adopting a position incompatible with the original representation. The tribunal in *Siag*

requirement that the representation giving rise to estoppel must deviate from objectively ascertainable truth, it is submitted that they are incorrect.[373] It is precisely the case that the operation of estoppel may bring about a situation where a party is estopped from maintaining what is objectively true because, on account of previous representations, that would be unfair to their representee(s) and generate detrimental reliance.[374] Objective truth can give way to individual justice. This differentiates estoppel from unilateral acts such as waiver or consent. As Kulick rightly notes:

> "[U]nilateral acts 'preclude' claiming Y because X is true. There is no further legal hurdle to pass because X is the content of the legal relationship between A and B. Estoppel, however, permits B to preclude A from claiming Y, even if Y is true. In order to use this legal 'magic trick' of estoppel, which overcomes the actual existence of a right or obligation and, thus, gives B an additional legal tool vis-à-vis A, as compared to a unilateral act, B must demonstrate an additional requirement – that is, that she has relied on the (clear, unequivocal and authorized) representation changing her position to her detriment".[375]

Instances where estoppel is found and where a representee was misled or otherwise relied on a misrepresentation will often coincide, however I submit that they do not exhaust the ambit of estoppel.

A representation may consist in a failure to act or, in other words, a course of conduct indicating that a party will not exercise a right legally vested therein. This inactivity should, however, be evident and should sufficiently demonstrate the intentions of the representor.[376] *A fortiori*, it appears that also a statement to the same effect, oral or in writing, would be capable of producing preclusive effects provided that all other requirements are made out. Instances of inactivity unaccompanied by clear indications of unwillingness to change course would be governed by other legal principles, such as statutes of limitation, extinctive prescription and laches.[377] Tribunals have not approached the classification of silence as a representation light-

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(Award) could have been inspired by the submissions of the host state where references to "wilful misrepresentations" were prominent.

[373] See also note 129 for a statement of principle to this effect as enunciated by Judge Fitzmaurice in *Temple of Preah Vihear*.

[374] On the other side of the spectrum, a case can transpire where, by virtue of estoppel, a party could be held to its representation consisting in an interpretation of a particular point of law even where it is ultimately held to be incorrect. To this effect, see: H. Thirlway, *The Law and Procedure of the International Court of Justice…*, see note 239, p. 36.

[375] A Kulick, "About the Order of Cart and Horse, Among Other Things: Estoppel…", see note 7, p. 125.

[376] *Mamidoil Jetoil*, para 469.

[377] See e.g. *Canfor Corporation*, paras 164-166 (laches); *UAB Energija*, paras 537-540 (extinctive prescription).

ly, and typically silence would only be considered in the totality of circumstances and not as a standalone representation.[378] This is largely consistent with Judge Spender's observation in *Temple of Preah Vihear* regarding the evidentiary value of silence.[379]

Traditionally, estoppel has been limited to statements of fact. It must be noted, however, that no investment tribunal has expressly formulated the rule that statements of law are outside the scope of the principle. At any rate, it is evident that the boundary between the two types of statements is blurry – the particular grey area appears to be representations concerning a party's understanding of the ramifications of a given legal rule. Laws are not clear cut and are intrinsically subject to, often divergent, interpretations. It will be demonstrated further in my argument that tribunals have shown willingness to consider estoppel arguments in the context of such purely legal issues as illegality of an investment under the domestic laws of the host state.[380] Further, estoppel has been invoked with regard to interpretations of domestic law issued by public authorities,[381] stability commitments (promises not to change the state of the law),[382] interpretation of complex judicial proceedings,[383] pronouncements of state agencies purporting to exempt an investor from certain administrative requirements in order to facilitate foreign investment,[384] exercise of a procedural right in arbitration proceedings,[385] scope of consent to arbitral jurisdiction,[386] objections to jurisdiction necessitating a legal construction of a judgment of the Court of Justice of the European Union,[387] exercise of rights expressly accorded under BITs,[388] interpretation of forum selection clauses and freedom of a party to pursue alternative dispute resolution forums,[389] interpretation of arbitration agreements,[390] right to pursue a legal argument previously advanced in the same proceedings[391] or in other proceedings,[392] including before a domestic dispute resolution forum, both an arbitral[393] and a state judicial one.[394] Such cases involve complex legal evaluations and force the tribunal to make sophisticated inquiries into how a representee understood a given statement

[378] *Pac Rim Cayman*, para 8.49.
[379] See Section 1.3.1 *in principio*.
[380] Notably, in cases like *Kardassopoulos, Karkey Karadeniz* and *Fraport (Award)*. For more, see Section 4.2.
[381] *Duke Energy*.
[382] *OperaFund, Cube Infrastructure Fund*.
[383] *Siag (Award)* (bankruptcy proceedings).
[384] *Bernhard von Pezold*.
[385] *Canfor Corporation, KS Invest.*
[386] *Gruslin*.
[387] *ICW Europe Investments Limited, Photovoltaik Knopf, Voltaic Network, WA Investments-Europa*.
[388] *Urbaser (Jurisdiction)*, paras 109-110.
[389] *SGS v Pakistan, Pan American Energy*.
[390] *Rumeli*.
[391] *RSM Production, Apotex Holdings, Eskosol, Petrobart, Mytilineos Holdings*.
[392] *Nova Scotia Power*.
[393] *Helnan*.
[394] *Chevron Corporation (2010 Partial Award)*.

or course of conduct as these may not have been liable to literal interpretation. The foregoing examples go to show that questions of fact and law are closely inter-related,[395] to a degree much higher than signified by the old cliché that *ex facto ius oritur*. In sum, although for the purposes of the test of the strict concept of estoppel and clarity of argument I shall avail myself of the "statement of fact" terminology where appropriate or necessary, this is to be considered a shortcut of sorts and shall extend to expressions or manifestations of one's interpretation of the legal consequences of a legal instrument (a contract, legislation, an administrative decision or any other qualifiable representation)[396] – a peculiar type of fact that conveys a state of mind relating to how legal reality is to present itself on a good faith interpretation by a party.

2.6.1.2. Clarity

Fundamentally, a clear representation should be amenable to only one reasonable construction. Excessively purposive interpretations, which attempt to recast statements or conduct as pertaining to another fact or purport to link, for the purposes of making an estoppel argument, events which are only tangentially correlated (if at all), will not be accepted.[397] The clarity of the representation encompasses, some authorities seem to suggest, clarity as to the addressee. A representation said to form basis of an estoppel as against a particular agent should have been addressed thereto.[398] The representation must squarely address the factual basis later used to mount an estoppel argument.[399]

Where a party makes a number of statements or engages in a lengthy pattern of conduct, for a representation to be clear it must be consistent. In such cases, one instance of divergence will be enough to break the chain and render the resulting representation unclear. In *UAB Energija*, the host state alleged that the investor waived its right to arbitration by engaging in protracted negotiations aimed at achieving an amicable resolution to the dispute. Prior to one of the meetings, however, an official representing the company made a mention of "potential international arbitration". This was sufficient for the tribunal to conclude that there was

[395] The claimant in *Feldman Karpa* argued more forcefully that "within the same issue of estoppel (…) a statement regarding how a law is applied is a statement of fact. In any event, the distinction is not relevant under international law. Estoppel can be availed of to deny both statements as well as their legal consequences". *Feldman Karpa*, para 60.
[396] This point was made by Bowett. See: D.W. Bowett, "Estoppel before International Tribunals…", see note 6, p. 178.
[397] *SGS v Philippines*, para 109.
[398] *Pope & Talbot*, para 109.
[399] *Duke Energy*, para 437; *SGS v Philippines*, para 109 (where a distinction was made between representations of the claimant investor that it did not have a local office and an allegation by the host state that the investor was thus estopped from denying that the underlying investment was not in the territory of the host state).

no clear representation to rely upon.[400] Drawing upon academic writing, clarity of the representation should be viewed from the perspective of the representee, the inquiry, however, is objectified in the sense that a requirement of reasonableness is superimposed. A clear representation should, therefore, be understood by the representee in a manner and to an extent that then allows it to place reliance thereupon. Sinclair has argued that the threshold in respect of estoppel is to be lower than in the case of unilateral acts – a representation should be able to cause the representee to believe in certain truth but at the same time can allow room for doubt.[401]

2.6.1.3. Unambiguity

As for the meaning of "unambiguous", the tribunal in *Duke Energy* offered the following guidance, referring to the synonymous term "unequivocal":[402]

> "(…) [F]or the conduct or representation of a State entity to be invoked as grounds for estoppel, it must be unequivocal, that is to say, it must be the result of an action or conduct that, in accordance with normal practice and good faith, is perceived by third parties as an expression of the State's position, and as being incompatible with the possibility of being contradicted in the future".[403]

The requirements of clarity and unambiguity necessitate that the interpretation of representations be based on a plain, rather restrictive, reading, mirroring broadly the rules for the interpretation of unilateral declarations as enshrined in Principle 7 of the GPAUD.[404] The interpretation should be largely objective.[405] Investment arbitral case law also points towards the directive of narrow interpretation.[406] Extrapolating from the ICJ's statements made in the context of unilateral acts *sensu largo*, principally declarations on the acceptance of compulsory jurisdiction of the Court,[407] the following inferences can be made:

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[400] *UAB Energija*, para 532.
[401] I. Sinclair, "Estoppel and Acquiescence", see note 6, p. 107.
[402] The tribunal expounded the notion of "unequivocal" representation rather than "unambiguous", but these terms are to be considered synonymous.
[403] *Duke Energy*, para 249.
[404] P. Saganek, *Unilateral Acts of States…*, see note 220, pp. 408-409.
[405] C. Goodman, "*Acta Sunt Servanda*? A Regime for Regulating the Unilateral Acts of States at International Law", 25(1) Australian Year Book of International Law 2006, p. 56.
[406] *Cemex Caracas*, para 82.
[407] Such analogies were permitted in: *Tidewater Incorporated*, paras 92-94; *Cemex Caracas*, paras 83-84. On the legitimacy of making cautions analogies in such contexts, see: K. Pan, "A Re-Examination of Estoppel…", see note 6, p. 765.

- regard should be had, first and foremost, to the words actually used, and the statement should be construed "as it stands";[408]
- before an assessment is made, the statement should be interpreted "as a whole";[409]
- a purely grammatical interpretation of the text is insufficient; interpretations must be made "in harmony with a natural and reasonable way of reading the text".[410]

In this context, Saganek has opined that the starting presumption should be that a given declaration does not give rise to a binding promise.[411] Das has argued that a representation should be given an interpretation which has been objectively adopted by the representee, which is to be ascertained by reference to available evidence and circumstances.[412] If determination of such an objective meaning is possible on a balance of probabilities, a representation should be deemed, I submit, unambiguous.

2.6.2. The representation must be voluntary, unconditional, and authorized

2.6.2.1. Voluntariness

The "voluntariness" requirement implies that the representor must act wilfully, deliberately.[413] What should be present on the facts is not necessarily the intention to be bound by the representation (an outward appearance in the form of words or conduct) bur rather that there was intention on the part of the representor to make a statement or act in a specific manner. Intention is therefore more factual and less prescriptive – the inquiry stops at ascertaining that a given event took place or not, and no further inferences or presumptions are formulated with regard to the meaning (including legal meaning) the representor could have intended to attach to the given representation. This intention shall be assessed objectively, by reference to available evidence of the attendant circumstances.

A representation cannot be coerced or induced by means of physical or economic duress.[414] The representor should be fundamentally conscious of the economic and political circumstances in which a given representation is being made. For example, in *Desert Line Projects*, the investor signed a settlement agreement with the host state under physical and eco-

[408] *Anglo-Iranian Oil Co.*, p. 105.
[409] *Fisheries Jurisdiction*, p. 454, para 47.
[410] *Anglo-Iranian Oil Co.*, p. 104. As explained below in Section 2.6.2.1 *in principio*, we are not concerned with ascertaining the existence of intention to be bound but rather with intention on the part of the representor to make a statement or act in a specific manner. Circumspection is advised.
[411] P. Saganek, *Unilateral Acts of States…*, see note 220, p. 409.
[412] H. Das, "L'Estoppel etl'Acquiescement: Assimilations Pragmatiques et Divergences Conceptuells", 30 Revue Belge de Droit International 1997, p. 613.
[413] *Siag (Award)*, para 483.
[414] P.C.W. Chan, "Acquiescence/Estoppel in International…", see note 6, p. 428.

nomic duress resulting from illegal acts of the latter. The investor clearly indicated that the representations made in the agreement were made under pressure.[415]

It follows from the voluntary character of a representation that it can, under certain circumstances, be revoked. The comments made in Section 1.7 are applicable by analogy as no reported arbitral award or decision exists where this aspect has been discussed.

2.6.2.2. Unconditionality

A statement capable of giving rise to estoppel cannot be liable to produce an effect only upon the occurrence of a potential, uncertain future event.[416] Representations predicated upon future events that lie beyond the will of both parties should be treated by analogy. A representation cannot be accompanied by reservations which suggest that it is not to be relied upon. One example would be to circumscribe the terms of a representation by a proviso that no legal consequences are to be inferred therefrom. Further, the threshold will not be cleared by representations which were made under protest or with a clear indication that the statement is made for a specific purpose not capable of giving rise to estoppel.

2.6.2.3. Authorization

The "authorization" requirement is to be equated with questions of attribution[417] of a representation (statement or conduct) to a party to the proceedings. As the estoppel argument is raised in an overwhelming majority of cases by private parties (claimants) against host states, little to no attention has been devoted in the jurisprudence to attribution of representations to the former category of persons. Some tentative remarks will be made to address this lacuna before the issue of attribution as against states will be considered at more length.

Attribution of representations to natural persons should be construed restrictively, especially since areas in which an estoppel claim could be sought are often intrinsically person-

[415] *Desert Line Projects*, paras 146, 190. See: S. Klopschinski, C. Gibson, H.G. Ruse-Khan, *The Protection of Intellectual Property Rights Under International Investment Law*, Oxford University Press 2020, p. 376 (addressing the issue of coercion).
[416] *Cambodia Power*, para 264.
[417] The analogy between "attribution" and "authorization" could be considered a simplification given the fact that attribution is an international law doctrine whilst the latter concept is derived from municipal contract law. Mindful of those potential objections, I am using this analogy instructively to maintain a link between the language used in investment arbitration jurisprudence (authorization being the prevailing term within the context of representations and estoppel) and general international law and rules governing attribution of responsibility to states for internationally wrongful acts. See also: J. Crawford, "Investment Arbitration and the ILC Articles on State Responsibility", 25(1) ICSID Review—Foreign Investment Law Journal 2010, p. 134: "Attribution is an international law doctrine. Municipal legal systems have similar rules but tend to use different names. Those domestic schemes regulate the way in which liabilities are distributed amongst different parts of the State, there being, in general, no conception of the unity of the State in domestic law".

al. To cite one example, in *Binder*, the host state advanced (as a jurisdictional objection) an estoppel argument against Mr. Binder to preclude him from asserting that he was a national of another Contracting State within Article 25(1) of the ICSID Convention (Germany). If successful, as a result of estoppel Mr. Binder would have been considered a citizen of the Czech Republic (which would render the claim barred).[418] The tribunal analysed in detail the personal history of the claimant and his ties to both countries. With the construction of the term "permanent residence" being important for the outcome of the case, the tribunal refused to assimilate Mr. Binder's business endeavours or actions of his family members with his own association as a citizen of a given country.[419]

This rule would apply *mutatis mutandis* to non-personal characteristics, such as the authorization of business decisions. Provided they are arbitrable or otherwise relevant to the resolution of an investment dispute, representations related to the investment should be cautiously attributed to the natural person only, with a margin of appreciation for powers of attorney such a person may have granted. These, in turn, should be assessed through the prism of applicable municipal law rules governing the validity, scope and effect of powers of attorney. As for juridical persons, deference should be had to the internal workings within a given organization, including the relevant authorization processes.[420] An objective test should be applied, i.e. whether, in the totality of circumstances, the representation could have reasonably been inferred to have originated from the private party. Signatures will be assumed to be original and coming from persons indicated thereunder, unless evidence to the contrary is adduced.[421] The constitutional documents of the company in question should ordinarily determine whether a given official was authorized to offer a representation binding on the entity as a whole. It is in the interest of private companies (and an economically justified expectation), professional participants in the market, to create efficient authorization mechanisms.

2.6.2.3.1. Tests of attribution

Attribution of representations to states raises a host of complex questions related, *inter alia*, to: (1) the set of applicable rules that should be used as reference; (2) application of these rules in a manner that does not jeopardize the consistency of like outcomes in like circumstances. Three sets of analogies have been made in doctrine and arbitral practice:

[418] *Binder*, para 79.
[419] Ibid, paras 77-78.
[420] As a side note, under Rule 2(f) of the ICSID Institution Rules, a juridical person wishing to lodge a request to institute arbitration proceedings must append a statement that it has taken all necessary internal actions to authorize the request.
[421] See: *Abaclat (Jurisdiction)*, paras 196, 428.

- analogy with the DARSIWA;[422]
- analogy with the GPAUD;[423]
- analogy with Article 46 of the VCLT.[424]

As the DARSIWA and the GPAUD are discussed at length in Section 1.3.2, what follows is merely a brief exposition of examples of cases and the types of reasoning where references to these instruments were prominent in international investment arbitration within the context of estoppel arguments. The third approach is expounded in more detail. As a general proposition, it is true on all three accounts that "actual authority is not the test, since representations made by a person "cloaked with the mantle of Governmental authority" may bind the State".[425] This reflects the general tenor of the formulation of the attribution test from the ICJ's judgment in *Nottebohm*.

2.6.2.3.2. Analogy with the DARSIWA

Whilst the key tenets of the DARSIWA pertinent to the issue of attribution were discussed in Section 1.3.2.1 within the context of general international law, it is apposite to mention here the key corollaries flowing from an analysis, conducted by Kałduński, of the international investment law jurisprudence regarding attribution by reference to the DARSIWA:

- where an entity purporting to represent and bind the state does not form part of its structure by law (*de jure* organ), but in practice performs recognized state functions, its conduct and statements will be imputed to the state;
- where an entity has a legal personality separate from that of the sovereign state, this will be a factor strongly pointing against attribution;
- an entity should not be considered a *de facto* organ of the state, and so its representations should not be attributable thereto, where it has been granted organizational and financial autonomy (by analogy, also where an entity is self-governing);
- despite making representations as part of carrying out public functions, these shall not be attributable to the state where the entity in question does not form *de jure* a part of the state's organizational make-up and, by virtue of its constitutional documents such

[422] M. Kałduński, *The Protection of Legitimate Expectations in International investment Law*, Nicolaus Copernicus University Press 2020, pp. 94-109; G. Petrochilos, "Attribution: State Organs and Entities Exercising Elements of Governmental Authority" (in:) K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd edition, Oxford University Press 2018, p. 361.
[423] K. Lim, "Upholding Corrupt Investors' Claims…", see note 97, pp. 656-664.
[424] *Duke Energy*, paras 248-250.
[425] *Churchill Mining (Award)*, para 220.

as the Articles of Association or Statutes, it has private funds and resources, and follows a business plan or model subject to market fluctuation;

- on the other hand, conduct of an entity should be attributed to the state even where it is autonomous and independent from the same under national laws provided that the entity in question exercises sovereign public authority or, more specifically, governmental functions;
- inversely, contractual activity, i.e. performance, modification and termination of contracts will not *prima facie* be qualifiable as outward appearances attributable to the state, even where such contracts are executed and performed for the good of the national economy and entail the carrying out of publicly useful functions.[426]

One example from arbitral practice where the tribunal referred to the DARSIWA, when discussing attribution of statements strictly for the purposes of estoppel, is *Kardassopoulos*. The tribunal drew upon Draft Article 7 to counter the host state's argument that representations it gave regarding the validity of a concession and related agreements concluded by an investor-partaken joint venture could not be attributed to it because at that time Georgia had yet to ratify the Energy Charter Treaty or the relevant BIT. Attribution, the tribunal retorted, applied to Georgia by virtue of it being a sovereign state and irrespective of the exact timing of its accession to a treaty. The tribunal availed itself of Draft Article 7 of the DARSIWA, which embodies a broad principle of attribution under which even *ultra vires* acts are attributable to the state, and does contain a "manifest lack of competence" caveat like Article 46 of the VCLT.[427] In *Siag (Award)*, the tribunal relied on Draft Articles 4 and 7 of the DARSIWA to impute to the host state knowledge of the outcome of bankruptcy proceedings conducted by the state's courts. The tribunal expressly noted the extension of the ambit of the DARSIWA beyond state responsibility to questions of attribution of knowledge and did not object to a party submission that Draft Article 4 represented a widely applicable general principle of international law.[428] Judicial determinations were also attributed to the state in *Saipem,*[429] *Deutsche Bank*[430] and *Chevron Corporation (2018 Second Partial Award)*.[431] The tribunals failed to address the criticisms of a *mutatis mutandis* application of the DARSIWA to attribution of representations, discussed in Section 1.3.2.1 *in fine*.

[426] M. Kałduński, *The Protection of Legitimate Expectations…*, see note 422, pp. 96-97.
[427] *Kardassopoulos*, paras 189-192.
[428] *Siag (Award)* , 2009, paras 194-197.
[429] *Saipem*, paras 143-149.
[430] *Deutsche Bank*, paras 404-407.
[431] *Chevron Corporation (2018 Second Partial Award)*, para 8.51.

2.6.2.3.3. Analogy with the GPAUD

Attribution under the GPAUD is discussed in detail in Section 1.3.2.2.

The GPAUD were made reference to extensively by the claimant investor in *Opera-Fund* to justify attribution of obligations entered into unilaterally by the host state by means of domestic legislation and representations of state officials in the context of Article 10(1) *in fine* of the Energy Charter Treaty. The relevant fragment of the provision imposes a duty on contracting parties to observe any obligations they may have entered into with an investor or an investment of an investor of any other contracting party. The dispute concerned, *inter alia*, the repeal by the host state of a domestic statute (Royal Decree 661), contrary to its earlier representations, and replacement thereof by legislation which imposed stringent requirements on the investment in issue. The claimant, having argued that it is the principle of good faith that constitutes the basis for understanding such provisions and statements as binding at an international level, proceeded to rely on the preamble to the GPAUD and Principle 4 to contend that the host state should be bound by promises made by its Minister of Energy that Royal Decree 661 would remain in place and not be changed for renewable energy facilities that would meet certain requirements, and that promises of public officials that were included in official statements are unilateral acts binding on the state as a matter of international law. To prove authority to bind the state, reliance was placed upon the final sentence of Principle 4. The Minister of Energy was to be considered a person authorized to bind the state in matters governed by the Energy Charter Treaty.[432]

2.6.2.3.4. Analogy with Article 46 of the Vienna Convention of the Law of Treaties

In *Duke Energy*, the tribunal rejected the usefulness of the DARSIWA for the purposes of establishing attribution of representations in the context of an estoppel claim.[433] Instead, the tribunal drew upon Article 46 of the VCLT which lays down rules to determine the binding character of a treaty despite it having been signed in violation of a country's domestic law. Having set out the provision in full, the tribunal proposed the following:

> "The decisive element for estoppel is the reasonable appearance that the representation binds the State. In this regard, the competence, or rather, the manifest lack of competence, of a State organ is relevant, given that no one can reasonably have confidence in

[432] *OperaFund*, para 560.
[433] *Duke Energy*, para 248.

representations or statements coming from an organ which manifestly lacks the competence to make them".[434]

"Reasonable appearance" was fleshed out as follows:

"The appearance is "reasonable" when, within the specific circumstances of the case, the act or representation creates confidence in the other party that it expresses a position that will not be contradicted in the future".[435]

On this account, it appears inevitable to merge the question of attribution with the reasonableness of the addressee's reliance. The propriety of attribution is predicated, at least in part, on outward appearances, and tilts the burden of proof slightly towards the claimant. The threshold, however (manifest lack of competence), is rather low, which helped the claimant succeed in the immediate case. The tribunal concluded that, although representations were made by a state entity which, the host state argued, acted outside of its detailed purview as determined in domestic law, the lack of competence, if any, was not manifest and, at any rate, it could not have been known by the investor.[436] The tribunal underscored that it is the host state that shall bear the risk for the acts of its organs or officials which, by their nature, may reasonably induce reliance in third parties.[437] Further, it was asserted in respect of tax interpretations (and, more broadly, representations pertaining to tax) that for those to be binding they need not necessarily be made by the national tax service as the binding effect may also be generated by other agencies which purport to act on behalf of the state.[438]

It should be added that Article 46 of the VCLT conditions the invalidation of consent to be bound by a treaty cumulatively on a violation of internal law regarding competence to conclude treaties being manifest and concerning a rule of internal law of fundamental importance. The latter requirement is to be taken to refer to important rules of procedure, notably parliamentary consent (or lack thereof).[439] Substantive incompatibilities are resolved, from an international law perspective, by reference to the principle of primacy of international law. By

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[434] Ibid, para 434.
[435] Ibid, Partial Dissenting Opinion of Arbitrator Dr. Pedro Nikken, para 7.
[436] Thirlway has argued to a similar effect, noting that inferences regarding attribution should be made taking account of the effect a representation has produced on the representee. The actual authorization of an official, related to the "constitutional niceties" of the representing state, should be of secondary importance. See: H. Thirlway, *The Law and Procedure of the International Court of Justice…*, see note 239, p. 33.
[437] *Duke Energy*, para 433. See also: M. Kałduński, "The Element of Risk in International Investment Arbitration", 13(1-2) International Community Law Review 2011, p. 111 et seq.
[438] *Duke Energy*, para 432.
[439] M. Bothe, "Article 46 (1969)" (in:) O. Corten, P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary*, Oxford University Press 2011, pp. 1093-1094.

analogy, on the account of the *Duke Energy* tribunal, it could follow that a representation would be attributable to the host state unless it would be made in violation of internal authorization procedures. Analogies with treaty making are difficult here, because it appears untenable to argue that every representation of a host state capable of giving rise to estoppel must be given or authorized by the parliament. Further, sometimes far-fetched, analogies would have to be made, possibly involving complex inquiries into the order of command of various ministries and state agencies, with a view to discerning whether a given act of making a representation was in line with internal bylaws and policies.

It is submitted that the discussion of the tribunal in *Duke Energy* was slanted more towards the issue of the impact of a violation of municipal law upon a host state's international obligations. The tribunal failed, it appears, to give guidance, at least by means of a typology or an enumeration, as to the types of offices, agencies or officials that are capable of authorizing representations on behalf of states. No reference or analogy in this context is made to other provisions of VCLT, notably Article 7 which designates persons considered as representing a state for the purpose of adopting or authenticating the text of a treaty. This leaves us with a conundrum – how broad is the scope of attribution? A plain reading of the relevant passage of the award could suggest that any representation given purportedly on behalf of the state could give rise to estoppel unless, objectively speaking, it is evident that the person or entity making that representation manifestly lacked competence. Not only does this, as noted above, imbue investors with a presumption of at least some knowledge of the domestic constitutional arrangements of the representing state, but at the same time, crucially, it overlooks the same. For it is plausible that the competences of agencies operating within a given block policy area (e.g. economy, environment, justice, etc.) are not delineated sufficiently clearly and the risk of overlaps is palpable. Setting aside the fact that authorities may act *ultra vires*, the "manifest lack of competence" view fails to consider the internal authorization processes of state agencies and ministries. For example, it could be reasonable for a foreign investor to rely on an account given by a ministry's spokesman, whereas under domestic law no legal weight is typically accorded to such statements. What appears at first glance as a position that strives to strike a balance between the duties of the host state and the investor, is in fact one-sided as it exposes the host state to potentially adverse consequences under international law in respect of representations which would not be considered binding or representative of the state's position under domestic law.

It is worth noting that Arbitrator Pedro Nikken dissented on the application of the above tests to the facts of *Duke Energy*, contending, *inter alia*, that there must be a require-

ment towards the private investor to have fundamental knowledge of the host state's tax laws and the identity of the competent authorities. The arbitrator argued that the claimant's reliance could not have been reasonable as it did not do the requisite due diligence to familiarize itself with the fundamentals of the host state's laws which affected it and its investment directly.[440]

2.6.2.3.5. Rules of attribution specific to estoppel

In parallel with the approaches illustrated above, it must be underscored that contentions around questions of attribution are rather sporadic and, even within this category, tribunals tend often not to expound upon the doctrinal method applied. In the absence of such an indication, it appears that a fact-specific inquiry is made, and corollaries regarding attribution are made instinctively. In *Mamidoil Jetoil*, the tribunal had to decide whether the following representations could be attributed to the state: (1) a statement recorded in the minutes of an internal discussion between a World Bank mission and a newly appointed cabinet minister; (2) a comment of an ex-Prime Minister made in a newspaper interview shortly after taking office. The tribunal implied that *prima facie* both representations could be attributed to the host state, although a restrictive, literal interpretation was applied – for instance, a statement acknowledging that the state cannot avoid legal and financial responsibility for the investment was not taken to mean that the legality of the same would not be questioned.[441]

2.6.3. The representation was relied on in good faith either to the detriment of the party so relying on the representation or to the advantage of the party making the representation

It is submitted that the question of attribution should be detached from considerations of reliance. It is noted in the literature that attribution does not engage any questions in relation to the legal significance and ramifications of a representation. Rather, it is a threshold that must be cleared before the merits of the representation itself, and its addressee(s)' responses thereto along with the same's reasonableness and good faith, can be turned to by a tribunal seized of the merits of a dispute.[442]

This final requirement has two distinct prongs: (1) good faith reliance; (2) to the detriment of the representee or to the advantage of the representor. These will be addressed separately.

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[440] Nikken's reasoning is dissected further in Section 6.3.
[441] *Mamidoil Jetoil*, paras 474-475.
[442] G. Petrochilos, "Attribution: State Organs and Entities…", see note 422, p. 362.

2.6.3.1. Good faith/reasonable reliance

The question whether a subject of international law relied on a clear, unambiguous, voluntary, unconditional and authorized representation is a separate legal question to be ascertained by reference to an analysis of the addressee's reaction to the other party's statement(s) or conduct. A judgment call is to be made of the actual reaction which should ordinarily manifest itself in the undertaking of deliberate actions or omissions.[443] Where a decision was made in reliance upon a representation (by virtue of which a detriment or a benefit obtained), a temporal element may be relevant. The representation, or course of conduct, must have predated the decision made in reliance therefrom and where a course of conduct forms basis of the claim, the course of conduct must have been ongoing at the time the decision was made.[444]

Reliance "in good faith" necessitates a certain level of fairness and transparency in dealings between the parties. Although this will ultimately be fact-specific, regard should be had, *inter alia*, to the knowledge of the parties concerned – if a representation is known by the representee to be untrue, inaccurate, spurious, a sham or otherwise unreliable, bad faith should be imputed.[445] The assessment should incorporate elements of objectivity.[446] It is submitted that objective presumptions (that, due to what the addressee, considering its status, should have known as a reasonable entity, reliance exhibited signs or good or bad faith) should be *prima facie* permissible, however they should find substantiation in evidence. As signalled above, *Duke Energy* stands for the proposition that where an investor obtains a representation from a state agency that it knows has acted manifestly outside of its competence, it will not be taken to have relied in good faith. Of importance will be the determination whether the representations in question created confidence in the investor that the host state would not reverse course.[447]

Importantly, good faith is equated, for all relevant intents and purposes, by arbitral tribunals with reasonableness and both notions are used interchangeably. Even where a tribunal casts the estoppel test in terms of "good faith reliance", references to reasonableness within the same line of argument are common.[448] One tribunal remarked that "good faith includes

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[443] As confirmed by the tribunal in *Duke Energy*, at para 433: "what is relevant for estoppel is that there has been a declaration, representation, or conduct which has in fact induced reasonable reliance by a third party, which means that the State, even if only implicitly, has committed not to change its course" (underlining in original).
[444] *Besserglik*, para 425.
[445] *Cortec Mining*, para 222.
[446] *Duke Energy*, para 241. In the same case a proposition was made that in assessing reliance a tribunal should take account of what a given party was deemed to have known. See: *Duke Energy*, Partial Dissenting Opinion of Arbitrator Dr. Pedro Nikken, para 7.
[447] *Duke Energy*, para 436.
[448] See e.g. *UAB Energija*, paras 531-532.

reasonableness", suggesting a broader substantive ambit of the former, however no further guidance was offered.[449] One academic writer has noted in this context that good faith denotes a general framework of fairness, equity and reasonableness for the proper administration of justice.[450] Importantly, good faith reliance as applied to host states as representees has been used to impose a certain standard of reasonableness.[451] In *Siag (Award)*, the tribunal deemed the host state's reliance unreasonable or otherwise in bad faith as it should have had the knowledge of the citizenship status of the investor claimants.[452]

In *Pan American Energy*, reasonableness of reliance was connected with bifurcation of claims under contract and treaty. The host state, Argentina, alleged that before its local courts the investor admitted that disputes under a concession agreement concluded between the two parties should be submitted to the exclusive jurisdiction of Argentine courts. The tribunal distinguished between contract claims and treaty claims and concluded that even if such a clear and unambiguous representation was made with regard to claims arising out of contract, the preclusive effect of such a statement cannot be extended, for lack of further evidence, to cover treaty claims. Such expansive understanding on the part of the host state was not only misguided, but could also be considered as devoid of good faith:

> "The mention of the BIT and the ICSID Convention in a specific litigation between two private parties, which is exclusively governed by Argentine law, could not have "reasonably and effectively", in good faith, generated a conviction on the part of Argentina that its own courts rather than the present Tribunal would have jurisdiction over an investment treaty claim involving different parties and facts".[453]

Reasonableness of reliance can be affected by the duty on the part of the investor to conduct due diligence prior to making an investment in a given host state. This aspect has been underscored in a number of recent awards.[454] The tribunal in *Churchill Mining (Award)*, in assessing the investor's efforts, took account of: (a) "the level of institutional control and oversight deployed" by the investor; (b) "whether the [investor] was put on notice by evidence of fraud that a reasonable investor" in the specific industry "should have investigated";

[449] *Pac Rim Cayman*, para 8.47.
[450] A. Tanzi, "The Relevance of the Foreign Investor's Good Faith" (in:) A. Gattini, A. Tanzi, F. Fontanelii (eds.), *General Principles of Law and International Investment Arbitration*, Brill/Nijhoff 2018, p. 194.
[451] *Canfor Corporation*, para 169.
[452] *Siag (Award)*, para 483.
[453] *Pan American Energy*, para 153.
[454] *Churchill Mining (Award)*, paras 516-527; *Indian Metals*, para 244; *Antaris*, paras 432-440.

and (c) "whether or not [the investor] took appropriate corrective steps".[455] A suggestion has been made in the literature that much can depend on a company's number and complexity of investments – it remains to be seen whether the requisite standard of due diligence will be held to vary depending on the country of investment, its economic and political conditions, local culture etc.[456] The exact scope of the duty remains uncertain, and there has been some pushback from arbitrators against imposing an excessively high threshold on the quality and extent of due diligence to be demanded from investors.[457]

2.6.3.2. Detriment of the representee or benefit of the representor

Different formulations to denote detrimental reliance are used by arbitral tribunals. Whilst those references could be situated on a sliding scale from the most "technical" to the most "descriptive", it is difficult to infer whether they signal different qualitative thresholds. For tribunals have used the following terms to refer to the normative effects of reliance, other than detriment: serious injustice,[458] prejudice[459] or injury.[460] The notions appear to be used interchangeably and presumably import no difference in the gravity of adverse consequences suffered by a party as a result of a change of position by the representor. Arbitral tribunals are yet to substantively consider the content of the concept of "detriment" within the context of estoppel. Notably, it would be useful for potential claimants to know whether any kind of loss is qualifiable (*damnum emergens*/*lucrum cessans*, loss of a chance), whether monetary loss must be proven (is reputational damage sufficient?), etc. What follows is a distillation of some of the pleadings made by parties during arbitral proceedings and *dicta* rendered by arbitral panels, however it should be reserved that claimants often only offer a restatement of the requirements of estoppel (so if the strict view is relied on, the element of detriment gains prominence) without a detailed substantiation by reference to the underlying facts or without making connections between the circumstances of an investment which could indicate detriment (such as expenditures made, costs of employment, fees of professional advisors, political lob-

[455] *Churchill Mining (Award)*, para 504.
[456] J. Ahmad, "Complicity in Forgery and Investor Due Diligence over Local Partners", 19(2) Journal of World Investment & Trade 2018, p. 304.
[457] *Wirtgen*, Dissenting Opinion of Gary Born, paras 98-99:

> "[I]t is not the role of the Tribunal to pass abstract judgment on the quality of the Claimants' due diligence. Due diligence is only relevant if it would have provided the Claimants with information that contradicted their asserted expectations. (…) Due diligence is not a condition to protection of an investment under international law, whether under the fair and equitable treatment standard or otherwise. What is sometimes referred to as an obligation to conduct due diligence is relevant only where particular inquiries would have led an investor to alter its expectations about national law protections".

[458] *Pan American Energy*, para 159; *Canfor Corporation*, para 168.
[459] *Besserglik*, para 424; *Chevron Corporation (2010 Partial Award)*, para 334.
[460] *Pope & Talbot*, para 107; *Khan Resources*, para 294.

bying, seeking out external contractors) and their estoppel arguments. Claimants tend to argue detriment, or detriment or benefit in the form of an alternative. This is why my discussion is focused on the treatment of detriment, however the corollaries can be applied by analogy to benefit accruing on the side of the representor.[461]

One example where the existence of detriment was pleaded and analysed at some length is *Karkey Karadeniz*. The case showcases some of the typical arguments that can be raised considering the type of disputes resolved in international investment arbitration, casting detriment in terms of quantifiable monetary loss. The investor alleged that the host state, Pakistan, should be estopped from contesting the domestic legality of the underlying investment[462] as it specifically induced the investor to first make and then to maintain the investment, which led to significant expenditures and commitment of personnel.[463] Karkey, as part of the investment, signed two public procurement agreements with Lakhra Power Generation Company Ltd. ("Lakhra"), a state owned company. Lakhra was supposed yet unable to secure a letter of credit to provide a security for Karkey's investment.[464] Ultimately, after a series of protracted negotiations, the amount secured was significantly reduced.[465] Other amendments were also introduced into the agreements, shifting the transactional balance away from the investor.

The limits of "detriment" could conceivably go beyond heavy financial losses or a threat to incur significant monetary obligations. An inability to fully exercise contractual rights could be reconceptualized as detriment.[466] The requirement could be fulfilled if the investor proves that, had it not been for the host state's representations, it would have applied for a concession, permission or another type of administrative decision[467] or approval from the central government.[468] Reliance upon a party's choice of dispute resolution forum and focus of resources upon defending a claim before a given forum could also be argued to be detrimental,[469] just as inability to enjoy peaceful possession of an investment.[470]

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[461] Benefit was argued in *Chevron Corporation (2010 Partial Award)*, where Ecuador alleged that the investor asserted contradictory statements regarding the fairness and efficiency of local Ecuadorian judiciary as part of a litigation strategy aimed at undermining the outcome of pending proceedings where the investor acted as defendant. Estoppel was, the host state argued, to preclude Chevron from obtaining a benefit in the form of having the proceedings against them derailed. See: *Chevron Corporation (2010 Partial Award)*, para 345.
[462] This aspect of the case is analysed further in Section 4.2.
[463] *Karkey Karadeniz*, para 170.
[464] Ibid, para 95.
[465] Ibid, para 179. The tribunal in this case ultimately based its holding on the broad notion of estoppel. See Section 2.1 *in principio* and Section 4.2.
[466] *Deutsche Bank*, para 269.
[467] *Walter Bau*, para 7.2.
[468] *Desert Line Projects*, para 119.
[469] *Pan American Energy*, para 144.

The existence of detriment could be very difficult to prove in certain cases, depending on the type of representation which estoppel is alleged to affect. In *Gruslin*, an estoppel argument failed, *inter alia*, for lack of detrimental reliance upon a failure on the part of the host state to object to jurisdiction, on the grounds that the investment had not been approved in a timely manner.[471] It is difficult to understand how proof of detriment could be adduced – it would not have been apposite to argue that detriment obtained by virtue of the investor's decision to invest. Estoppel was raised in respect of a procedural matter, therefore the claimant should have had to demonstrate how a failure to bring an objection or the fact that an objection was brought late (which objection effectively denied jurisdiction and therefore deprived the investor of a dispute resolution avenue) gave rise to detriment. The edge of the estoppel argument should have been directed towards the host state's failure to invoke the approval requirement at the time the investment was granted as it would have been easier to argue that the investor's financial and other outputs, which were part and parcel of its decision to make an investment, generated actionable detriment. The travails of proving detriment could go deeper. One tribunal has posited that if a retraction or a failure to act in accordance with a representation can be challenged, and a specific dispute resolution avenue is ascertainable from the letter of the original representation, it is difficult to infer detrimental reliance.[472]

2.7. Analogies with domestic concepts of estoppel

The final concern of this Chapter is related to the extent of permissible analogies between international investment law and domestic law. The question may appear to be all the more pressing within the context of estoppel. H. Lauterpacht made an observation that international law mirrors, in many important respects, domestic private law as early as in 1927.[473] Different views have been expressed in doctrine as to the inter-relation of the substantive purviews of each of the systems and methods of regulation, it is, however, uncontroversial to observe that international and municipal law often purport to regulate similar factual scenarios.[474] Investment tribunals have, on occasion, relied on formulations of estoppel derived di-

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[470] *Belenergia*, para 363.
[471] *Gruslin*, para 20.4. The case is also examined in another context, i.e. permissibility of application of estoppel to challenges to jurisdiction. See Section 3.2.1.
[472] *Cambodia Power*, para 266 (where arbitration at the ICC was envisaged as a viable means for the claimant to enforce a promise).
[473] H. Lauterpacht, *Private Law Sources and Analogies…*, see note 35, p. 38.
[474] For views that admit a degree of overlap between international and domestic laws, see: Y. Shany, *Regulating Jurisdictional Relations between National and International Courts*, Oxford University Press 2007, p. 13; W. Daniłowicz, "The Relation between International Law and Domestic Law in the Jurisprudence of the International Court of Justice", 12 Polish Yearbook of International Law 1983, p. 159; cf. K. Skubiszewski, "Wzajemny

rectly from domestic law in spite of international law being applicable on the facts.[475] In one case, *RSM Production*, it appears that an inference concerning issue estoppel's status as a general principle of international law was directly based on an analysis of the doctrine in U.S. law.

In the first reported investment arbitration award addressing estoppel, *Amco (Jurisdiction)*, the tribunal extensively cited English jurisprudence to support its preference towards the strict view of estoppel:

> "Where 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".[476]

The test transposed from English law was then juxtaposed with the formulation from *Temple of Preah Vihear*. Importantly, the tribunal followed the quote with an assertion that estoppel should apply equally in relations between states and private parties as it does between states in general international law.[477] One commentator has interpreted this as testament to the public international law-origin of the principle,[478] which, for the purposes of international relations, was stripped from its characteristics more apposite for private (contract) law. I submit that this is only partially true and overlooks the weight the tribunal gave to the Eng-

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stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym", 48(1) Ruch Prawniczy, Ekonomiczny i Socjologiczny 1986, p. 10.

[475] It has been argued that it is legitimate for international courts and tribunals to resort to domestic laws once a lacuna is identified. See: O. Schachter, *International Law in Theory and Practice*, Martinus Nijhoff 1991, p. 53. A safer proposition, however, is to rely on general principles of law. In fact, it follows from the formulation of Article 38(1)(c) of the ICJ Statute that such principles should be traceable to some shared assumptions and rationales found in domestic legal systems.

[476] *Amco (Jurisdiction)*, para 47.

[477] Ibid.

[478] A. Carlevaris, "General Principles of Commercial law and International Investment Law" (in:) M. Andenas, M. Fitzmaurice, A. Tanzi, J. Wouters (eds.), *General Principles and the Coherence of International Law*, Brill/Nijhoff 2019, p. 221.

lish law roots of the principle.[479] Further, it is evident that the tribunal thought it was within its powers to refer to equitable concepts,[480] estoppel being one example.

Another case where a rule of domestic law was discussed in lieu of the international notion of estoppel is a 2018 partial award in the Chevron saga.[481] A link was made to the domestic U.S. doctrine of judicial estoppel which prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that is successfully advanced in another proceeding. The tribunal termed judicial estoppel a general principle of international law[482] and promised to offer an overview of municipal legal systems to support that conclusion, however only American authorities were cited. The issue considered by the tribunal was not novel in the field of international investment arbitration,[483] and it is difficult to construe the arbitrators' reasoning as anything other than a convenient shortcut.[484]

The tribunal imported the municipal law context for the purposes of creating an analogy from a case decided by the US Court of Appeals for the Fifth Circuit in *Republic of Ecuador v John A. Connor*, in which Chevron was an intervening party.[485] The judgment, in turn, references U.S. Supreme Court authorities. Stopping short of applying judicial estoppel within the meaning of U.S. municipal law, the shared rationale of both U.S. judicial estoppel and international estoppel was underscored, that being the objective to instil good faith in the face of "a party's inconsistent statements calculated to thwart the integrity of the judicial process for its own benefit and to the other party's prejudice".[486] This language evokes ideas about the broad notion of estoppel whose ambition stops at curbing inconsistency in conduct. Confusingly, the analogy with municipal U.S. law, which was both preceded and followed by references to general international law authorities and precedents,[487] culminated in an assertion that the ratio of the decision shall be good faith.[488] The detrimental reliance requirement was

[479] The tribunal expressly reserved that estoppel is derived from the common law. See: *Amco (Jurisdiction)*, para 47. Further, the strict view of estoppel was likened by the tribunal to the English concept of estoppel by representation.
[480] A. Gourgourinis, "Delineating the Normativity of Equity in International Law", 11 International Community Law Review 2009, p. 335.
[481] *Chevron Corporation (2018 Second Partial Award)*.
[482] Ibid, para 7.99.
[483] *Nova Scotia Power* can be cited as a case in point. See also Section 5.2.4 *in fine*.
[484] The award is considered in more depth in Section 2.3.
[485] *Chevron Corporation (2018 Second Partial Award)*, para 7.103. See also: B. Sabahi, N. Rubins, D. Wallace, Jr., *Investor-State Arbitration*, see note 288, p. 217.
[486] Ibid, para 7.105.
[487] The tribunal drew upon, *inter alia*, early inter-state arbitrations (*Fur Seal Arbitration*, *Kunkel*) and the writings of H. Lauterpacht, D.W. Bowett, B. Cheng, I.C. MacGibbon and A. McNair. No reference was made to ICJ jurisprudence on the strict view of estoppel.
[488] *Chevron Corporation (2018 Second Partial Award)*, para 7.107.

yet to appear, however, somewhat mysteriously, it did in the final invocation of the principle.[489]

It is submitted that reference to the domestic concept of judicial estoppel only obfuscated the tribunal's reasoning. To stave off potential attacks that municipal law was purported to be applied in lieu of international law, a pivot was made to a seemingly strict view of estoppel. There appear to be many commonalities between judicial estoppel and the strict view as the former concept also requires detriment on the part of the addressee of inconsistent conduct. The introduction of good faith and heavy reliance on consistency, as well as references to authorities, all of whom but Bowett are commonly taken to prefer the broad view, was perhaps unnecessary.

In contradistinction, it should be noted that in a related case involving Chevron and Ecuador decided 8 years prior to the case cited above, *Chevron Corporation (2010 Partial Award)*, an attempt on the part of the host state (Respondent) to invoke the American doctrine of judicial estoppel failed, and the tribunal was adamant that it was the international notion of estoppel, in the form abridged from the jurisprudence of the ICJ,[490] should apply:

> "The Respondent points out that estoppel at international law is to be applied flexibly. However, this does not allow the Respondent to invoke domestic doctrines of estoppel in order to avoid certain prerequisites to the application of this doctrine. Therefore, the U.S. doctrine of "judicial estoppel" proposed by the Respondent is not applicable to the present dispute".[491]

The concept of issue/collateral estoppel is probably the most far-reaching analogy made in investment arbitration. In *RSM Production*, the tribunal, in granting Grenada's request to dismiss the arbitration because it was barred as a result of a previous award, relied directly on U.S. municipal law to import into international investment law the concept of collateral estoppel.[492] The tribunal cited *in extenso* a passage from a judgment of the U.S. Supreme Court laying out the requirements of the domestic principle:

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[489] Ibid, para 7.112.
[490] The tribunal in that case adopted the test proposed by Judge Spender in his Dissenting Opinion in *Temple of Prear Vihear*. See: *Chevron Corporation (2010 Partial Award)*, para 350.
[491] *Chevron Corporation (2010 Partial Award)*, para 352.
[492] See, on the common law origin of the concept: P. Dumberry, *A Guide to General Principles of Law…*, see note 135, p. 174; P. Janig, A. Reinisch, "General Principles and the Coherence of International Investment Law: of Res Judicata, Lis Pendens and the Value of Precedents" (in:) M. Andenas, M. Fitzmaurice, A. Tanzi, J. Wouters (eds.), *General Principles and the Coherence of International Law*, Brill/Nijhoff 2019, p. 250.

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery cannot be disputed in a subsequent suit between the same parties or their privies, and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified".[493]

The primary tenets of the judgment were applied substantially verbatim to the facts of the case at hand as the tribunal methodically singled out the issues that should be barred from further reconsideration.[494] A strong preference can be detected from the tenor of the decision for the American iteration of the doctrine – the tribunal did in fact refer to one international investment arbitration authority, albeit only by means of a footnote.[495] It is understandable that collateral estoppel functions as a reflection of res judicata under American law, however the analogy could be questioned as not thoroughly accurate as those concepts do not appear identical. Collateral estoppel within the wide meaning proffered by the tribunal, encompassing both claim and issue preclusion, had been unknown to international investment arbitration and general international law alike.[496]

The analogy with domestic law made in this case deserves attention as it could be said to have exerted momentous influence upon future investment arbitral tribunals. In later cases, where the principle of collateral estoppel was analysed, reference was made not to relevant municipal authorities but to the *RSM Production* award itself.[497] In this way, therefore, the tribunal in *RSM Production* transposed the specialist notion of collateral estoppel from municipal U.S. law into international investment law and equipped it with the status of a well-established general principle of law applicable in international investment arbitration,[498] thus compelling other tribunals to grapple with this reality.

2.8. Chapter summary

Estoppel as a doctrine operating within international investment law is a two-edged sword and although in a majority of cases it has been pleaded against the host state, it can

[493] *Southern Pacific Railroad Co v United States*, as cited in: *RSM Production*, para 7.1.3.
[494] Ibid, para 7.1.8.
[495] *Amco (Jurisdiction in Resubmitted Proceeding)*, para 30.
[496] The concept is further discussed in Section 5.2.
[497] *Apotex Holdings*, paras 7.18-7.19, 7.59; *Caratube II*, para 459; *Orascom*, para 542 (footnote 835).
[498] *RSM Production*, para 7.1.2.

symmetrically be of use against investors. In order for any of the parties to avail itself of estoppel, it must first be incorporated into the body of law to be applied within the context of a given arbitration. The applicable law will often represent a combination of domestic law of the host state, the relevant BIT or MIT (if an arbitration is initiated under an investment treaty) and general international law, including general principles of law *pro foro domestico* within the meaning of Article 38(1)(c) of the ICJ Statute and general principles of international law. Attempts have also been made, in both case law and doctrine, to superimpose rules of international law even where no direct reference was made thereto in a given choice of law clause. Recourse can be had to commonly accepted collections of rules of international law incorporating uniform rules of contract law, such as the UNIDROIT Principles of International Commercial Contracts. On occasion, tribunals have applied estoppel in its both international and domestic forms, like in *Pac Rim Cayman*[499] and *Vestey Group Limited*.[500]

Tribunals have on occasion conflated estoppel with other related principles, notably waiver, recognition and acquiescence. The lines of convergence here are similar to those observable in general international law where acquiescence would be assimilated with the broad view of estoppel. This risk becomes particularly apparent where alongside estoppel the claimant advances an alternative argument. What could be suggested in this connection is that tribunals shall avail themselves of more precise language when referring to the rights and obligations of the parties. Wording relating to the host state being "stopped" from embarking on a particular course of conduct conjures up a predilection towards estoppel, and should be avoided where what in fact the tribunal seeks to apply is a unilateral act.

The gap-filling function of estoppel is especially prominent within international investment law. Notwithstanding, the interpretative potential of the principle has been exploited to the extent that the axiological underpinnings, stripped from the peculiar intricacies of the principle (notably the demanding strictures of the detrimental reliance requirement), have been resorted to. The interpretative function of estoppel allows arbitrators to invoke somewhat amorphous ideas loosely associated with the umbrella of good faith to influence their reasoning and outcomes ostensibly based on a purposive interpretation of a contract or treaty.

Where the strict view of estoppel, proclaimed as a general principle of law[501] or a general principle of international law,[502] is applied in international investment arbitration, tribu-

[499] *Pac Rim Cayman*, paras 8.45-8.69.
[500] *Vestey Group Limited*, paras 255-261.
[501] The status of estoppel as a general principle of law had already been upheld in earlier jurisprudence of the Iran-United States Claims Tribunal: *Pomeroy*, para V(1); *American Bell International*, para 16.

nals have largely followed the ICJ's guidance, with some panels directly quoting from the relevant decisions of the Court. The prevalent test put forward in *Pope & Talbot* mirrors, in all material respects, the test most recently reiterated by the ICJ in *Bolivia v Chile*. A considerable degree of disagreement, however, is discernible among investment arbitral tribunals as to the applicable concept of estoppel. What is a cause for particular concern is that tribunals virtually never identify the type of estoppel they purport to apply and, as a consequence, no requisite weight and attention is accorded to the detrimental reliance element. The term "estoppel" is often, it appears, used by tribunals rather loosely and is assimilated with related concepts such as *venire contra factum proprium*, *allegans contraria non audiendus est*, abuse of process, abuse of rights or good faith.

Once the existence on the facts of a statement or conduct has been ascertained, an arbitral tribunal seized of an estoppel claim will move to analyse its clarity and unambiguity, voluntariness, unconditionality and authorization (attribution). Without reference to any established body of principles, tribunals have proffered that a clear representation should be amenable to only one reasonable construction. Unambiguity is a quality which instils in the representee an expression of the representor's position, which shall be incompatible with the possibility of being contradicted in the future. The requirement of consistency has also been added on by one tribunal, however it is submitted that it does play a role in the reasoning of other tribunals which have not vocalized it, and is probably subsumed under the heading of clarity. At any rate, consistency will not always be required as it is not necessary for a representation to stretch over a period of time and be regularly reiterated by the representor. One-off representations, provided that they are sufficiently clear, authorized and induce detrimental reliance, are also capable of generating the preclusive effects of estoppel. Voluntariness implies that the representor acted deliberately and whilst this requirement is firmly embedded in arbitral jurisprudence, it should not be confused with a party' firm intention to become bound within the meaning of Principle 1 of the GPAUD. The threshold in respect of estoppel appears to be lower, and it has been argued forcefully in the doctrine that estoppel's provenance and field of application lies exactly where no firm manifestation of will to be bound is discernible. A representation cannot be coerced or induced by means of physical or economic duress. Unconditionality is self-explanatory to the extent that the preclusive effect of estoppel will not be activated where a representation is made under protest or for a specific purpose with a reservation that no estoppel should arise pursuant thereto. Finally, a representation must be validly

[502] For more on the various qualifications of estoppel in international investment law, see Section 2.5 *in principio*.

attributed to the representor. International investment tribunals routinely avail themselves of the term "authorization" rather than "attribution" as estoppel can be invoked against either of the parties on account of the hybrid character of international investment arbitration, combining elements of private and public law. Both concepts appear comparable in the present context. Investment tribunals have applied three distinct approaches – reliance on the DARSIWA, the GPAUD, and an analogy with Article 46 of the VCLT.

Detrimental reliance, where it has been analysed at all, has been treated presumably the most neglectfully. Tribunals have often given short shrift to the requirement, especially where they had concluded that the estoppel claim shall fail on account of lack of clarity of the representation or attribution. Investigations have been highly fact-specific, however it appears that, within the context of foreign investment disputes, detriment will be typically cast in financial or monetary terms. Notwithstanding, in general international law it has been shown to be capable of having a broader meaning, encompassing other heads of loss, including loss of a chance or loss of opportunity. As for reasonableness of reliance, which is to be assimilated with the requirement of good faith, it has been assessed objectively and necessitates a requisite level of fairness and transparency in dealings between the parties, with knowledge of the parties relative to each other accorded special precedence. A recent development observable in a number of awards has been to impose a duty on the investor to undertake due diligence before relying upon a given representation. This obligation becomes particularly pronounced where an investor may be inclined to rely upon a representation inducing it to make the initial investment or to increase or otherwise modify its financial and organizational commitment in the host state. It has been noted that this requirement is new, has been imported from jurisprudence pertaining to protection of legitimate expectations, and has attracted some pushback among academics and arbitrators alike.

Contrary to international courts and tribunals seized of traditional public international law disputes, investment tribunals have made direct appeals to estoppel as operating in domestic legal systems, particularly in common law jurisdictions. Notably, in *Chevron Corporation (2018 Second Partial Award)*, the tribunal relied on the U.S. doctrine of judicial estoppel and although nominally the ultimate holding was based upon a peculiar, teleological interpretation of good faith, reasoning inspired by domestic estoppel heavily influenced the interpretative efforts of the tribunal. Extensive discussion of judicial estoppel appears to have confused the tribunal itself as its reasoning conflated, in international terms, the strict and broad notions of estoppel, exposing, in particular, a degree of hesitation as to whether the detrimental reliance element should be had regard to. In another consequential case, *RSM Production*, the

tribunal transposed directly the American principle of collateral estoppel onto international investment law, reserving at the same time that it considered the principle firmly embedded as a general principle of law within Article 38(1)(c) of the ICJ Statute. As shall be discussed further in Chapter V, there was scant evidence for that proposition at the time *RSM Production* was decided, however it gained acceptance in later awards. This phenomenon has coincided with the increasing acceptance of issue estoppel in the jurisprudence of the International Court of Justice and its pronouncements in *Nicaragua v Colombia* and *Costa Rica v Nicaragua*.

CHAPTER III. JURISDICTION OF ARBITRAL TRIBUNAL AND ADMISSIBILITY OF CLAIM

3.1. Introductory remarks

The mere intention to seek arbitral jurisdiction could trigger estoppel where a party has represented that future disputes shall be resolved by amicable means to the exclusion of arbitration. In *Pope & Talbot*, estoppel was argued to preclude the investor from submitting its claim to ICSID arbitration as the host state alleged that the private party committed to the performance of the contractual arrangement they had concluded.[503] Canada argued that a decision to resort to arbitration stood contrary to a lengthy course of negotiations and consultation which was said to manifest a lack of good faith. The estoppel claim depended on a letter sent by the investor to the host state and a meeting attended by a state official. The tribunal, having conducted a meticulous analysis of the document, concluded that: (1) it was not addressed to Canada; (2) no reference was made to the performance by Canada of the contract; (3) Pope & Talbot did not waive their rights to compensation under Chapter 11 of NAFTA.[504] Although the estoppel claim failed for lack of a clear and unambiguous representation, the tribunal proceeded to lay out the strict test of estoppel and apply it on the facts. This would mean the tribunal considered it conceivable that an attempt to initiate an international arbitration proceeding contrary to earlier representations could be precluded even where this right in granted in either the relevant contract or treaty.[505] Another tribunal, however, in *Eastern Sugar*, disagreed with this proposition when it held that in the absence of a treaty clause providing for the exhaustion of local remedies as a pre-condition to a claim under the BIT, an investor's inability to challenge administrative decisions cannot be inferred by reference to estoppel.[506]

This chapter explores estoppel in juxtaposition with questions of jurisdiction and admissibility within international investment arbitration. As a related matter, preclusion in the field of forum selection is addressed, which will also touch upon fork-in-the-road clauses and how these may adversely impact the availability of estoppel.

To successfully bring an investment arbitration claim to ICSID, one must first establish jurisdiction. Substantive jurisdiction of an ICSID tribunal is defined in Article 25(1) of the ICSID Convention. The provision will be set out below *in extenso*:

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[503] *Pope & Talbot*, para 106.
[504] Ibid, para 109.
[505] See Article 1120(1) of NAFTA.
[506] *Eastern Sugar*, paras 140-141.

> "(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

Parsing the individual elements of jurisdiction by reference to the provision quoted above, the substantive requirements of jurisdiction are as follows: consent (jurisdiction *ratione voluntatis*), certain personal status of the parties to the dispute (personal jurisdiction or jurisdiction *ratione personae*) and specific underlying qualities of the case submitted to the Centre – a legal dispute arising directly out of an investment (jurisdiction *ratione materiae*).

Having set the scene, it is apposite to begin our discussion of the inter-relation between estoppel and the nature of jurisdictional requirements by quoting Lowe's expert opinion, which was approved by the tribunal in *Sociedad Anónima Eduardo Vieira*:

> "There is no shortage of cases (…) in ICSID tribunals (…) in which objections to jurisdiction and admissibility have been taken after the expiry of a 'cooling off' period to the reference of a dispute to arbitration; but there is no sign in those cases of any tribunal applying the concept of estoppel, the doctrine of unilateral acts of states, or any other doctrine or principle to bar objections to jurisdiction and or admissibility. (…) The jurisdiction of a Tribunal established according to the Washington Convention is an objective matter determined by its constitutive instruments, and the Parties cannot either increase or reduce it by agreement or acquiescence. The point was clearly made in *CSOB v.Slovakia and Autopista Concesionda de Venezuela, CA v. Bolivarian Republic of Venezuela*. Either the dispute is within the BIT or it is not. Express or implied assertions by the Parties cannot alter the position".[507]

Verification of the veracity of these assertions will guide the structure of this Chapter. The current state of the law of estoppel as regards jurisdiction in international investment arbitration is more nuanced and allows for certain limited exceptions to the statement of principle quoted above. The principle will generally be unavailable to parties intending to establish jurisdiction of an investment tribunal under the ICSID Convention where the formal require-

[507] *Sociedad Anónima Eduardo Vieira*, para 205.

ments of consent are not met. However, this should not apply to situations where the existence of consent in and of itself is not contentious but the parties disagree about its scope. Consent to arbitration may be qualified by reference to the type of disputes covered or the source of the same. Conflicting authorities exist as to whether estoppel can be invoked to challenge the other two substantive jurisdiction requirements.[508] One view approaches jurisdiction *ratione personae* restrictively as the exclusive domain of the ICSID Convention. Once the parties have consented to submit their dispute to an arbitral tribunal constituted under the auspices of ICSID, the jurisdictional issues are governed by the terms of the Convention and the ICSID Convention Arbitration Rules[509] only. There is, however, evidence that some tribunals have signalled openness to a more purposive interpretation as inquiries have been made into the relative conduct of the parties to the dispute in relation to challenges to their standing. A more expansive role for estoppel can be observed in relation to *ratione materiae* jurisdictional requirements. Arbitral tribunals have probed more incisively into the vexed questions of classification of a given arbitrated dispute as a "dispute" or pertaining to an "investment" within the meaning of Article 25(1) of the Convention. Although the success rate of estoppel pleas, as it is the case throughout the investment arbitration regime, is minimal, the sheer degree of tolerance some arbitral tribunals have showcased towards the possibility of considering challenges to objections to jurisdiction based on estoppel is remarkable.

Permissibility of the operation of estoppel in relation to the particular requirements of jurisdiction should be situated within the debate about their normative character in the Convention. The prevailing view, espoused by Lowe and quoted above, appears to be that the substantive requirements are objective in nature, therefore they cannot be derogated from by reference to sources of law located outside the treaty, including general principles of law.[510] This view is not absolute, however, and it would be justified to contend that interpretation by the parties of these objective requirements is given some weight, with the ICSID Convention

[508] There are also cases whose ratio is, in this context, difficult to interpret. In *Chevron Corporation (2018 Second Partial Award)*, the tribunal asserted that the principle of good faith could operate to affect jurisdiction, admissibility and merits alike. As discussed in Sections 2.3 and 2.7, it is not entirely clear what concept the tribunal purported to apply as references were made, throughout the argument, to both strict and broad concepts of estoppel as well as the U.S. domestic doctrine of judicial estoppel and *venire contra factum proprium*. Estoppel also appears to have been applied in that case in both functions, i.e. interpretative and gap-filling. See: *Chevron Corporation (2018 Second Partial Award)* para 7.113.

[509] International Centre for Settlement of Investment Disputes, *ICSID Convention Arbitration Rules*, available at: https://bit.ly/3tQ1i2R (accessed: 24.08.2021).

[510] *Eureko*, para 219. From the objective character of the jurisdictional requirements it also follows, according to one tribunal, that for a host state to be estopped from raising an objection to jurisdiction it must make a clear representation to that effect (which cannot be easily implied from conduct or silence). See: *Sociedad Anónima Eduardo Vieira*, paras 202-204. On a side note, in international human rights jurisprudence, it has been held by the European Court of Human Rights that the jurisdictional and admissibility requirements enshrined in the ECHR cannot be modified by estoppel. See: *Blečić and Interights*, paras 63-69; *Demir and Baykara*, para 58.

imposing outer limits to the Centre's jurisdiction that are not subject to the parties' disposition.[511] Categorical proclamations to the latter effect can be found in some awards. One tribunal has asserted that it is not open to the parties to an ICSID arbitration to refer to a phenomenon as an investment (in contract or treaty) if the same does not meet the strict requirements of Article 25 of the ICSID Convention.[512]

Unless otherwise stated, the findings of this chapter are limited to jurisdictional requirements enshrined under Article 25 of the ICSID Convention as it is the instrument that governs, and is referred to, by a majority of arbitration agreements contained in both investment contracts and treaties.[513] ICSID is also the busiest forum resolving international investment disputes.[514] One notable supplement will be jurisdiction *ratione temporis*, unregulated in the ICSID Convention and typically derived from investment treaties and state contracts, which conditions the effect of time upon a tribunal's competence.

3.2. Jurisdiction

3.2.1. Consent

Consent is a condition *sine qua non* to ICSID's jurisdiction. To grant an ICSID-sanctioned tribunal jurisdiction over a dispute, a state must have agreed, in addition to signing the ICSID Convention, to submit the specific dispute or a class of disputes to the Centre's jurisdiction. This consent can be expressed in a treaty (BIT or MIT), an investment contract with the investor or by reference to an offer made in the host state's domestic legislation and an acceptance by the investor.[515] Consent must be expressed in writing, but no further specific form is prescribed in the Convention. Consent in writing will normally be communicated be-

[511] C. Schreuer, "Commentary on the ICSID Convention", 11(2) ICSID Review - Foreign Investment Law Journal 1996, p. 326.
[512] *Joy Mining Machinery*, para 50. See also: *Salini Costruttori*, para 52.
[513] Jurisdiction of the ICSID is often co-regulated by an investment treaty provision and Article 25 of the ICSID Convention. Tribunals must have regard to both texts to establish compliance. An example of such a reasoning can be found in a decision of the *Eskosol* tribunal, which, whilst investigating jurisdiction *ratione personae* (*ius standi* of local companies controlled by foreign investors) detected differences between the standards employed by the Energy Charter Treaty and the ICSID Convention. Any finding on jurisdiction must have been preceded, therefore, by a two-stage inquiry necessitating the consultation of both documents. See: *Eskosol*, para 91.
[514] In August of 2020, ICSID reported its second-highest number of administered cases in a single year, with 40 new cases registered in the first half of 2020. Out of these, 37 cases were registered under the ICSID Convention Arbitration Rules, and three under the ICSID Additional Facility Rules. See: International Centre for Settlement of Investment Disputes, *The ICSID Caseload-Statistics*, Issue 2020-2, https://bit.ly/3p6Zalu (accessed: 24.08.2021).
[515] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement. International Centre for Settlement of Investment Disputes, 2.3 Consent to Arbitration*, United Nations 2003, UNCTAD/EDM/Misc.232/Add.2, pp. 7-24, available at: https://bit.ly/2YffsNv (accessed: 24.08.2021).

tween the parties but the Centre need not be notified at the time of consent. No *forum prorogatum* doctrine has hitherto been developed, contrary to the jurisprudence of the ICJ.

Estoppel *prima facie* cannot be used by parties to positively establish jurisdiction where the formal requirement of expressing consent in writing is wanting.[516] The writing requirement is both a minimum and a sufficient prerequisite of valid expression of consent. The recent case of *Besserglik* is illustrative in this respect. The respondent in those proceedings, initiated purportedly pursuant to the South Africa-Mozambique BIT, raised an objection to jurisdiction based on the fact that the BIT is yet to enter into force. The parties failed to comply, the argument went, with a condition precedent in Article 12(1) which predicated the entry into force of the treaty upon mutual notifications upon the fulfilment of relevant internal constitutive requirements.[517] Therefore, considering that it was the BIT that constituted the basis for consent to jurisdiction, the tribunal could not accept the claim.[518] The claimant sought to prove through available evidence that either the ratification was indeed effective by teleologically construing communications exchanged between South Africa and Mozambique or by showing that the host state failed to suggest at the appropriate time that the BIT had not entered into force. In particular with regard to estoppel, it was argued that an international tribunal should accept jurisdiction against a state which has implicitly consented to its jurisdiction through words, conduct or silence.[519] This was countered by Mozambique in reliance upon Article 24 of the VCLT which prescribes the manner in which treaties enter into force. As the states in question did agree on the formal preconditions of entry into force of the BIT, then, under Article 24(1) of the VCLT, the arrangements stipulated in Article 12(1) of the BIT must be considered paramount. Further, it was claimed that the detrimental reliance element had to be inferred missing – if the tribunal were to assume that there was a misrepresentation, the host state argued, no evidence existed that it induced the claimant to invest in the country, thus rendering their reliance unreasonable.[520]

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[516] Consent can be established in one of three ways: (1) by an express stipulation in an international agreement - e.g. BITs or MITs; (2) an expressed term contained in writing - e.g. contract and its dispute resolution clause; (3) explicit consent given after the dispute has arisen between the parties, e.g. by means of an arbitration agreement concluded after the parties' differences had matured into a dispute. P. Ghaffari, "Jurisdictional Requirements under Article 25 of the ICSID Convention: Literature Review, 12(4) Journal of World Investment & Trade 2011, pp. 605-606.

[517] Article 12(1) of the South Africa-Mozambique BIT: "The Contracting Parties shall notify each other promptly when their respective constitutional requirements for entry into force of this Agreement have been fulfilled. The Agreement shall enter into force on the day following the date of receipt of the last notification".

[518] *Besserglik*, paras 182-186.

[519] Ibid, paras 220-243.

[520] Ibid, para 214.

The tribunal, having found that there is insufficient evidence that the BIT was in force,[521] turned to the estoppel plea. The arbitrators agreed that there was no sufficient representation on which the claimant could be said to have reasonably relied. Above all, however, the tribunal directly attacked the contention that jurisdiction could be established by reference to estoppel where that issue is interpretable by reference to treaty:

> "The jurisdiction of the Tribunal and the BIT being in force is a matter of law. Just as the jurisdiction of the Tribunal cannot be created by invoking the doctrine of estoppel, neither can a treaty which is not in force be given effect by an argument based on estoppel".[522]

More potential lies in cases where written consent to jurisdiction could be identified. Host states, in offering to submit disputes to arbitration, may delimit, within their discretion, their consent to a given class of cases. This was the case in *Gruslin*. Article 1(3) of the 1979 Belgium-Luxembourg Economic Union-Malaysia BIT made clear that the definition of "investment" covered, in respect of Malaysia, only assets invested in a project classified as an "approved project" by the appropriate ministry in Malaysia, in accordance with domestic legislation and administrative practice. Countering the host state's attempt to object to jurisdiction on this basis by claiming the investment in question was not an "approved project", the claimant argued that this should be estopped owing to the fact that it was an "impermissible derogation" from the state's consent to ICSID arbitration.[523] The investor maintained specifically that since Malaysia issued a memorial and participated in proceedings before the ICSID, it should now be estopped from raising the "approved project" limitation on jurisdiction. Further, Malaysia failed to issue an objection to the notification of the claim sent as a letter to the host state by the claimant. The argument was rejected as none of the requirements of the strict test of estoppel were found.[524]

Gruslin could be construed as a case affirming the primacy of Article 25 of the ICSID Convention in determining jurisdiction and as confirmation of permissibility of circumscribing the range of disputes that should be subject to international investment arbitration. It should be noted, however, that the tribunal entertained the estoppel argument – whilst the

[521] Ibid, para 417. The conclusion rested, *inter alia*, on the absence of a formal record of notifications under Article 12(1) of the BIT.
[522] Ibid, para 422.
[523] *Gruslin*, para 18.3. In another case where a similar claim was lodged, the claimant argued that since the host state entered into an investment contract, performed it and obtained a benefit thereunder, its conduct should be interpreted to amount to an implied approval of the project. See: *Malaysian Historical Salvors*, para 24.
[524] Ibid, paras 20.1-20.4.

evidence adduced by the investor to prove reliance upon Malaysia's representations was considered insufficient and, to a degree, misguided,[525] the consideration of the requirements of estoppel was not conditional but *prima facie*. Alternatively, the tribunal could have approached the issue in question not as one of consent (jurisdiction *ratione voluntatis*) but rather as one of jurisdiction *ratione materiae*, where, as we shall see below, there is authority for allowing a more robust application of estoppel. This was, regrettably, not made clear in the decision, and the investor, in putting the issue of consent at the forefront of its submissions, might have contributed to the confusion.[526]

The tribunal in *CSOB* appears to have been ready to accept an estoppel argument to establish jurisdiction, however it found that the requirements of the strict view were not present on the facts.[527] One objection to jurisdiction raised by the host state alleged that the Slovakia-Czech Republic BIT (1992), pursuant to which the arbitration arose, had yet to enter into force as the parties had yet to exchange relevant notices and thus, it appeared, failed to comply with the entry into force conditions stipulated in Article 12(1).[528] As one possible rationalization for the entry into force of the BIT the tribunal propounded estoppel *proprio motu*. If successful, Slovakia, who had published in an official statutory gazette what for all intents and purposes presented itself as a notice qualified under said treaty provision, would have been estopped from denying that it was bound by the arbitration offer under the BIT. The dispute was resolved on other grounds,[529] still the tribunal delved into the manner of drafting of the investment contract in issue as well as the sequence of events to reach a conclusion that no reliance on the notice could have been inferred and therefore estoppel could not operate to ground a finding of jurisdiction on the facts.

Estoppel arguments going to the validity of consent to arbitrate were raised in *ICW Europe Investments* and *Magyar Farming Company* to preclude host states from raising ob-

[525] Ibid, para 20.3.
[526] In *Amco (Jurisdiction)*, the tribunal struggled with the separation of consent from personal jurisdiction and attribution of conduct to the host state. The claimants were held to be not estopped from asserting that, on the facts of the case, a private company which had entered into a lease agreement with the claimants was "one and the same" with or that the company was an "alter-ego" of Indonesia. On this basis the tribunal accepted jurisdiction over the dispute. See: *Amco (Jurisdiction)*, paras 43-49.
[527] *CSOB*, para 47.
[528] The wording of the provision was in all material respects similar to the one in the South Africa-Mozambique BIT, cited *in extenso* above, see note 517.
[529] As the investment contract between the parties was governed, *inter alia*, by the BIT, the tribunal established jurisdiction by incorporation through reference of the treaty in spite of the fact that, on the tribunal's own analysis, it appeared not to have entered into force. See: *CSOB*, paras 49-59. See also: C. Schreuer, "Consent to Arbitration" (in:) P.T. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press 2008, pp. 865-866; P. Dumberry, J. Stone, "International Law, Whether You Like It or Not: An Analysis of Arbitral Tribunal Practice Regarding the Applicable Law in Deciding State Contracts Disputes under the ICSID Convention in the Twenty-First Century" (in:) A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2012-2013*, Oxford University Press 2014, pp. 494-495.

jections to the jurisdiction of an ICSID tribunal in an intra-EU arbitration (arguing, in effect, that the host states did not consent to the present arbitration). In both cases the objections were rejected. In the former case, as discussed in Section 2.4, the tribunal used an estoppel-waiver principle, noting that the host state repeated at different stages throughout the proceedings that no jurisdictional objection would be raised with respect to the intra-EU issue. In *Magyar Farming Company*, the tribunal omitted the estoppel argument raised by the investor.[530]

Two more cases deserve a mention in respect of estoppel used to either establish jurisdiction or defeat a jurisdictional objection going to consent. In *Rumeli*, the tribunal upheld jurisdiction on various grounds, including under a domestic Kazakh statute (1994 Foreign Investment Law) which was no longer in force at the time the arbitration was initiated (it was repealed effective as of 8 January 2003). Reliance was placed upon two provisions, one of which provided for ICSID jurisdiction, whilst the other guaranteed protection to investments set up in accordance with the laws of Kazakhstan, the host state, for a period of 10 years from the date they were made. The latter provision was held to grant an extension of the consent to arbitrate beyond the period in which the 1994 Foreign Investment Law remained in force – the tribunal concluded that consent must have lasted 10 years from the date of making the investment as the statute was "valid and effective at all times relevant to this dispute". The offer made by the host state in the domestic statute was accepted by the investor when it filed its Request for Arbitration with the ICSID.[531] Having reached its decision on the basis of an interpretation of the 1994 Foreign Investment Law, the tribunal added in the alternative that, as a separate reason for upholding the claim, estoppel must operate to preclude host states from depriving foreign investors of accrued rights by domestic legislation abrogating an earlier law which had granted these rights in the first place.[532] The operation of estoppel was made contingent upon the fact that the domestic statute had granted an enforceable right to pursue arbitration.

The reasoning of the *Rumeli* tribunal was departed from in *Ruby Roz Agricol*, an award which also examined whether Kazakhstan expressed its consent to arbitrate under the 1994 Foreign Investment Law. In the opinion of the latter panel, the host state's consent to arbitrate could not be extended beyond the period in which the law remained in force. Therefore, at the time the investor filed its Request for Arbitration, it had not accrued any rights that

[530] *Magyar Farming Company*, para 185.
[531] *Rumeli*, paras 332-334.
[532] Ibid, para 335.

were capable of having been taken away by the host state – there was an offer to arbitrate but it was withdrawn when the 1994 Foreign Investment Law was repealed. Accordingly, the *Ruby Roz Agricol* tribunal expressed doubts as to whether, under such circumstances, estoppel could operate to guarantee to the investor the right to arbitration where there was effectively no right for estoppel to protect.[533]

3.2.2. Jurisdiction *ratione personae*

This requirement necessitates that legal disputes submitted to the ICSID are between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State. As regards the nationality requirements for natural and juridical persons, Article 25(2) of the Convention follows the traditional definitions of nationality which are accepted under both international and most domestic laws. Natural persons must hold the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to arbitration as well as on the date on which the request for arbitration was registered at the ICSID. An exclusion is carved out for natural persons holding dual or more citizenships, one of which is the citizenship of the Contracting State party to the dispute. Juridical persons (entities) eligible to pursue claims before ICSID tribunals cover juridical persons that had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such a dispute to arbitration as well as juridical persons which, albeit they are under foreign control, the parties agreed they should be treated as a national of another Contracting State. A separate requirement relates to the designation of a constituent subdivision or agency of a Contracting State for it to have standing. In the absence of such a designation, a request for arbitration against such a constituent subdivision or agency shall be refused by the Secretary-General of the ICSID.[534]

Little jurisprudence has been generated on the issue whether a party to investment arbitral proceedings can avail itself of an estoppel claim in order to challenge an objection to jurisdiction based on the identity of the parties. In the cases that have addressed this, the balance is tilted towards a reluctance to accept estoppel-based arguments. Notably, the tribunal in *Siag (Jurisdiction)* concurred with the orthodox view that jurisdiction *ratione personae* is

[533] *Ruby Roz Agricol*, para 156, footnote 93.
[534] United Nations Conference on Trade and Development (UNCTAD), *Dispute Settlement. International Centre for Settlement of Investment Disputes, 2.4 Requirements Ratione Personae*, United Nations 2003, UNCTAD/EDM/Misc.232/Add.3, pp. 9-11, 13-17, available at: https://unctad.org/system/files/official-document/edmmisc232add3_en.pdf (accessed: 24.08.2021).

wholly regulated in Article 25 of the ICSID Convention and no additional estoppel arguments shall be available.[535] To circumvent that restriction, the host state argued (with approval from the tribunal)[536] that the estoppel argument as to the investors' nationality shall be extensively analysed at the merits stage as part of discussion of defences to liability. Notwithstanding, as substantively these types of objections are jurisdiction-related, I shall consider the tribunal's approach here.[537]

The crux of Egypt's argument was that the claimants, in prior long-standing dealings, relied on and confirmed their Egyptian nationalities, notably in the process of acquiring Egyptian passports, to set up a company and conduct business, which, in the present proceedings, should amount to an estoppel precluding them from establishing jurisdiction *ratione personae* under the Italy-Egypt BIT and the ICSID Convention. The investors were also citizens of Italy, therefore, effectively, the allegation attached to the investors' status as dual nationals, who are expressly denied *ius standi* under Article 25(2)(a) of the ICSID Convention. The estoppel argument was rejected, primarily on the grounds that, on the view of estoppel adopted by the tribunal, it was sufficient for the claimants to show that in asserting their nationality they acted in good faith.[538] On the facts, it was ultimately established that the investors at one point lost their Egyptian nationalities but were unaware of that fact, in using it, therefore, they acted in accordance with their honest belief. The *ratio decidendi* of the case is difficult to encapsulate. Under the guise of defences to liability, the tribunal substantively considered an estoppel argument in relation to a legal characteristic (nationality) which directly conditions the availability of arbitration to investors. The investor was mistaken as to its actual status. The result reached is fair and just – to hold otherwise, i.e. to allow Egypt's estoppel claim, would amount to holding that a host state could absolve itself of responsibility for not recognizing the effects of its own domestic laws. The investors' attempts to avail themselves of their Egyptian nationalities should have been thwarted by the state, and it could be perceived as a manifestation of bad faith on the part of the latter to subsequently attempt to deprive the investor of treaty protection in reliance upon, at least impliedly, its own failings.[539]

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[535] *Siag (Jurisdiction)*, para 212.
[536] *Siag (Award)*, para 107.
[537] Fontanelli notes in the context of this case that estoppel treated in the merits phase thus became "an *exception préliminaire du fond*, akin to an objection of inadmissibility based on the investors' alleged misconduct". F. Fontanelli, "Jurisdiction and Admissibility in Investment Arbitration: The Practice and the Theory", 1(3-4) Brill Research Perspectives in International Investment Law and Arbitration 2017, p. 97.
[538] *Siag (Award)*, para 483.
[539] Despite my positive assessment of the outcome of the case, the notion that estoppel is activated only where the representor has misrepresented the truth or otherwise misled the representee as to the actual state of affairs is, it is submitted, incorrect. This aspect is examined in Section 2.6.1.1 *in principio*.

The point that Article 25 of the ICSID Convention forecloses any possibility for extraneous estoppel arguments was emphasized in strong terms in *East Kalimantan* in the context of designation of a subdivision of a contracting state to the ICSID.[540] Designation is defined as "an act by a Contracting State by which the State confers upon the agency the capacity to conclude a valid ICSID arbitration agreement and become a party to an ICSID arbitration".[541] Having discussed and considered the parties' arguments on estoppel, and having reached a negative conclusion, the following rule was laid down by the tribunal:

> "Finally, the Tribunal adds that even if its conclusion on estoppel had been different, a valid estoppel defense would not have done away with the requirement of designation of a subdivision under Article 25 of the ICSID Convention. Indeed, such requirement is an objective one that is not subject to the parties' disposition and cannot be waived".[542]

Estoppel gained slightly more traction in *Cambodia Power*, where, again, the estoppel argument went to the question of designation of an agency to the ICSID. The respondent raised an objection to jurisdiction, arguing that no proper designation had been made of a government agency to the Centre so that jurisdiction could not be established under Article 25(1). An estoppel argument advanced by the claimant, based upon a representation made in an arbitration agreement, was dispensed with on the strict view (for lack of a clear and ambiguous representation and non-existent detrimental reliance), however additional comments made by the tribunal do leave some room for speculation.[543] On the one hand, the tribunal confirmed that designation of an entity as an agency or subdivision of a contracting state must be made to the Centre by that state by means of a notification in writing, however this communication need not be made directly to the Centre. It may also be communicated by other means so long as the designation achieves public notoriety such as to come to the Centre's attention.[544]

In *Cambodia Power*, the tribunal asserted specifically that the "public notoriety" requirement is not fulfilled where the claimant, i.e. the party raising an estoppel argument, shall

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[540] Rule 2(b) of the ICSID Institution Rules requires claimants to submit, together with their request to institute arbitration proceedings, a statement, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention.
[541] *Niko Resources*, para 325
[542] *East Kalimantan*, para 216.
[543] The host state attempted to rely on *East Kalimantan* to argue that estoppel could not override the objective requirements of ICSID jurisdiction. See: *Cambodia Power*, para 214.
[544] *Cambodia Power*, para 269.

present the Centre with a private investment contract annexed to the request for arbitration.[545] This seems to have been relaxed, or perhaps even waived, in *Niko Resources*:

> "(…) an arbitral tribunal may give effect to an existing ad hoc designation which may be made known to ICSID by an investor when filing a Request for Arbitration by a statement pertaining to a specific dispute, particular facts, and in accordance with Institution Rule 2".[546]

It is submitted that there could be a residual function for estoppel to perform under a principle so formulated.[547] Under a plausible scenario, an intention of a contracting state to designate a subdivision or an agency could be made public but fail to reach the Centre, suppose by means of an announcement made in the official statutory gazette of the state in question. It appears that, in the absence of a categorical denial of permissibility of estoppel-based arguments in *Cambodia Power*, a case could be made in favour of preclusion where, in the hypothetical presented above, the contracting state sought to maintain during the jurisdictional phase of the proceedings that no designation had been made. On the liberal approach showcased in *Niko Resources*, the permissibility of estoppel appears to have broadened as the "public notoriety" requirement appears to have been effectively waived.[548] The argument only serves to amplify the sense of uncertainty in this largely unexplored area of international investment law.

Although hardly comparable with cases decided under the ICSID Convention, a mention may be made of the early case of *Robert Schott* decided by the Iran-United States Claims Tribunal. Iran questioned the tribunal's jurisdiction *ratione personae*, which extended to "nationals" of Iran and the United States within the meaning of Article VII(1) of the Claims Settlement Declaration,[549] as regards a person who was a citizen of the United States, but whose daughter was a dual citizen of the United States and Iran. One of the claims pursued in the

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[545] Ibid, para 269(c).
[546] *Niko Resources*, para 327.
[547] Notably, both parties to the proceedings in *Cambodia Power* accepted that estoppel could apply on the facts if its requirements were made out. *Cambodia Power*, para 261.
[548] I. Uchkunova, "Untying the Knot: Estoppel and Implicit Designation of a Constituent Subdivision or Agency under the ICSID Convention", 4 September 2014, Kluwer Arbitration Blog, https://bit.ly/2LeYkEJ (accessed 24.08.2021).
[549] The full text of the Clams Settlement Declaration is reproduced in: G.H. Aldrich, *The Jurisprudence of the Iran-United States Claims Tribunal: An Analysis of the Decisions of the Tribunal*, Oxford University Press 1996, pp. 546-549. Article VII(1) stated: "A 'national' of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock".

arbitration pertained to a purchase of shares in an Iranian bank by the daughter who, for the purposes of the transaction, presented herself as an Iranian national and availed herself of her Iranian citizenship. The citizenship constituted in fact a condition *sine qua non* for the effectiveness of the transaction since, under the relevant domestic laws in force at that time, all shares that were admitted to the market for sale to foreign investors had been already bought out by a foreign financial institution. When that foreign investor decided to sell some of its own shares, the claimant's daughter refused to convert her shares into "foreign shares" by invoking her American citizenship. The Tribunal denied jurisdiction *ratione personae*, ignoring the daughter's dual citizenship and treating her as a domestic investor, and therefore not having *ius standi* before the Tribunal. The facts of the case evince a degree of opportunism on the part of the claimant's daughter whose true position was interpreted out of her deliberate failure to act where a contrary position (conversion of the shares), which could later form basis for the Tribunal's jurisdiction, was in the short term detrimental to her. Although the tribunal exhibited warranted flexibility in applying the jurisdictional requirements to the economic realities on the facts of the case before it, the use of estoppel in this case is controversial for purely formal reasons, not least because the investor's daughter was not party to the proceedings and her conduct was essentially identified with that of her claimant father.[550] Another criticism relates to the alleged blurring of the lines between a determination of the claimant's effective and dominant U.S. nationality and countervailing considerations which shall render an otherwise meritorious claim inadmissible on account of equitable considerations relating to the claimant's (to be precise, his daughter's) Iranian nationality.[551]

3.2.3. Jurisdiction *ratione materiae*

Subject matter jurisdiction is regulated in the ICSID Convention rather briefly, and a body of arbitral jurisprudence has developed to delineate the exact scope of the key concepts. Without going too deeply into the intricacies of the disparate terms, it suffices for the purposes of our discussion that jurisdiction *ratione materiae* is encapsulated in the formulation "legal dispute arising directly out of an investment" in Article 25(1). The most contentious issue has proven the limits of "investment", a topic which has been hotly debated in both arbitral practice and doctrine.[552]

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[550] J.R.G. Weeramantry, "Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: the Practice of the Iran-United States Claims Tribunal", 27 Netherlands Yearbook of International Law 1996, p. 129.
[551] C.N. Brower, J.D. Brueschke, *The Iran-United States Claims Tribunal*, Martinus Nijhoff 1998, p. 314.
[552] See e.g.: B. Sabahi, N. Rubins, D. Wallace, Jr., *Investor-State Arbitration*, see note 288, pp. 335-366; B. Legum, C. Mouawad, "The Meaning of 'Investment' in the ICSID Convention" (in:) P.H.F. Bekker, R. Dolzer,

Estoppel claims have been raised several times in connection with the "investment" definition. In *Desert Line Projects*, a case arising out of several contracts for the construction of roads concluded between an Omani investor and the government of Yemen, the host state challenged the jurisdiction of the tribunal, arguing that there was no arbitrable investment on the facts of the case. The argument rested on two pillars: (1) the government never formally "accepted" the investment in accordance with domestic foreign investment legislation; (2) the investor failed to obtain an investment certificate required by the same. The claimant countered that the treaty basis for the claim, the Oman-Yemen BIT, made no reference to the requirements imposed by domestic statute, and hence no investment certificate was required for the investor to make an investment within the meaning of the BIT. Alternatively, the claimant argued that Yemen should be estopped from raising this objection. The tribunal sided with the claimant, accepting the argument based on the wording of the BIT, however devoted some space in its dictum to estoppel, confirming that even if the claim had failed on the treaty point, it would have succeeded on estoppel.[553] The tribunal tacitly accepted that estoppel could operate to expand the notion of "investment" or, rather, confine it to the limits laid down in the Convention to the exclusion of additional formalities envisaged in the domestic law of host states principally to escape liability. In other words, estoppel prevented the definition of "investment" in Article 25(1) of the ICSID Convention from encompassing compliance with domestically regulated prerequisites for a business endeavour to be considered as a foreign investment deserving of protection. Although the domestic legislation was in force at the time of the ratification of the BIT and when the investment in issue was made, its application was excluded. The tribunal made reference, albeit not expressly, to the notion of opposability when it stressed that the BIT creates an entirely separate legal regime and its protections apply only to Omani investors who, pursuant to the privileges granted thereto under the BIT, may forego certain domestic requirements.[554] The tribunal analysed at length the history of correspondence between the parties and based its estoppel argumentation on an instruction from

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M. Waibel (eds.), *Making Transnational Law Work in the Global Economy. Essays in Honour of Detlev Vagts*, Cambridge University Press 2010, pp. 326-356; P. Vargiu, "Beyond Hallmarks and Formal Requirements: a "Jurisprudence Constante" on the Notion of Investment in the ICSID Convention", 10(5) Journal of World Investment & Trade 2009, pp. 753-768; J.M. Boddicker, "Whose Dictionary Controls?: Recent Challenges to the Term "Investment" in ICSID Arbirtration", 25(5) American University International Law Review 2010, pp. 1031-1071; P.-E. Dupont, "The Notion of ICSID Investment: Ongoing 'Confusion' or 'Emerging Synthesis'?", 12(2) Journal of World Investment & Trade 2011, pp. 245-272; W. Shan, L. Wang, "'The Concept of "Investment': Treaty Definitions and Arbitration Interpretations" (in:) J. Chaisse, L. Choukroune, S. Jusoh (eds.), *Handbook of International Investment Law and Policy*, Springer 2020, available at: https://bit.ly/3qL8VX1 (accessed: 24.08.2021). In Polish jurisprudence, see: M. Pyka, *Pojęcie inwestycji w międzynarodowym arbitrażu inwestycyjnym*, Warszawa, C.H. Beck 2018.

[553] *Desert Line Projects*, para 118.

[554] Ibid, para 121.

the Vice-President to the Prime Minister of Yemen and another one from the Vice Prime Minister to the Minister of Foreign Affairs,[555] as well as on numerous outward appearances and inducements the government gave to the claimant to entice it to invest. The tribunal's reasoning on estoppel has been positively assessed in doctrine as furthering the objective of finality in investment arbitration.[556]

A contention that there was no investment, and therefore the ICSID lacked jurisdiction, was the subject of consideration of the tribunal in *SGS v Philippines*. The case, decided on the basis of the Switzerland-Philippines BIT, involved an agreement for the provision of import supervision services. The respondent objected to jurisdiction on the grounds, *inter alia*, that there was no investment in issue in the territory of the Philippines.[557] This attached to the specific nature of the services provided by the claimant, that is pre-shipment inspections carried out on behalf of the governmental authorities of the importing country in the country of export. Therefore, the services were physically carried out outside of the territory of the Philippines.[558] The contention was supported by the fact that under domestic legislation the claimant's services were considered as performed abroad, a determination with which the investor complied. Further, the Philippines argued that the claimant represented, on several occasions, before municipal courts that it was not locally present for the purposes of legal proceedings brought against it, despite having a sizable liaison office on site. Statements to similar effect were also submitted before numerous local government authorities.[559]

Nevertheless, an estoppel argument intended to prevent SGS from denying that their investment was not made in the territory of the host state was rejected. The domestic tax legislation was discarded as a regime separate from that set up by the BIT. Regarding the representations made before local courts and government agencies, the tribunal admitted these were questionable as there "was certainly a sufficient presence to establish jurisdiction based on residence under many legal systems".[560] Yet, they were distinguished as not attaching to whether there was, in the claimant's view, an investment for the purposes of the BIT. The tribunal went on to add, hypothetically, that even if these statements were sufficient to ground

[555] Ibid, para 122.
[556] C.T. Kotuby, L.A. Sobota, *General Principles of Law and International Due Process…*, see note 269, p. 202. See also: C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd edition, Oxford University Press 2017, pp. 243-244.
[557] Article II of the BIT read as follows: "The present Agreement shall apply to investments in the territory of one Contracting Party made in accordance with its laws and regulations by investors of the other Contracting Party, whether prior to or after the entry into force of the Agreement".
[558] *SGS v Philippines*, para 12.
[559] Ibid, paras 51-59.
[560] Ibid, para 108.

the existence of a binding representation, no reliance was detected on the facts, not least because the Philippines failed to exercise a dispute resolution clause in the investment contract that provided for local jurisdiction; the tribunal implied that this would constitute reasonable reliance.[561]

The tribunal in *UAB Energija*, an arbitration under the 1996 Lithuania-Latvia BIT, zeroed in on the limits of the term "dispute" in Article 25(1) of the Convention. The estoppel argument advanced by the host state depended on a course of conduct of the investor which, according to the respondent, amounted to a representation that no arbitration proceedings shall be instituted. The investor was therefore now, the host state argued, estopped from seeking jurisdiction of the Centre. By relying on *Pope & Talbot*, the host state argued that the representation allegedly made by the investor induced reliance that a potential claim would no longer be pursued.[562] Further factual circumstances were called upon to buttress the argument: a lapse of 42 months after the time limit prescribed in the BIT; protracted silence on the part of the investor following the conclusion of the main round of negotiations; isolated communications between the parties in which the host state acknowledged that the claimant's claims were time-barred, in the aftermath of which the parties agreed to have a meeting which never transpired. The claimant replied, without questioning the permissibility of raising estoppel in the present case, that none of the requirements of the strict view of estoppel were made out.[563] The tribunal rejected the estoppel claim following a meticulous review of the correspondence between the parties. The tribunal endorsed the strict view and held that there was no clear and unambiguous representation that could have reasonably induced reliance on the part of the host state.[564] Not only did the tribunal not question the applicability of estoppel as regards the fulfilment of the "dispute" requirement to establish jurisdiction, but it proceeded to consider each of the other grounds advanced by the respondent, notably acquiescence, waiver and prescriptive extinction.[565]

The cases discussed confirm that the contours of subject matter jurisdiction can be affected by estoppel. Whilst it is true that domestic legislation or additional requirements will be without prejudice to the meaning of "investment" under an international investment treaty (a point confirmed in *Desert Line Projects*), internationally relevant representations may alter

[561] Ibid, para 109.
[562] *UAB Energija*, para 473. The host state relied on a number of other legal doctrines to prove there was no "dispute" within the meaning of Article 25(1) of the ICSID Convention – acquiescence, waiver, prescriptive extinction and bad faith on the part of the investor.
[563] Ibid, para 483.
[564] Ibid, paras 531-533
[565] Ibid, paras 534-553.

arbitral conclusions on jurisdiction so long as the contemplated construction is not a *contra legem* interpretation of the treaty. Estoppel can assume in this context a pronounced gap-filling role. Estoppel can operate to prevent the excessive expansion of the notion of "investment" so that ultimately investors are deprived of treaty protection. The principle can also be used to achieve the goal of promoting fairness and police state conduct which is deemed contrary to good faith. It is possible that the significance of estoppel transcends the foregoing – one commentator has suggested that in *SGS v Philippines*, under the guise of estoppel, the tribunal in fact applied principles of international public policy, which it perceived as distillations of the former.[566] I submit that this is particularly evident in *UAB Energija* where denial of estoppel served as a conceptual tool to guarantee to the investor the right to pursue arbitration which, in turn, exposes and furthers the rationale of international investment arbitration of providing a dispute resolution mechanism additional to any avenues available to investors under the domestic law of the host state. Such cases are a powerful reminder that a failure of an estoppel argument can perform as momentous a function as a successful pleading of estoppel. For estoppel claims are often ill-intentioned and it is the duty of an arbitral tribunal seized of a dispute to refuse relief to parties who purport to avail themselves of estoppel where it is indeed themselves who should be precluded from pursuing a claim (under estoppel or a related doctrine, such as clean hands or abuse of process).

Finally, it is pertinent to add that estoppel arguments are currently undergoing a resurgence as counters to objections to jurisdiction raised by host states based on alleged illegality of the investment, which manifests itself in the fact that the investor is claimed to have failed to comply with relevant domestic laws governing the grant of the investment. The availability of estoppel has been particularly contested within the context of allegations of corruption. As arbitral tribunals have struggled to proffer a principled classification of such claims (considering them as questions of jurisdiction, admissibility or substance on various occasions), these matters are analysed separately.[567] At any rate, we shall see that not in one single case has an arbitral tribunal outrightly denied the applicability of estoppel, even in the presence of treaty provisions that expressly conditioned arbitral jurisdiction/admissibility on the compliance of an investment with domestic law (so-called "in accordance with host state law" clauses). More than that, several such pleas have been successful where the tribunal was of the view that such an outcome was desirable for reasons of fairness and justice.

[566] C.A. Miles, "Corruption, Jurisdiction and Admissibility in International Investment Claims", 3(2) Journal of International Dispute Settlement 2012, p. 350.
[567] See Chapter IV. The question of separate treatment of such cases is addressed at more length in Section 4.1.

3.2.4. Jurisdiction *ratione temporis*

Investment treaties may impose time limits on bringing and admission of claims. An example is found in Article XV(6) of the Canada-Slovakia BIT, which stipulates that its provisions shall apply to any dispute which has arisen not more than three years prior to its entry into force. Another example is Article 1117(2) of the NAFTA, which particularizes the right of a controlling investor of a protected enterprise (typically a shareholder) to submit, within the scope specified in Article 1117(1), claims to arbitration on behalf of the enterprise:

> "An investor may not make a claim on behalf of an enterprise (…) if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach [of a treaty-guaranteed investment protection] and knowledge that the enterprise has incurred loss or damage".[568]

The provision of the BIT referred to above was the subject of arbitral scrutiny in *EuroGas Incorporated*. In response to a jurisdictional objection of the host state that the dispute between the parties had arisen more than three years before the entry into force of the BIT and, therefore, the tribunal lacked jurisdiction, one of the claimants asserted that Slovakia should be estopped from raising this argument. Reliance was placed upon a 2012 letter sent to the investor by the deputy prime minister of Slovakia, where allegedly a representation was made to the effect that the dispute was "not yet ripe" to be submitted to arbitration. This was interpreted by the claimant that, in the estimation of the host state, either a dispute was yet to arise at that stage or that, at any rate, it did arise after the cut-off date of 14 March 2009 (3 years before the entry into force of the BIT). The estoppel argument was rejected by the tribunal on the ground that the investor's interpretation was excessively teleological and imputed to the host state intentions that they could not have had. What the host state was meaning to represent was not that it was too early for the factual situation to be considered a dispute within the meaning of the BIT, but rather that it was premature to commence amicable negotiations envisaged under the treaty while a dispute was still pending before the local courts.[569] On top of this conclusion, reached primarily on the basis of a textual interpretation of Slovakia's representation, a number of additional observations were made, which should be categorized within the more conservative (objective) strain of thought. For the tribunal observed that even if it had been the intention of the host state to impliedly extend the applicability of

[568] See also Clause 4(b) of Annex 14-E to the USMCA, the successor to the NAFTA which came into force in July 2020, which is to a similar effect.
[569] *EuroGas Incorporated*, para 431.

treaty protections to disputes that had arisen before the cut-off date indicated in the BIT, this would not have been capable of having a legal effect as jurisdiction *ratione temporis* depends solely on the intentions of the parties to the treaty.[570] As a consequence, it was not open to the parties to the proceedings to make any alterations in this respect and, in effect, the investor was deprived of any meaningful possibility of affecting this tenet of jurisdiction.

The NAFTA provision quoted above was in issue in *Feldman Karpa*. In response to a temporal objection to jurisdiction raised by the host state, the claimant investor argued that Mexico should be estopped on account of the fact that on numerous occasions the state was said to have represented that the limits did not apply (reliance was placed, *inter alia*, on an agreement concluded between the parties).[571] The tribunal took only a slightly less categorical approach than that exhibited in *EuroGas Incorporated*. Generally, it was stressed that by design it is one objective of the NAFTA regime to limit the availability of arbitration within the clear-cut period of three years. The limitation defence laid out in Article 1117(2) (limitation of jurisdiction *ratione temporis*) is generally not subject to any suspension. The tribunal did, nonetheless, envisage that the running of the three-year limitation period could be interrupted in at least two cases: (1) express acknowledgment of the claim in issue; (2) more importantly, under "exceptional circumstances" in the event of a "long, uniform, consistent and effective behavior of the competent state organs which would recognize the existence, and possibly also the amount, of the claim".[572] A modicum of latitude was therefore reserved for modification of the strict treaty provisions by reference to the conduct of the host state.

3.3. Admissibility

As opposed to jurisdiction, objections which go to an arbitral tribunal's competence to countenance and rule on a dispute, are considered to challenge a claim's admissibility on a ground other than its ultimate merits (the substantive protections afforded to investors).[573] An objection to admissibility tackles the claim itself and presupposes that in all other respects the tribunal seized of a dispute has jurisdiction.[574] Jurisdiction will thus be normally considered a primary issue, a necessary pre-condition of the tribunal's ability to hear a case, whereas admissibility will be of secondary importance and will arise once a tribunal has confirmed its

[570] Ibid, para 432.
[571] *Feldman Karpa*, paras 53-59.
[572] Ibid, para 63.
[573] D.A.R. Williams, "Jurisdiction and Admissibility" (in:) P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press 2008, p. 919.
[574] *Micula (Jurisdiction)*, para 63; V. Heiskanen, "*Ménage à trois*? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration", 29(1) ICSID Review - Foreign Investment Law Journal 2014, p. 237.

jurisdiction. Propositions have been made that questions of admissibility will often be of a temporal nature (notably with regard to cooling-off periods)[575] or pertain to the question of exhaustion of local remedies,[576] although the catalogue of potential admissibility objections remains open.[577]

Whilst it is opined in academic doctrine that issues such as the existence of a legal dispute, the existence of a legal interest by the claimant or the nationality of the claim provide a challenge to admissibility rather than jurisdiction,[578] the line between jurisdiction and admissibility is blurry and tribunals often reclassify issues of jurisdiction as going to admissibility and *vice versa*.[579] There is therefore a risk of certain overlap between the issues discussed under the respective headings. Notably, a number of cases discussed throughout this dissertation in disparate categories treated estoppel within the context of objections to admissibility.[580] Capturing the difference between jurisdiction and admissibility is often all the more difficult within the context of ICSID arbitrations because the term "admissibility" does not feature in the ICSID Convention, which instead in Article 41 avails itself of the concepts of "competence" of ICSID tribunals and "jurisdiction" of the Centre.[581] Therefore, what follows is an illustrative discussion which shall serve to tentatively explore the applicability of estoppel with regard to admissibility and objections thereto, in contradistinction to jurisdiction.

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[575] Cooling-off periods are treaty-prescribed periods within which claims cannot be brought pending settlement attempts. See: *SGS v Pakistan*, para 184; *Biwater Gauff*, paras 338-350; *Abaclat (Jurisdiction)*, para 496. Cf. *Murphy Exploration*, paras 149, 154-156. See also: M. Jeżewski, *Międzynarodowe prawo inwestycyjne*, see note 82, p. 440.

[576] *SGS v Philippines*, para 154; *RosInvest*, paras 152-156.

[577] *Bureau Veritas*, para 132.

[578] I.A. Laird, "A Distinction without a Difference? An Examination of the Concepts of Admissibility and Jurisdiction in *Salini v. Jordan* and *Methanex v. USA*" (in:) T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May Ltd. 2005, p. 201. Laird's classification of nationality of a claim as a matter of admissibility is, I submit, doubtful considering the wording of Article 25(2)(a) of the ICSID Convention and the reasoning of the tribunal in *SGS v Philippines* pertaining to the question whether the investment was made "in the territory" of the host state. The questions of the latter kind are often considered to attach to jurisdiction *ratione loci*. See: *Abaclat (Jurisdiction)*, Dissenting Opinion of Professor Georges Abi-Saab, para 11; *Urbaser (Award)*, paras 152-153; C.A. Miles, "Corruption, Jurisdiction and Admissibility…", see note 566, p. 334; M. Waibel, "Investment Arbitration: Jurisdiction and Admissibility" (in:) M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.), *International Investment Law: A Handbook*, C.H. Beck/Hart/Nomos 2015, pp. 1248-1250; F. Fontanelli, "Jurisdiction and Admissibility in Investment Arbitration…", see note 537, pp. 66-70.

[579] See e.g. *Bernhard von Pezold*, para 403; *Rusoro Mining*, para 278. In *Pan American Energy*, the tribunal refused to delve into the differences between jurisdiction and admissibility, resigning itself to reiterating the bases of claim advanced by the respondent. In doing so the tribunal did not qualify the objections made as belonging to either category. See: *Pan American Energy*, para 54.

[580] See e.g. *Churchill Mining (Award)* (fraudulent procurement of an investment) – discussed in Section 4.3; *Awdi (Admissibility)* (alleged criminal behaviour of the claimant investor) – discussed in Section 4.5.2 *in fine*; *Phoenix Action* (domestic illegality of investment) – discussed in Section 4.5.1.

[581] A. Reinisch, "Jurisdiction and Admissibility in International Investment Law" (in:) A. Gattini, A. Tanzi, F. Fontanelii (eds.), *General Principles of Law and International Investment Arbitration*, Brill/Nijhoff 2018, pp. 134-135. The writer also points to cases where tribunals denied that there is any meaningful difference between the concepts within ICSID arbitration (*CMS Gas*, para 41; *Ambiente Ufficio*, para 572).

As a point of departure for my discussion concerning the permissibility of operation of estoppel with regard to issues of admissibility, one tribunal stated the following regarding acquiescence:

> "Jurisdiction is fixed by treaty and cannot be altered by the parties to the dispute. The parties, however, may acquiesce in any breach of a requirement of admissibility; such acquiescence would "cure" the breach. In other words, defects as to admissibility can be waived or cured by acquiescence, while jurisdictional insufficiencies cannot be equally remedied. However, even if such categories were to be adopted, which appears to be an extremely delicate proposition as a matter of comparative law, the question whether a particular legal issue falls in one and not the other is contingent on the meaning of the relevant provisions of the BIT".[582]

Mindful of the differences between acquiescence and estoppel, the dictum could nonetheless be *prima facie* applicable to estoppel. Reference to three illustrative cases should help verify the veracity of this hypothesis.

The tribunal in *Rusoro Mining* classified as going to admissibility two objections advanced by the host state, both based on estoppel.[583] The investor was alleged not to have pursued its investments in good faith for two reasons – (1) it purported to acquire Venezuelan mining rights through offshore transactions without governmental authorization; (2) it misrepresented its identity as a Russian-controlled entity.[584] As for (1), it is unclear whether the tribunal applied a standard test of estoppel. Although account was taken of the fact that the acquisition was publicized and the host state was being properly informed at all junctures of the transaction of its progress, legal effect and the investor's intentions, the crucial observation the tribunal made pertained to the acquisition's legality under domestic law, contrary to Venezuela's contentions.[585] The investor was consistent in its conduct and pursued a coherent and reasonable business objective in a transparent fashion. No representation was ever made that could give grounds to subsequent estoppel. Neither did the tribunal discern a misrepresentation when examining (2). The host state relied on a letter sent by the chairman of Rusoro to the state where a number of assurances were made, including that the company will remain in control of Russian individuals following a contemplated acquisition of a South African com-

[582] *Urbaser (Jurisdiction)*, para 112.
[583] F. Fontanelli, A. Tanzi, "Jurisdiction and Admissibility in Investment Arbitration. A View from the Bridge at the Practice", 16(1) The Law & Practice of International Courts and Tribunals 2017, p. 12.
[584] *Rusoro Mining*, para 350.
[585] Ibid, para 351.

petitor. Although after the completion of the transaction the chairman's shareholding was diluted, even so, together with his son and through agreements with other shareholders, he controlled the majority of votes at the shareholders' meeting.[586] This meant that, effectively, the investor kept his promise and acted in accordance with his original representation. It appears that estoppel claims in *Rusoro Mining* failed at the very preliminary stage of proving that the representor attempted to change its original position. In most other cases, this element of contradiction between a prior representation and an argument maintained during arbitral proceedings will be self-evident on the facts.

The claimant investor in *Hulley Enterprises (Jurisdiction)* alleged that the host state, Russia, had expropriated its investment contrary to the Energy Charter Treaty, at a time when the ECT was provisionally applicable to Russia.[587] Special attention was devoted to Article 45(2)(c) which provides for provisional application of the ECT to the extent this is not inconsistent with a signatory's laws or regulations. The host state attempted to rely on this provision (so-called "limitation clause") to defeat jurisdiction of the tribunal. Interpreting Russia's objection as one going to admissibility, the tribunal purported to resolved the controversy via treaty interpretation, and concluded that the host state was within its rights to claim an inconsistency between the ECT and its internal laws to seek to avoid the application of Part V of the Treaty.[588] The claimant investor argued, however, that Russia's objection should be estopped, irrespective of any conclusion that may be drawn on the principles of treaty interpretation alone, due to its steadfast and long-standing support of provisional application of the ECT during its negotiations.[589] The host state countered that the requirements of the strict view of estoppel were not made out on the facts, in particular there was no clear and consistent representation made to the investor, nor did it detrimentally relied thereon. Reference was made to the test proffered in *North Sea Continental Shelf*.[590] The tribunal applied the test suggested by the respondent and sided with its propositions. No regard was had to the investor's reliance on the host state's alleged representation, for the tribunal inferred that Russia's support for provisional application voiced during negotiations, even if it passed the threshold

[586] Ibid, paras 353-356.
[587] For ease of reference, the passage will discuss admissibility and estoppel with regard to *Hulley Enterprises (Jurisdiction)*, however note that with it two other claims were resolved jointly on the same grounds, i.e. *Veteran Petroleum Limited (Jurisdiction)* and *Yukos Universal Limited (Jurisdiction)*. For more on issues related to provisional application of the ECT within the context of these cases, see: D. Azaria, "Provisional Application of Treaties" (in:) D.B. Hollis (eds.), *The Oxford Guide to Treaties*, 2nd edition, Oxford University Press 2020, pp. 240-246.
[588] *Hulley Enterprises (Jurisdiction)*, para 284.
[589] Ibid, para 286.
[590] Ibid, para 287.

of consistency, was never clear enough to rule out the possibility that the host state was at all times relying on its entrenched interpretation of Article 45(1) of the treaty – which, in turn, would in any event exclude or limit its provisional application.[591] The tribunal had established earlier in its judgment that the host state's interpretation of the relevant provision of the Treaty, under which there could be no provisional application on the facts, was plausible and legitimate. Therefore, there could be no "clear" acceptance of the Treaty regime, to use the language of *North Sea Continental Shelf*. It appears, I submit, that the tribunal omitted a significant part of the test enunciated by the ICJ in that case, treating estoppel, in effect, in a one-sided manner, without regard to the investor's reliance upon Russia's alleged representation. Such an application of estoppel is not only deferential to state sovereignty, but it fails to recognize the importance of fairness and justice of dealings between subjects of international investment law. On the other hand, it could be argued that even though the tribunal misconstrued and misapplied the strict view of estoppel (essentially agreeing with the strict view but applying what bears closer resemblance to the broad concept based on inconsistency of conduct), the tribunal's dictum reinforces the proposition that estoppel cannot operate to override the letter of the treaty (*contra legem*) and impose on a state obligations it did not clearly consent to. For the sake of consistency, it would have been recommended that the tribunal classified the question, as in *Besserglik*, as one of consent to tribunal's jurisdiction rather than as one of admissibility, and accordingly refused to consider an estoppel argument. Alternatively, as the classification of the claim in issue as one going to consent would possibly require a teleological interpretation which is far from unassailable, a more rigorous application of the strict view would have been warranted, and the investor's reliance upon the host state's representations made during the negotiations of the ECT should have been accounted for. Another option would have been for the tribunal to abandon its inquiry once it was established, in its judgment, that Russia made no clear representation. A failure to prove one element of estoppel dooms the entire claim, and venturing into a discussion of reliance, let alone a misapplication thereof, was unnecessary.

The final case to be analysed in this context concerned an objection of a temporal nature. In *Salini Impregilo*, the tribunal examined an objection alleging that a delay between the purported breach of an investor protection and submission to arbitration can have the effect of rendering an arbitral claim inadmissible. The investor, relying on the Italy-Argentina BIT, alleged breaches of the FET standard, the most favoured nation clause, and expropriation. The

[591] Ibid, para 288.

host state raised an objection to the admissibility of the claim by arguing, by reference to Article 8(7) of the BIT,[592] that the investor's initiation of the arbitration proceedings, occurring more than 10 years after the contested measures entered into force, shall be time-barred due to extinctive prescription under Argentine laws.[593] Further, extinctive prescription, within the meaning of those domestic laws, was also argued to constitute a principle of international law. The investor countered, *inter alia*, that Argentina should be estopped from pursuing its objection based on prescription because it had represented, by words and conduct, that the dispute would be resolved amicably by means of renegotiation.[594] The investor's failure to bring the claim earlier was to be attributable to the host state's attempts to drag the process out and entangle Salini in time-consuming and costly contractual talks, having failed to execute a number of significant transactional documents.

The tribunal rejected the host state's objection by reference to an interpretation of Article 8(7) of the BIT, inferring that as the provision incorporated principles of international law, domestic Argentine regulations concerning prescription are inapplicable and the concepts as understood in international and domestic law appear to diverge. The estoppel argument was therefore left open, albeit no outright refusal of potential applicability was indicated.[595] Nonetheless, taking the nature of the claim and the facts as recounted by the tribunal into account, there appear to be no reason why estoppel could not have been applied. Specifically, estoppel was not argued to attach to any of the jurisdictional elements which have been established in jurisprudence to be beyond the purview of estoppel (primarily consent). Further, it appears that the estoppel argument could have succeeded, perhaps subject to the tribunal's conclusion on the existence of a clear and unambiguous representation as the parties were engaged in protracted talks which involved a significant volume of representations exchanged back and forth. The other elements appear *prima facie* to be present. By failing to bring an arbitral claim earlier, the investor placed good faith reliance upon whatever outward appearance was held out by the host state, and an inability to pursue an ICSID arbitration for years after the alleged breach represents a qualifiable detriment or, in the alternative, a benefit for the host state. Questions could arise with regard to potential contributory negligence on the part of the

[592] The provision regulates the law applicable to any dispute between the contracting state and a national of the other contracting state in the event of an arbitration. To the extent relevant to our discussion, the arbitral tribunal was to apply, *inter alia*, the domestic laws of Argentina, the provisions of the BIT and applicable principles of international law.
[593] *Salini Impregilo*, para 51.
[594] Ibid, para 78.
[595] Ibid, para 150.

investor in not striving to enforce its rights earlier, however this would be a matter for the tribunal to ascertain on the merits separately from estoppel.

Further, it should be recalled that in cases discussed in other parts of the dissertation,[596] estoppel was successfully juxtaposed with objections to admissibility. Although reservations can be made to the nuances of the reasoning of the tribunals analysing the applicability of estoppel to precluding objections to admissibility, in principle, the dictum in *Urbaser (Jurisdiction)*, cited above, can be extended to estoppel. As opposed to jurisdiction, no inherent limits to estoppel have been inferred and so long as the requirements of the strict view are made out, preclusion is available. Notably, none of the cases discussed above embraced the broad view of estoppel which was probably the reason why the estoppel argument failed every time.

3.4. Forum selection and fork-in-the-road clauses

In general terms, estoppel does not operate to limit the permissibility of the pursuit by investors of parallel claims before multiple fora.[597] By way of example, under the ICSID Convention, where an investor has consequently insisted that it refuses to waive its right to pursue its claim in a forum other than the ICSID, prior submission of a claim to the jurisdiction of an ICC tribunal does not deprive an ICSID-instituted tribunal of jurisdiction.[598] Arbitration of the same claim before two arbitral panels (or a judicial forum and an arbitral panel) does not inherently constitute inconsistent conduct, whereas the duty on the part of the host state to defend one claim on more than one forum is not qualifiable as detriment for the purposes of the strict test of estoppel. By the same token, it has been held that this type of behaviour is not *per se* inconsistent with the principle of good faith.[599] Notwithstanding, estoppel remains applicable provided that the requirements of the strict concept are made out on the facts of a particular case.

A case study is *SGS v Pakistan*. The dispute arose initially under a 1994 investment contract (PSI Agreement). When in 1996 Pakistan notified SGS that its intention was to cancel the contract, the investor initiated judicial proceedings before municipal courts in Switzerland for unlawful termination. The proceedings were later dismissed on the grounds of sover-

[596] See Section 3.3.
[597] Nor does, in ordinary circumstances, the principle against abuse of process. See: *Caratube II*, para 378; *Lauder*, paras 174, 177; *CME Czech Republic*, para 412.
[598] *Southern Pacific Properties (Jurisdiction)*, paras 54, 58; *Ampal-American (Jurisdiction)*, paras 337-339. Article 26 of the ICSID Convention is of dispositive character and can be excluded by the parties ("unless otherwise stated").
[599] *Southern Pacific Properties (Jurisdiction)*, paras 62-63.

eign immunity, however, as they remained pending, the host state pursued arbitration in Pakistan under the contractual dispute resolution clause (PSI Agreement Arbitration). SGS submitted counterclaims whilst simultaneously objecting to the domestic arbitral tribunal's jurisdiction. Six months following the commencement of the PSI Agreement Arbitration, the investor initiated ICSID arbitration proceedings under Article 9(2) of the Switzerland-Pakistan BIT alleging, *inter alia*, a breach of the FET standard and expropriation. The investor then attempted to petition Pakistani courts with a view to barring the state from pursuing the PSI Agreement Arbitration, to which Pakistan responded symmetrically, applying to its courts to enjoin the investor from pursuing ICSID arbitration and hold it in contempt of court. Eventually, the state prevailed in the Pakistani Supreme Court which issued a restraining order against SGS's participation in the ICSID arbitration whilst expressly confirming the state's right to proceed with the PSI Agreement Arbitration.[600] The host state objected to ICSID jurisdiction by reference to, *inter alia*, estoppel, alleging that SGS had an opportunity to raise its claims under the BIT in the domestic PSI Agreement Arbitration and thus should be precluded from doing so in the present ICSID proceedings.[601] Another ground for estoppel hinged upon the prior initiation by the investor of the Swiss domestic judicial proceedings.[602] The investor countered the estoppel argument by invoking the strict concept and inferring that the requirements thereof were not fulfilled on the facts. Specifically, SGS never represented to the host state that it was not to pursue its claims before multiple fora.[603]

The tribunal rejected the estoppel argument, however it did not purport to apply the principle to the facts. Rather, the claim failed on an interpretation of the BIT, its object and purpose, and the "general purpose of the ICSID Convention". Namely, as the BIT did not contain a fork-in-the-road clause[604] nor has the investor otherwise assumed an obligation to waive its right to pursue its contract claims prior to the exercise of its BIT rights before an alternative forum, estoppel could not operate to preclude it from instituting ICSID arbitration proceedings. Further, since it appeared that the investor's BIT claims were not in fact argued previously before the Swiss courts or in the PSI Agreement Arbitration, the tribunal refused to apply estoppel under the circumstances where there was no indication that SGS at any point

[600] *SGS v Pakistan*, paras 10-42.
[601] Ibid, para 71.
[602] Ibid, para 118.
[603] Ibid, para 122.
[604] Generally, a fork-in-the-road clause obliges the claimant investor to make a choice between pursuing its claims against the state either through the arbitration mechanisms provided in the relevant BIT or in local courts or other avenues envisaged in relevant contractual provisions. In the doctrine, three broad types are differentiated. See: M.A. Petsche, "The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches", 18(2) Washington University Global Studies Law Review 2019, pp. 397-398.

represented its intention not to pursue such claims at all.[605] In sum, the estoppel argument failed for want of a clear and unambiguous representation that BIT claims would not be pursued before an ICSID-instituted tribunal, however the gateway was left open – in principle, estoppel was accepted as potentially applicable.

In contrast to *SGS v Pakistan*, in *Pan American Energy* the tribunal was faced with an estoppel argument in the presence of a fork-in-the-road clause in Article VII of the United States-Argentina BIT. In one of their preliminary objections going to jurisdiction, the host state argued that a claim pursued by the investor's Argentine branch before the Supreme Court of Justice of Argentina should preclude it from instituting an ICSID arbitration by virtue of the fork-in-the-road clause. The claim advanced before the local court pertained to hydrocarbon concessions and was in many respects similar to the dispute submitted to international arbitration. Initiation of proceedings in Argentina was therefore argued to constitute a forum selection under Article VII of the BIT. Further, the host state underpinned its argument by reference to the strict concept of estoppel, stressing that it relied to its detriment on the investor's representation as to forum selection in undertaking its ordinary business activity.[606] The investor countered on two fronts. First, institution of proceedings before the Supreme Court of Justice of Argentina could not constitute a forum selection as the dispute being litigated in those proceedings differed from that being the subject of the present ICSID arbitration. Neither the cause of action nor the parties involved were the same. Therefore, there was no actionable representation to which estoppel could attach. Second, there could be no detrimental reliance on the part of the Argentinian state as it was not party to the dispute before the local court. Those proceedings concerned a claim for damages advanced against a private entity, arising out of a contract. Further, the fact that the BIT and the ICSID Convention were mentioned in a domestic litigation could not have generated reasonable, good faith reliance on the part of the Argentine state that it was its own courts and not an ICSID tribunal that shall exercise jurisdiction over an entirely different claim, one that involves different parties and facts, and is based upon an international investment treaty.[607]

The tribunal rejected the estoppel claim. First, a finding was made that in fact no forum selection was made by the claimant as there was no identity of parties or cause of action.[608] The basis for the local proceeding was a different business relationship under a separate contract between two private parties, none of which was the state of Argentina (it was

[605] *SGS v Pakistan*, paras 175-177.
[606] *Pan American Energy*, para 144.
[607] Ibid, para 153.
[608] Ibid, paras 155-157. The same approach was taken by the tribunal in *Camuzzi*, paras 61-64.

insufficient that it acted as *amicus curiae*). On estoppel, the tribunal effectively reiterated the arguments advanced by the claimants, finding in particular that: (1) there was no clear, unambiguous, voluntary and authorized representation; (2) as the government was not party to the proceedings before the Supreme Court of Justice of Argentina, no reasonable reliance could have arisen, much less detrimental reliance.[609]

One explanation is warranted. *Pan American Energy* does not involve questions of re-litigation or-re-arbitration, although the tribunal did refer to certain elements of the triple identity test. In the case, when the ICSID arbitration proceedings were initiated, no final determination had been made of a given claim or issue, therefore no issue estoppel could arise and no question of re-litigation. These matters are discussed in detail in Chapter V.

3.5. Chapter summary

Generally, it appears that Lowe's opinion, cited and approved in *Sociedad Anónima Eduardo Vieira*, according to which all preconditions governing the jurisdiction of arbitral tribunals are firmly embedded in the ICSID Convention and cannot be modified by means of estoppel, is cast in terms too absolute. Analysis conducted in this chapter shows that whilst there appear to be certain parameters of jurisdiction which are not amenable to the operation of estoppel, notably the element of consent (jurisdiction *ratione voluntatis*), tribunals have been ready to contemplate estoppel arguments with regard to jurisdiction *ratione personae, ratione materiae* and, albeit to a very limited extent and not unanimously, *ratione temporis*. Notably, in one award (*Siag (Award)*), the tribunal reiterated the orthodox view that the objective elements of jurisdiction enshrined in Article 25(1) of the ICSID Convention cannot be modified by reference to estoppel, however it went on to consider at length an estoppel claim related to jurisdiction *ratione personae* at the merits stage. In my opinion, this approach only further bolsters the general thrust of the argument advanced herein that there is room for estoppel arguments in the field of arbitral jurisdiction.

The most convincing rationale against the availability of estoppel claims appears to exist in respect of consent to jurisdiction. The ICSID Convention, as well as other major arbitration rules and investment treaties, stipulate strict form requirements for a party's consent to arbitrate. The common requirement that consent should be expressed in writing is difficult to circumvent by virtue of estoppel. Notwithstanding, it appears that only one case, *Besserglik*, has tackled that issue head-on, and there had been some prior authority in the form of *CSOB*

[609] Ibid, paras 158-161.

and *Gruslin* that a more permissive approach is also conceivable, particularly where an objection could be reconceptualized as not attaching to the existence of consent *per se* but to consent to arbitration in respect of a specific class of case or claim. As regards the other elements of jurisdiction, the approach is also inconsistent, however an attempt of the host state in *Cambodia Power* to rely on a passage from an earlier award in *East Kalimantan*, to the effect that estoppel claims in respect of the objective requirements of jurisdiction was unavailable, was effectively rejected or, at a minimum, sidestepped. Still, in *Cambodia Power*, the tribunal considered all prongs of estoppel on the strict view with regard to an objective element of jurisdiction enshrined in Article 25(1) of the ICSID Convention. Sweeping conclusions proclaiming the establishment of precedent are unwarranted in international investment arbitration, however the case should be considered a watershed moment. That early investment tribunals, deciding before the proliferation of investment treaties in the 1990s and onward, were more eager to rely on nebulous principles of law is evinced by the case of *Robert Schott* decided by the Iran-United States Claims Tribunal, where an expansive notion of estoppel was applied to interfere with the requirements of jurisdiction *ratione personae*, specifically with the issue of claimant nationality. Despite the dictum in *Cambodia Power*, the debate as to whether the requirements of jurisdiction as laid down in treaties are objective and as such not amenable to estoppel, remains divided, with the tribunal in the recent case of *EuroGas Incorporated* denying such a possibility. It appears settled law that estoppel can preclude parties from exercising their treaty-granted rights, but the rationale for denying estoppel claims in relation to jurisdiction and admissibility is different – the objective nature of jurisdictional requirements is not a "right" granted to investors and host states, but rather a guarantee of the rule of law, a constitutional provision which delineates the competence of a dispute resolution mechanism fundamental to the creation, maintenance and functioning of an entire body of law that is international investment arbitration.

Navigation around case law on the availability of estoppel to preclude the host state from raising objections going to admissibility is difficult as there are no clear criteria that guide tribunals in their treatment of admissibility and differentiation between the same and jurisdiction. Party claims presented as going to jurisdiction are on occasion reclassified. Further, claims ostensibly pertaining to jurisdiction are sometimes considered on the merits which should elevate the underlying issue to the level of admissibility, albeit this is rarely conceded expressly by the tribunal. Nonetheless, cases such as *Salini Impregilo* and *Rusoro Mining* appear to confirm that the passage from *Urbaser (Jurisdiction)*, laid out above and

proclaiming that acquiescence can modify the conditions for admissibility of claims, extends also to estoppel.

Finally, the chapter considered cases where parties attempted to pursue claims before multiple fora. Simultaneous arbitrating of a claim before more than one arbitral panel is not intrinsically contrary to the principle of good faith, and estoppel can operate to preclude host states from objecting to jurisdiction of a tribunal on the basis that the claim before it is being considered elsewhere. Estoppel has been accepted in respect of claims where there was no fork-in-the-road or another forum selection clause in the relevant treaty, however, in *Pan American Energy*, the tribunal appeared open to an estoppel claim even in the presence of an express treaty forum selection made by the parties. It is difficult to extrapolate, however in that case an implication was made that estoppel could, under certain circumstances, operate to override a treaty provision or, at a minimum, deprive a party from an ability to benefit from the same. The latter proposition, whilst less ambitious, appears more proper considering the current state of arbitral case law on estoppel.

As is the case with the majority of case law considered in the dissertation, the success rate of estoppel claims going to jurisdiction and admissibility as well as forum selection clauses is very low. In terms of the concept of estoppel used, the following cases appeared to endorse the strict view: *Besserglik* (where the tribunal purported to apply estoppel hypothetically whilst maintaining that consent to arbitrate cannot be established via estoppel), *Gruslin*, *CSOB*, *Magyar Farming Company*, *Siag (Award)*, *East Kalimantan*, *UAB Energija*, *Hulley Enterprises (Jurisdiction)*. The broad view was considered or directly applied in: *Rumeli*, *SGS v Pakistan*, *Desert Line Projects*, *SGS v Philippines*, *Feldman Karpa*, *Rusoro Mining*, *Pan American Energy*. Arbitral panels in the following cases failed to state their preference for any of the established concepts, *inter alia* due to the fact that estoppel was merely mentioned in passing: *Eureko*, *Joy Mining Machinery*, *Ruby Roz Agricol*, *Salini Impregilo*, *Camuzzi*. The type of issue discussed (jurisdiction, admissibility, forum selection) did not have any impact upon the concept of estoppel ultimately applied. In an overwhelming majority of the cases where the strict view of estoppel was nominally embraced, the tribunal seized of the dispute failed to meticulously apply the test so espoused to the facts. There is a preponderance of sweeping statements concluding that the requirements of the strict view of estoppel have not been made out (as tribunals on most occasions reach a negative verdict on the application of estoppel). Where the tribunal did not raise estoppel *proprio motu*, it usually diligently followed the formulation of estoppel proffered by the parties. Further, a tentative observation could be made that there is not much disagreement between the parties themselves as to the

test for estoppel to be applied on particular facts. An invocation by one party of either concept is almost never met with opposition from its opponent as to the formulation of the test. Rather, the claim is fought on the facts and not on the doctrinal underpinnings and details of the individual requirements.

There is, in some cases, an indication of a particular element (normally the clarity of the underlying representation or lack of detrimental reliance) that the tribunal felt was lacking for estoppel to apply, whilst in other awards the tribunal limited itself to inferring non-compliance with the test without going into detail regarding the intricacies thereof. Some tribunals appear to forge an unwarranted connection between the requisite qualities of representations and reliance without explaining their reasoning. A failure to prove the existence of a clear and ambiguous statement is often extended to also signify a lack of detrimental reliance whilst it appears reasonable to posit that a party could rely in good faith on an ambiguous statement. Such an eventuality has been rejected, albeit not expressly, in several decisions. In this context, the approach adopted by the *Siag (Award)* tribunal is distinctive in that a clear differentiation was made between the question of making a representation (which was discerned on the facts) and detriment (and being a party to arbitral proceedings was rightly not classified as detriment), and the tribunal intimated that the estoppel claim failed also on account of an absence of reasonableness of reliance (although this was not expressly vocalized).

CHAPTER IV. ESTOPPEL AND ALLEGED ILLEGALITY OF INVESTMENTS

4.1. Introductory remarks

A contentious area of law that has been the subject of a number of recent investment arbitrations concerns the illegality of disputed investments. Host states have attempted to challenge jurisdiction of tribunals by alleging that the investment was procured in violation of domestic law and, as such, cannot be arbitrated upon. The argument would typically be based either on: (1) Article 25(1) of the ICSID Convention; (2) "in accordance with host state law" clauses inserted into investment treaties.[610] Under the former proposition, it would be contended that an investment made in breach of provisions of the domestic law of the host state does not constitute an "investment" within the meaning of the ICSID Convention and/or that, at any rate, the Convention cannot condone and give protection to illegal investments.[611] The second possible iteration of the illegality argument would refer to a BIT clause, one example of which may be Article 1(a) of the Netherlands-Pakistan BIT:

> "the term 'investments' shall comprise every kind of goods, rights and interests of whatsoever nature, which have been invested *in accordance with the laws of the Party in the territory of which the investment is made* (…)" (emphasis added).

In some cases, where an illegality defence has been brought, it is clear that the host state either participated in the illegal activities of the investor, acquiesced in them by turning a blind eye, or actively condoned the same. It is in such cases that one can observe the potential for unfairness where host states attempt to invoke lack of jurisdiction and preclude the investor from pursuing its claims when, on the facts, the host state is at least partially to blame for the underlying illegality, due to contributory negligence or, *a fortiori*, knowing participation or condonation. In doctrine, opinions have been voiced that estoppel could be used to pre-

[610] It has been argued that the inclusion in a BIT of a provision to the effect that protected investments are only those made "in accordance with host state law" is a manifestation of the doctrine of clean hands. See: P. Dumberry, "State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the *Yukos* Award", 17(2) Journal of World Investment & Trade 2016, p. 234.

[611] The reach of illegality defences remains contested. Whilst some tribunals have required express legality clauses, others have inferred that compliance with domestic law is an implied condition for granting international protection to investments even in the absence of treaty language to that effect or indeed, of an international treaty altogether. See: R. Yotova, "Compliance with Domestic Law: An Implied Condition in Treaties Conferring Rights and Protections on Foreign Nationals and Their Property?", University of Cambridge Faculty of Law Research Paper No. 43/2018, p. 1 et seq., available at: https://bit.ly/3ovvXQG (accessed: 24.08.2021). This issue is not explored further in the thesis.

clude the host state from objecting to jurisdiction under such circumstances. The idea has also been considered, yet ultimately rejected, in one high-profile arbitral award, however on numerous occasions panels have expressed regret that host states are effectively let off despite their reprehensible actions. The topic remains to be hotly debated, with several prominent voices recently advocating in favour of expansive use of estoppel in these circumstances.

Aside from the cases referred to in the preceding paragraph, estoppel could also find application in more standard scenarios where the host state actively encouraged an investment by making appearances that domestic laws will not be enforced as regards a particular aspect of an investment. An example could be the grant or waiver of an administrative permission or concession to a foreign investor resulting in the bypassing of applicable domestic requirements. Perhaps the foreign investor failed to present technical specifications or obtain an environmental permit, or procure an authorization or certificate from another public authority. Nevertheless, having successfully obtained the concession, the investor commenced its business activities which were subsequently indirectly expropriated. The host state lodges an objection to jurisdiction based on illegality. For the sake of argument, suppose the relevant BIT does contain an "in accordance with host state law" clause and an ICSID arbitration agreement.

The state of the law in these areas is unsatisfactory, with arbitral tribunals adopting an all-or-nothing approach to jurisdiction over cases where an investment was procured by way of corruption. As signalled above, such claims have been summarily dismissed as tribunals refuse to assume jurisdiction. More success the estoppel argument has found in cases of illegality where there was evidence that the host state had made express representations that the investor was to be exempted from given statutory requirements or otherwise that the requirements that the investor did meet were to be considered sufficient for the purposes of admitting an investment into the country.

The discussion in this chapter will therefore tackle two distinct albeit related issues concerning the potential for the operation of estoppel: (1) "ordinary" illegality where an investor violated domestic law of the host state in response to some encouragement or an appearance induced by the latter, which was interpreted by the investor as a promise, inducement or commitment (on which it relied) that domestic laws will not be enforced within a specific area relevant to the investment; (2) corruption-based illegality cases involving active participation or condonation on the part of the host state.[612] I also avail myself of the follow-

[612] In the context of estoppel, Hepburn has proposed a differentiation between narrow illegality (involving merely non-compliance with host state laws) and broad illegality where there is a violation of a principle of interna-

ing terms: one-sided illegality (which shall encompass ordinary illegality within the meaning of the preceding sentence and illegality due to fraud perpetrated by the investor where no involvement of the host state, conceptualized as participation or condonation, is discernible on the facts) and two-sided illegality (corruption where, alongside the investor, also public officials (agents) of the host state are implicated). For clarity, the discussion will not concern the complex issues related to finding an instance of illegality (and preconditions therefor). It is taken that when reference is made to illegality, a relevant finding has been made and illegality (understood as a failure to comply with the host state's domestic law) is deemed to have been conclusively proven. The same assumption applies to instances of corruption.

The availability of estoppel to preclude host states from pleading illegality of investments to attack the jurisdiction of a tribunal is considered separately from jurisdiction *ratione materiae* and admissibility in Chapter III for several reasons. Above all, it is a topic of significant practical and political importance as the principle of economic liberalization and integration, which underlies the ICSID regime, cannot be derogated from by the fact that corrupt practices of certain states deter foreign investment or that outside investors are looped into illegal activities under threat of refusal of business opportunities. To allow host states to defeat claims would not only distort competition but flagrantly flout fairness. It is trite law by now that host states cannot rely on their own failures to comply with domestic laws, and estoppel could help transpose this principle onto investment relations where either: (1) the host state could be taken to have made a representation that certain domestic requirements applicable to the investment would be waived or enforced in a manner not encroaching upon the investment and/or the investor; or (2) both parties share a degree of blame for the illegality of the underlying investment. Importantly, however, estoppel would not serve as a "get-out-of-jail" free card for investors, but rather as a balancing instrument, the effect of which would be to account for the involvement of both parties in the resulting illegality when determining liability at the merits stage. Otherwise, as will be seen in the analysis of the case law below, claims brought by investors in such circumstances are foreclosed early on which has at least two adverse effects. First, it lets host states profit from their own illegal behaviour. Second, it could constitute a bar to justice for investors who engaged in illegal activity to "get their foot in the door" on account of the corrupt character of the political climate of the host state. Es-

tional public policy. As I am interested, within the broad illegality category, primarily in corruption cases, and my argument for availability of estoppel is confined to those cases of two-sided illegality alongside narrow one-sided illegality (to the exclusion of fraud and other instances of one-sided illegality which appear to be situated within Hepburn's broad illegality spectrum), I have introduced my own typology. See: J. Hepburn, "In Accordance with Which Host State Laws? Restoring the 'Defence' of Investor Illegality in Investment Arbitration", 5(3) Journal of International Dispute Settlement 2014, p. 555.

toppel would allow arbitral tribunals to consider all of this background and render a properly tailored award which would do justice to both parties.

Another reason for a separate discussion of illegality and corruption claims is their treatment by investment tribunals. For there has been no consistent classification of such pleas or their legal effect, and illegality defences have been interpreted as going to jurisdiction, admissibility or even merits.[613] Legality can be, under a given treaty, an element of the definition of "investment" or can be linked to its admission in the host state. Further, these cases prompt substantively different questions to those analysed in Sections 3.2 and 3.3 as they involve a thorough factual examination of the conduct of both parties to a proceeding.

To illustrate my argument, first, a critical overview shall be made of arbitral case law where estoppel arguments have been raised within the context of illegality and corruption. Then, I shall consider, by reference to opinions voiced by arbitral tribunals and academic writers, the potential for application of estoppel in the two areas of illegality as explained above. Justifications in favour of availability of estoppel are largely similar (an extension of the adage that host states should not be able to rely on breaches of domestic law to justify their failures to perform its obligations in the field of international investment)[614], albeit more policy-based in the case of corruption. Where ordinary illegality is discerned on the facts, the application of the strict view of estoppel should strongly accentuate the fact that the host state represented, by distinct actions or silence, that the investment would be considered in order despite the irregularities, and that the investor relied on those assurances in good faith. The latter element will often be crucial and, as demonstrated below, at least in one case, *Cortec Mining*, an estoppel claim failed because of want of this requirement. Where a case involves corruption with the participation or condonation by the host state, it has been argued in doctrine that the availability of estoppel should be preceded by a factual investigation into the efforts the host state made to discover and investigate the corrupt activities. If no such activity has been inferred, and the host state can thus be thought to have condoned, acquiesced or otherwise participated in the corruption, such evidence should speak strongly in favour of estopping it from raising a corruption defence. My proposition is more limited and focuses on the reconceptualization of the notion of representation. In this way I have been able to frame an

[613] F. Fontanelli, "Jurisdiction and Admissibility in Investment Arbitration…", see note 537, pp. 131-134; S.W. Schill, "Illegal Investments in Investment Treaty Arbitration", 11(2) The Law & Practice of International Courts and Tribunals 2012, p. 288. Douglas has argued that all illegality-based defences should be considered as going to admissibility and not jurisdiction. See: Z. Douglas, "The Plea of Illegality in Investment Treaty Arbitration", 29(1) ICSID Review - Foreign Investment Law Journal 2014, p. 155 et seq.
[614] *Karkey Karadeniz*, para 624; *Kardassopoulos*, para 182.

estoppel claim purporting to preclude the host state from raising jurisdictional objections in cases of two-sided corruption within the strictures of the narrow view of estoppel.

4.2. Illegality based on non-compliance with domestic laws (ordinary illegality)

The starting point is the classic case of *Fraport (Award)*, an arbitration initiated under the Germany-Philippines-BIT, which concerned an investment into PIATCO, a Philippine company which subsequently obtained a concession for the construction and operation of a new terminal for the airport of Manila.[615] In the early 2000s, as domestic opposition against the project began to grow, the legality of the investor's conduct during the bidding process, which led to the grant of the concession, was questioned. Specifically, the investor was said to have breached, *inter alia*, domestic laws governing the permissible level of foreign shareholding in companies in the public utilities sector. The investor had entered into shareholder agreements granting it approx. 60% of direct and indirect control over PIATCO. In 2002, the concession and the shareholder agreements were concluded to be null and void by the government and a decision was made to halt the development of the new terminal. In response, after protracted attempts at negotiations were to no avail, the investor brought a claim alleging expropriation. The host state countered with an illegality objection going to jurisdiction. By the time the claims were brought before an ICSID tribunal, the Supreme Court of the Philippines had ruled the concession and the shareholder agreements null and void *ab initio*.

In response to an estoppel argument raised by the claimants, the tribunal enunciated the general principle that:

> "[p]rinciples of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law".[616]

[615] It should be noted that in an earlier case, *SwemBalt*, the tribunal found that the host state could not rely on the investor's allegedly illegal mooring of a ship after no protest was lodged for 4 months. No estoppel was mentioned by name as the tribunal based its opinion on two other grounds: (1) either the host state failed to prove illegality of the investment; (2) or, even if the investment was illegal, the countermeasures undertaken by the state were late and disproportionate. Nonetheless, it appears that preclusion was applied and it was based on an implied acceptance of the investor's actions or the strict view of estoppel under which the investor was taken to have detrimentally relied on the host state's failure to raise illegality and interfere with the investment earlier. *Swembalt*, paras 34-35.

[616] *Fraport (Award)*, para 346; For a statement of principle to a similar effect, see: *ATA Construction*, para 122. Cf. *Feldman Karpa*, para 64, where a suggestion was made that even an express representation of the host state going against domestic laws on taxation would only have a "quasi private" character and could not be enforced in international arbitration by virtue of estoppel against that state. This proposition appears to have been contra-

The principle, however, did not find application on the facts as the tribunal felt the shareholder agreements were covert and the government could not be imputed knowledge thereof. The test was objectified as it would have been sufficient for the claimants to establish that the host state should have known about the disputed arrangements and effectively acquiesced therein.[617]

Almost concurrently with *Fraport (Award)* (one month prior), in *Kardassopoulos*, the tribunal held the host state estopped from invoking its own domestic law to claim that an oil and gas concession, along with related agreements, were invalid. A company controlled by the investor entered into a joint venture agreement with a state-owned Georgian oil conglomerate, with a view to creating a company whose business objective was to improve the host state's energy pipelines and related infrastructure. In 1993, the newly created company was issued a 30-year concession and concluded a related concession agreement. Subsequently, Georgia established business cooperation with the investor's competitors, thus depriving it of important opportunities in the country and making it sustain substantial losses. After an ad hoc compensation committee failed to come up with any award in favour of the claimants, they brought an ICSID arbitration claim under Part III of the Energy Charter Treaty and Article 4 of the Greece-Georgia BIT, claiming damages for expropriation. The host state countered, *inter alia*, by arguing that the concession and the agreements concluded by the investor were void *ab initio* as a matter of Georgian law.[618] Specifically, Georgia sought to argue that it was its own officials who did not have the authority to enter into the underlying agreements. These objections to jurisdiction were dismissed by the tribunal which agreed with the investor that the host state should be held to its earlier representations which were detrimentally relied on, however the tribunal ultimately sidestepped the question as to which (strict or broad) concept of estoppel it was applying. The tribunal noted that the joint venture agreement: (1) expressly affirmed its compliance with relevant statutory law; (2) confirmed that the party signing for the host state had received all necessary authorizations; (3) declared conformity thereof with any judgment or award.[619] Similar compliance representations were given in the concession agreement.[620] The tribunal was careful to underscore that assurances regarding the validity of the aforementioned agreements were given, over the years, by some of the most

dicted in *Occidental* and *Duke Energy*, where tribunals were ready to consider estoppel-based arguments attaching to representations relating to tax.

[617] *Fraport (Award)*, para 347.

[618] *Kardassopoulos*, paras 49-57.

[619] Ibid, para 186.

[620] Ibid, paras 187-188.

prominent officials of the host state, including members of the cabinet of ministers and the president, who also participated in their negotiations.[621] The host state's failure to raise illegality for years following the conclusion of the agreements was held to have created a legitimate expectation that no further objections or reservations shall be lodged. Drawing upon a dictum from *Southern Pacific Properties*, the tribunal concluded that, irrespective of the actual fact of illegality under domestic law, Georgia was estopped from challenging jurisdiction *ratione materiae* of the tribunal as the repeated representations concerning the legality of the agreements were "cloaked with the mantle of Governmental authority" and thus binding.[622] The permissive approach from *Kardassopoulos* was later applied in *Alpha Projektholding*, where the host state's illegality objection was dismissed on the basis that a state agency had explicitly approved of an extension of the investment contracts in issue.[623] Similar arguments have been raised in more recent arbitrations, they were, however, glossed over by the tribunals.[624]

In *Railroad Development Corporation*, the tribunal returned, in the vein of *Fraport (Award)*, to less easily ascertainable "principles of fairness" to estop the host state from objecting to jurisdiction on the ground that its own authority, which entered into an investment contract, acted *ultra vires*. It made no difference to the tribunal that the government did not approve of the conclusion of the contract (which was signed by a state-owned enterprise) or of the making of the investment. It was sufficient that the conduct was attributable to the Guatemalan state, which was accordingly taken to have knowingly overlooked the relevant domestic requirements and effectively endorsed an investment which was not in compliance with its law.[625] This point will be revisited below, however the tribunal, it appears, reconceptualized the factual scenario before it as one where the state enterprise, acting on behalf of the state, impliedly represented to the claimant investor that the investment contract, irrespective of its domestic illegality, shall be upheld and considered legal by the state.

The estoppel plea was not decisive to solve the case, it was nevertheless accepted as defeating two objections in *Bernhard von Pezold*. The case was pursued under the Switzerland-Zimbabwe BIT and the Zimbabwe-Germany BIT and concerned claims by Swiss and German investors in respect of three vast Zimbabwean agricultural estates. The claimants, dual Swiss and German nationals, alleged that a 2005 expropriation without compensation of

[621] Ibid, para 191
[622] Ibid, paras 193-194.
[623] *Alpha Projektholding*, para 302. See also: *Deutsche Bank*, paras 196-197.
[624] *MNSS BV*, para 122; *Gavrilovic*, para 318; *Mobil Exploration*, paras 200-201.
[625] *Railroad Development Corporation*, paras 145-146.

these estates stemming from the host state's land reform programme constituted a breach of several investor protection standards enshrined in the BITs. Zimbabwe raised two objections; (1) an objection that the investments were not approved by appropriate Zimbabwean authorities under Article 9(b) of the Zimbabwe-Germany BIT; (2) an illegality objection to jurisdiction/admissibility[626] that the investments were not made in accordance with the laws of the host state as required by Article 9(a) of the Zimbabwe-Germany BIT and Article 2 of the Switzerland-Zimbabwe BIT ("in accordance with host state law" clauses).[627] The tribunal disposed of those two objections in favour of the claimants.

As regards (1), the tribunal resolved the issue by construing the Zimbabwe-Germany BIT in light of the Protocol thereto, however it also accepted, as an alternative ground, the estoppel argument. The tribunal stressed that the host state's authorities repeatedly expressed approvals in an informal fashion, and considering the convoluted nature of the relevant laws, it was unclear whether any other formal approvals were needed. Although this was not expressly articulated, it appears the tribunal thought the investor, having diligently applied for and obtained a number of authorizations, did enough, and any further requirements now claimed by Zimbabwe were not in good faith.[628] An extensive account was given of the investor's efforts to comply with the domestic legal landscape in response to representations made by the local authorities. The illegality objection got rather short shrift as the tribunal, having analysed relevant Zimbabwean legislation, felt strongly that there was no sufficient basis for a finding of illegality or non-compliance, inferring in the process that a number of requirements said by the host state to have formed part of the laws of Zimbabwe were in fact not in force or were otherwise inapplicable at the time the investment was made.[629] Nonetheless, the tribunal was careful to preface its conclusions with a proviso that even if illegality were to be established, the respondent, taking the totality of circumstances into account, would be estopped from raising it.[630] No further analysis was made of the concept of estoppel being applied or how its requirements were thought by the arbitrators to have been made out on the facts; the detrimental reliance element was not mentioned.

In *Mamidoil Jetoil*, the tribunal saw little room for the application of estoppel on comparable facts. The case concerned a dispute which arose under the Greece-Albania BIT and the Energy Charter Treaty, and pertained to an investment in the late 1990s entailing the con-

[626] Originally presented by the respondent as an objection to jurisdiction, the tribunal ultimately interpreted it as one going to admissibility. *Bernhard von Pezold*, para 403.
[627] Ibid, paras 356-359.
[628] Ibid, paras 411-414
[629] Ibid, paras 417-422.
[630] Ibid, para 416.

struction and operation of petroleum-storage facilities (tank farms) in the Albanian port of Durres, along with the conclusion of a lease agreement for the project site. The investor claimed expropriation, a breach of the FET standard and application of discriminatory measures in relation to a ban on transport of fuel products at the Durres port effective in 2009. Albania raised an illegality objection to jurisdiction, contending that the investor had failed to obtain necessary construction and exploitation permits. This was countered by the claimant with an estoppel argument relying on the fact that the investment was solicited by the highest-ranking officials in the Albanian government and, subsequently to the construction of the tank farm, for years no protest or reservation were lodged by any competent authority.[631]

The estoppel plea was rejected by the tribunal, which effectively sided with the host state on the point that estoppel was to be available only in "exceptional circumstances".[632] Arbitrators disagreed with the claimant on a number of factual submissions, crucially concluding that the host state had raised doubts regarding the legality of the investment prior to the alleged expropriation.[633] No subsequent implied issuance of permits could be inferred on the facts, nor a waiver of the legality requirements or an affirmation of legality. Notwithstanding, it should be added that the tribunal ultimately found jurisdiction as Albania was open to allowing the investor to cure the shortcomings and take steps towards legalizing the investment. Further, the host state refrained from exercising its rights under relevant domestic legislation which empowered it to, *inter alia*, order the demolition of the tank farm or impose an administrative sanction. Instead, the government invited the claimant to submit administrative applications anew in proper form and accompanied by the necessary statutory documentation.[634]

Where parties have agreed to an arrangement which transpired to be contrary to the host state's domestic law, recent authority suggests that estoppel will be available. In *Karkey Karadeniz*, Pakistan alleged that a number of investment contracts concluded breached provisions of Pakistan's domestic public procurement laws. An initial understanding reached by the parties was subsequently amended numerous times which, in the host state's opinion, shifted the transactional balance substantially in favour of the investor and to the detriment of Pakistan.[635] The tribunal, having reiterated the principle that a host state cannot avoid jurisdiction under the BIT by invoking its own failure to comply with domestic law and drawing upon a

[631] *Mamidoil Jetoil*, paras 315-320.
[632] Ibid, paras 468-470.
[633] Ibid, para 472.
[634] Ibid, paras 490-494.
[635] *Karkey Karadeniz*, para 621.

passage from *Kardassopoulos*, drew attention to inconsistencies in the conduct of Pakistan. First, the host state's representations before the tribunal regarding the validity of the contracts were in direct contradiction with its position maintained in parallel proceedings before the municipal supreme court. Second, throughout the public procurement bidding procedure, the investor was assured on numerous occasions by the host state of the investment's compliance with domestic and international bidding standards. Further, the contracts contained specific clauses confirming their validity and compliance with applicable laws. This course of action was considered by the tribunal to be sufficient to infer a clear and unambiguous representation, coupled with good faith reliance on the part of the investor. Subsequently, the estoppel claim was allowed and Pakistan was precluded from raising an illegality objection based on the alleged incompliance of the investment contracts with domestic law.[636]

Estoppel appears to have played an interpretation role in determining whether the host state was successful in proving illegality of the investment. In *Kim*, in response to the parties presenting two opposing concepts of estoppel, a majority of the members of the tribunal, having found that the evidence adduced by the respondent did not evince illegality of the investment, admitted that the equitable notions underlying the claimants' argument, in particular the weight to be accorded to the host state's inaction and a failure to lodge a protest earlier, were taken into account when assessing the significance of the obligation to the state and the seriousness of the investor's conduct.[637] In this way, it appears, the equitable core of estoppel was subsumed under the threshold of illegality. Notably, the illegality test adopted by the majority also incorporated elements of proportionality – even if the investor could be said to have acted in contravention of domestic laws, such acts of non-compliance could not result "in a compromise of an interest that justifies, as a proportionate response, the harshness" of denying jurisdiction.[638]

An estoppel claim was denied in *Cortec Mining*. The claimants alleged that the host state, contrary to Article 5 of the United Kingdom-Kenya BIT, expropriated the investor's mining license. In 2015, the Kenyan highest instance court ruled that a mining license granted several years prior to the investor by an outgoing mining commissioner was void *ab initio* for illegality and did not exist as a matter of law. Alternatively, it was concluded that at any rate the claimants had not satisfied the prerequisites for granting a licence under Kenyan law. It

[636] Ibid, paras 624-628. The case is also notable for endorsing a high burden of proof for corruption defences. See: B.K. Greenwald, J.A. Ivers, "Addressing Corruption Allegations in International Arbitration", 2(3) Brill Research Perspectives in International Investment Law and Arbitration 2018, pp. 16-17.
[637] *Kim*, para 539, footnote 405.
[638] Ibid, para 541.

was this judicial conclusion that later served as the basis or Kenya's objection to jurisdiction of the ICSID arbitral tribunal. The claimants countered, *inter alia*, with an estoppel claim, arguing that it believed in good faith the license was valid, which was ultimately rejected. The tribunal disputed the reasonableness of reliance of the investor, inferring it from Cortec's attempts to influence state officials through the back channels. The tribunal was particularly disappointed with the fact that the investor, once it was informed of the license's incompatibility with domestic law, did not make meaningful efforts to attempt to bring its business activity in line with the regulations.[639]

4.3. Other cases of one-sided illegality – investor fraud

Corruption and a failure to comply with a host state's domestic requirements governing the making of investments do not exhaust the category of possible instances of illegality of investments. Wilful fraud on the part of the investor may render estoppel arguments inadmissible. In *Churchill Mining (Award)*, a British and an Australian investor lodged claims under the United Kingdom-Indonesia and Australia-Indonesia BITs, respectively, arising from alleged failures of the host state to protect investments in a thermal coal mining project in the East Kalimantan province of Indonesia. The claimants specifically alleged that four mining licences secured in 2007 were revoked by the authorities unilaterally without due process and any cogent legal justification. The tribunal, upon a careful examination of evidence adduced by the host state, concluded that the a number of documents used to apply for the mining licence were forged and as such the investment was procured by fraud. Although the actual perpetrator of the forgeries was not identified, it was clear for the tribunal that the investors failed to verify and enquire about the conduct and business practices of a local business partner, and neglected to investigate the first indications of forgery as soon as they came to light.[640] In conclusion, the claims were held to be inadmissible,[641] and the tribunal did not address the pleas of estoppel advanced extensively by the claimant during the proceedings. In essence, the host state were to be estopped from alleging that the claimants facilitated the fraud at this late stage because it had not raised this argument before the hearing which led the

[639] *Cortec Mining*, para 222. For more, see: L. Cotula, J.T. Gathii, "*Cortec Mining Kenya Limited, Cortec (Pty) Limited, and Stirling Capital Limited v. Republic of Kenya*", 113(3) American Journal of International Law 2019, p. 574 et seq.
[640] *Churchill Mining (Award)*, paras 518-526.
[641] Ibid, paras 528-531.

investors not to take account of possible allegations of fraud in their preparation of defences.[642]

The ad hoc annulment committee in its decision on annulment, confirming the tribunal was right in not considering any of the investor's defences, strongly suggested that as fraud went to the core of the investment and constituted a primary vehicle for its procurement, the estoppel argument, grounded in the principle of good faith, was not available:

> "[T]he Tribunal did not wish to inquire about the facts on estoppel, and made no ruling on estoppel in the Award. Instead, the Tribunal accepted in the Award the State's argument that failure to conduct proper diligence precluded Churchill and Planet from even invoking estoppel (or acquiescence): "the general principle of good faith and the prohibition of abuse of process entail that the claims before this Tribunal cannot benefit from investment protection under the [BITs] and are, consequently, deemed inadmissible." Fraud infected every aspect of the investment. Given the seriousness of the forgery, the Tribunal found no need to delve into the estoppel issue. The Committee's conclusion on estoppel also applies to all legal theories based on the same facts, which included good faith".[643]

The committee's observation appears to be deeply inspired by a good-faith based principle of public policy that the arbitral tribunal shall not assist parties which resorted to illegal behaviour to achieve their objectives.[644] The principle may be said to further the rule of law where the illegality is one-sided, with the host state oblivious in good faith thereto. Concurrently, there is an implied suggestion in the tribunal's dictum that there is a sliding scale governing the availability of estoppel, in line with which an investor pursuing its claims with unclean hands may be denied relief. The clean hands doctrine was not mentioned by name by the tribunal and as a concept its recognition in international investment arbitration is rather new and not entirely solidified, especially as regards its classification as a general principle of law.[645] All the same, the annulment committee in *Churchill Mining (Annulment)* alluded to

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[642] Ibid, paras 212-214.
[643] *Churchill Mining (Annulment)*, para 200.
[644] *Churchill Mining (Award)*, para 528. See: C. Le Moullec, "*Churchill Mining Plc and Planet Mining Pty Ltd v Republic of Indonesia*, ICSID Case No. ARB/12/14 and 12/40, Award, 6 December 2016", 2(1) European Investment Law and Arbitration Review Online 2017, p. 149.
[645] See e.g.: J. Seifi, K. Javadi, "The Consequences of the "Clean Hands" Concept in International Investment Arbitration", 19 Asian Yearbook of International Law 2013, pp. 132-143; P. Dumberry, "State of Confusion: The Doctrine of 'Clean Hands'…", see note 610, pp. 241-252; O. Pomson, "The Clean Hands Doctrine in the *Yukos* Awards: A Response to Patrick Dumberry", 18(4) Journal of World Investment & Trade 2017, p. 727 et seq.; P. Dumberry, "The Clean Hands Doctrine as a General Principle of International Law", 21(4) Journal of World Investment & Trade 2020, p. 489 et seq.; M. Kałduński, "Principle of Clean Hands and Protection of

the fact that the seriousness of a party's wrongdoing may adversely affect its chances of succeeding or, moreover, their options for proving its case. Separately, the investor, to avail itself of estoppel, shall have to demonstrate it performed necessary due diligence.[646]

4.4. Corruption-based illegality of investment

The paradigm awards in this field are *World Duty Free* and *Metal-Tech*. An estoppel claim was only raised in the former case, however both will be discussed as suitable expositions of the type of case that, according to my argument advanced herein, should be susceptible to estoppel.

In *World Duty Free*, a claim brought under an investment contract in which it was alleged, *inter alia*, that the host state expropriated the investor's duty-free concession by appointing a receiver over its operations, the tribunal established that the claimant had bribed the President of Kenya to obtain a concession agreement and that the agreement was therefore illegal and could not be enforced. The investor adduced evidence that the payment was solicited by the Kenyan President, who told the claimant's representative this was "Protocol in Kenya" and "[it] didn't have a choice if [it] wanted the investment contract".[647] World Duty Free contended that the actions of the President and his aides and associates were to be attributed to the Kenyan state and since both parties went on to perform their side of the bargain, the host state should be estopped by conduct.[648] The tribunal disagreed. The conduct of the Kenyan President could not be attributed to the host state.[649] The investment contract and the concession were void *ab initio* due to having been procured by corruption and therefore any preclusive effect of estoppel that could have operated was vitiated by this fundamental legal defect.[650]

In *Metal-Tech*, an investor brought a claim under the Israel-Uzbekistan BIT for alleged, *inter alia*, breaches of the FET standard, a failure to accord to the investment full and constant protection and security, as well as expropriation of Metal-Tech's investment without

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Human Rights in International Investment Arbitration", 4(2) Polish Review of International and European Law 2015, pp. 85-93. The clean hands principle is mentioned again below when discussing the availability of estoppel in challenges to jurisdiction raised in cases involving corruption. See also: *Philip Morris Brands*, paras 348-350, for an argument that the clean hands doctrine is not to be classified as a principle of international investment law.

[646] This requirement is discussed at more length in Section 2.6.3.1 *in fine*.

[647] Paras 13 and 19 of Mr. Nasir Ibrahim Ali's (the CEO of World Duty Free Company Limited) witness statement, reproduced in *World Duty Free*, para 130.

[648] *World Duty Free*, para 114.

[649] Ibid, para 185.

[650] Ibid, para 164, quoting a legal opinion by Lord Mustill submitted by Kenya.

due process and payment of prompt, adequate, and effective compensation.[651] After the proceedings commenced, the host state alleged that Metal-Tech, alongside entering into an investment contract, paid substantial bribes to five local "fixers" for the purposes of corrupting high-ranked Uzbek officials in order to obtain the contract. One of those persons was to be the Prime Minister of Uzbekistan's brother. The investor's CEO confirmed during a hearing that payments were made under consulting agreements with the intention of procuring the investment contracts under dispute, and produced further evidence of corruption. The tribunal declined jurisdiction on the basis of illegality of the investment, pursuant to Article 1(1) of the BIT which defined protected investments as "any kind of assets, implemented in accordance with the laws and regulations" of the host state.[652]

While receptiveness to estoppel arguments in cases involving corruption allegations has been minimal, it should be said that arbitral tribunals have inferred certain consequences from the detection of corruption on the part of the host state. The *World Duty Free* and *Metal-Tech* tribunals both refused to award costs to Kenya and Uzbekistan, respectively.[653] In the latter case, it was determined that the tribunal lacked jurisdiction to consider the host state's counterclaims on account of the corruption.[654] In *Spentex*, a 2016 confidential case, the host state was mandated to either pay a lump sum of USD 8 million to an anticorruption fund of the United Nations Development Programme or, failing it, pay the costs of the proceedings and reimburse 75 percent of the investor's legal fees.[655]

A related case, one that straddles the boundary between ordinary illegality and corruption, deserves a mention in this context. In *Customs and Tax Consultancy*, the host state (Democratic Republic of the Congo) was estopped from claiming illegality of the investment (alleged award of an investment contract in violation of local public procurement laws as no open bidding process was held). The tribunal emphasized a line of clear representations in the form of statements and assurances given to the investor that the contract was valid, including official pronouncements in state media. Alternatively, the DRC argued that the lack of an open, transparent tender breached the state's obligations under the United Nations Convention against Corruption. This point was ultimately left open by the tribunal because the DRC did

[651] *Metal-Tech*, para 55.
[652] Ibid, paras 372-374.
[653] *World Duty Free*, para 190; *Metal-Tech*, paras 420-422.
[654] *Metal-Tech*, paras 405-413.
[655] D.M. Orta, „Allegations of Corruption in Investment Treaty Arbitration: the Need for Reform", Expert Guides, 17 September 2019, available at: https://bit.ly/3q2X4D8 (accessed: 24.08.2021); V. Djanic, „In Newly Unearthed Uzbekistan Ruling, Exorbitant Fees Promised to Consultants on Eve of Tender Process are Viewed by Tribunal as Evidence of Corruption, Leading to Dismissal of all Claims under Dutch BIT", "Investment Arbitration Reporter", 22 June 2017, available at: https://bit.ly/2LhFCMH (accessed: 24.08.2021).

not allege that the investor engaged in corruption or bribery, but rather that it was the state itself that failed to honour its obligations arising by virtue of the Convention. It was ultimately held that not every instance of non-compliance with international obligations to combat corruption shall amount to a breach of the international public order which would vitiate the investment contract. Further, the tribunal agreed with the claimants that no automatic presumption of corruption shall arise every time a failure to comply with the preventative measures enshrined in the Convention is inferred. Thus, a clear differentiation was made between one-sided state failings related to the implementation of Convention-mandated systemic and procedural safeguards against corruption (which would not lead to invalidity of the investment contract and therefore lack of arbitral jurisdiction) and, on the other hand, instances of investor corruption.[656]

4.5. Potential for the application of estoppel to defeat illegality-based objections to jurisdiction

4.5.1. Ordinary illegality

The availability of estoppel with regard to instances of ordinary illegality, consisting in a failure on the part of an investor to comply with all attendant administrative or regulatory requirements in good faith reliance upon representations of the host state, appears to be recognized in arbitral practice. The tribunals in *Fraport (Award)* and *Kardassopoulos* appeared to have endorsed a broad notion of estoppel by focusing on inconsistency of conduct. The tribunal in *Karkey Karadeniz* followed suit, and here the estoppel claim raised by the investor succeeded. Arbitrators in *Bernhard von Pezold* failed to give a cogent explanation of the concept of estoppel they purported to endorse. On the other end of the spectrum, *Kim* and *Cortec Mining* applied a strict view of estoppel. The claim did not succeed in *Kim*, however the tribunal admitted it availed itself of the interpretation function of estoppel in deciding whether the investment in issue was illegal. Estoppel failed in *Cortec Mining*, however, I submit, this was largely due to the claimant's wrongdoing – this would distinguish the case, placing it somewhere between ordinary illegality cases and cases of the *Churchill Mining* type. Prescriptively, the general principle enunciated in *Kardassopoulos* and *Fraport (Award)* should be emulated by future tribunals, building on its pillars rooted in inconsistency of conduct to

[656] D. Charlotin, "In Newly-Surfaced Award, ICC Tribunal Rejects Government's Attempt to Use UN Convention on Corruption – and Non-Public Tendering of Contract – to Argue for Illegality of Investment", "Investment Arbitration Reporter", 17 June 2018, available at: https://bit.ly/2LjvSl4 (accessed: 24.08.2021).

transform it into a specialized estoppel principle encompassing the element of detrimental reliance. In doing so, it is submitted tribunals should have particular regard to the following:

- whether the investor had any knowledge that the investment did not comply with the domestic requirements; if it did, then no good faith reliance can be established;
- whether the host state made representations that the investment will be considered legal or otherwise valid despite a failure to comply;
- whether the domestic requirements alleged by the host state to have been flouted are indispensable for the exact type of investment in issue;
- whether the investor enquired with the host state about the investment's compliance; whether it conducted any due diligence in relation to the conditions of doing business in the host state; the level of familiarity of the investor with the host state's legal, political and economic climate could also be drawn upon as an indicator of whether its reliance was in good faith.

As a viable alternative, resort could be had to cases like *ADC Affiliate Limited*, where, although it appears the tribunal conflated waiver and estoppel, the following passage, referring squarely to the fact that the host state knowingly entered into investment agreements that subsequently turned out to be void *ab initio* under domestic law, appears to conceptualize the issue in terms of the strict concept of estoppel, underscoring in particular the fact that Hungary obtained a benefit by virtue of performance of the contracts (benefit which can be situated within the ambit of detrimental reliance):

> "If any of the suite of Agreements in this case were illegal or unenforceable under Hungarian law one might have expected the Hungarian Government or its entities to have declined to enter into such an agreement. However when, after receiving top class international legal advice, Hungary enters into and performs these agreements for years and takes the full benefit from them, it lies ill in the mouth of Hungary now to challenge the legality and/or enforceability of these Agreements. These submissions smack of desperation. They cannot succeed because Hungary entered into these agreements willingly, took advantage from them and led the Claimants over a long period of time, to assume that these Agreements were effective. Hungary cannot now go behind these Agreements. They are prevented from so doing by their own conduct. In so far as illegality is alleged, they would in any event be seeking to rely upon their own illegality".[657]

[657] *ADC Affiliate Limited*, para 475.

This approach reinforces many of the arguments already advanced above, notably the fact that the host state by advancing an ordinary illegality-based jurisdictional objection purports to rely effectively on its own illegality or own failure to counteract such illegality. But the emphasis on the benefit the host state obtained by virtue of the contracts could be conveniently utilized in tandem with the observations made by the *Kardassopoulos* and *Fraport (Award)* tribunals to increase the chances of an estoppel argument succeeding in such circumstances.

An opinion has been put forward by Hepburn that estoppel arguments are in tension with the professed commitment of investment treaties to respect objective legality, expressed in such cases as *Plama, Anderson* and *Feldman Karpa*. Estoppel is liable to upend the letter of domestic statute and the meaning of any legal arrangements the parties may have had. Further, estoppel is said to stand contrary to the exact principle that it is perceived by many to be an embodiment of – fairness understood as equality in the eyes of the law. An investor whose estoppel argument succeeds, so that certain domestic law requirements are excluded or waived, is treated differently from all other investors who bear the burden of complying therewith. Further, it has been raised that investors who had taken steps to do proper due diligence and familiarize themselves with the host state's domestic regulations are placed at a disadvantage as against other investors who instead relied on specific individualized assurances. Moreover, by reference to cases such as *Arif*, Hepburn contends that estoppel cannot operate to preclude host states from relying on certain fundamental, constitutional provisions of its own law (in *Arif*, it was the prohibition on foreign ownership of strategic resources).[658]

To address the foregoing arguments, I submit that not enough attention is given to the requirements for the strict view of estoppel to arise. The objection that estoppel is susceptible to hampering the operation and upholding the rule of law can be countered by pointing to the fact that a claimant must show good faith reliance upon a given representation. Consequently, whilst it could transpire in a particular case that domestic law of the host state is overridden by estoppel, this is entirely owing to the exercise of the sovereign powers of the state which effectively relinquished a portion of its sovereignty by, first, entering into an investment treaty, and second, representing, within its contained regime, a position contrary to its internal law which must then give way to estoppel as an international legal principle to which primacy must be accorded. It is a questionable proposition to argue that the rule of law is furthered where host states are absolved of any responsibility for contradicting it in the first place –

[658] J. Hepburn, "In Accordance with Which Host State Laws?...", see note 612, pp. 549-558.

where the state represents that a given administrative or regulatory requirement is to be waived, this could well fit the description of a violation of the rule of law. To the argument concerning the investors' obligation to conduct legal due diligence prior to embarking on an investment, this appears to be a matter of degree and not of kind. At any rate, it is unrealistic to expect a foreign investor to have better knowledge of the local requirements than the host state itself. This, then, goes back to the good faith (reasonableness) of reliance. Where a host state made a representation that happened to contradict a provision of internal law, it is for the tribunal to assess whether the investor was justified in its reliance. As estoppel's requirements relating to the quality of representations are interconnected, the tribunal will have to take account of the clarity and unambiguity of the statement, its frequency (whether it was repeated) and voluntariness – concessions forced out of host states by a blackmailing investor will not give rise to estoppel. The objections laid out above will hold true, but to a degree. Estoppel will not lead to unjustified discrepancies in treatment between investors. Instead, it will only realistically correct them to account for the host state's conduct which could have misled the investor or otherwise generated a good faith conviction that no further legal steps are to be taken, subject to verifying whether reasonable due diligence (such as seeking local advice or the engagement of a local business partner) was conducted.

On a separate point, recent arbitral jurisprudence could signal a retreat from the absolutist stance towards illegality, exhibited in cases such as *Phoenix Action*,[659] towards a more substantive approach, focused more on the significance of a violation and not on the type of domestic law being subject to a breach. Attention is directed in this connection particularly to the aforementioned case of *Kim* where a three-prong test of illegality was proffered. Tribunals, in contemplating a denial of jurisdiction on account of ordinary illegality, should consider the following: (1) significance of the investor's obligation under domestic law; (2) seriousness of the investor's conduct; (3) whether the juxtaposition of the domestic law and the investor's violation thereof leads to a compromise of a material interest vested in the host state

[659] The case is relied upon as authority for the proposition that investor protection under BITs is impliedly conditional upon the investment's conformity with host state domestic law. See: *Phoenix Action*, paras 101-106. A dictum from the case was later cited, *inter alia*, in *Gustav F W Hamester*, para 123. See: R. Moloo, A. Khachaturian, "The Compliance with the Law Requirement in International Investment Law", 34(6) Fordham International law Journal 2011, pp. 1486-1489; M. Lawry-White, "International Investment Arbitration in a *Jus Post Bellum* Framework", 16(4) Journal of World Investment & Trade 2015, p. 657; E. Sipiorski, *Good Faith in International Investment Arbitration*, Oxford University Press 2019, pp. 99-100; C.A. Miles, "Corruption, Jurisdiction and Admissibility…", see note 566, p. 349. It should be added, however, that for the *Phoenix Action* tribunal domestic illegality was not necessarily a jurisdictional requirement – it was one of admissibility to be resolved on the merits provided that a violation was not "manifest". See: C.N. Brower, J. Ahmad, "The State's Corruption Defence, Prosecutorial Efforts, and Anti-corruption Norms in Investment Treaty Arbitration" (in:) K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues*, 2nd edition, Oxford University Press 2018, p. 460.

so grave that to deny the investment the BIT's protection constitutes a proportionate consequence of the investor's conduct.[660] This development is to be welcomed as an appropriate recognition of the realities of foreign investment and a departure from the strictures of the *Phoenix Action* test of illegality. As such, host states can rely on interest-based objective criteria to determine whether a given violation attaches to a legal provision deemed fundamental within their domestic constitutional systems. Finally, the test injects a measure of fairness into the equation by relying on the concept of proportionality.[661] Consequently, should those arbitral tribunals which elect to follow the *Kim* test decline to use their latitude to deny jurisdiction on an all-or-nothing approach in ordinary legality cases, the objective now pursued by the estoppel principle (curbing the host states' use of illegality-based objections) would nevertheless be achieved, albeit by a different avenue.

By reference to *Kim*, it appears that there are good reasons to abandon the dichotomy between breaches of fundamental/other provisions of domestic law, and to accept, by extension, the application of estoppel to all cases of ordinary illegality. Further support is gleaned from arbitral practice. That breaches of a fundamental constitutional provision exclude the applicability of estoppel is contradicted by *Bankswitch* where the host state objected to jurisdiction on the grounds of illegality of the investment, arguing that a constitutional provision (Article 181(5) of the Constitution of Ghana), requiring parliamentary approval of international transactions, was not complied with. The tribunal held that the claimant was under no obligation to know the provision, much less to seek parliamentary approval of the transaction; these items were the burden of the host state as the only entity in the context of the dispute which had the standing to do it.[662] It appears that the host state's inconsistent arguments during proceedings had much weight in the tribunal's reasoning, for Ghana contended, on the one hand, that the investor, as a domestically-incorporated entity, should have known about the existence and implications of Article 181(5), on the other, however, it maintained that the provision nevertheless applied (which it should not if the investor was indeed to be considered a domestic entity). The tribunal accorded no importance to the status of the provision within Ghana's legal system.[663] A similar approach to estoppel was adopted in *Balkan Energy*,[664] a

[660] *Kim*, paras 406-408.
[661] S. Luttrell, "Fall of the Phoenix: a New Approach to Illegality Objections in Investment Treaty Arbitration", 44(2) University of Western Australia Law Review 2019, p. 140.
[662] *Bankswitch*, paras 11.45-11.70.
[663] D. Charlotin, L.E. Peterson, "Analysis: Arbitrators See Two Ways in Which International Principle of Estoppel can be Imported into a Contract Governed Solely by Domestic Law", "Investment Arbitration Reporter", 18 September 2017, available at: https://bit.ly/3nEzmLM (accessed: 24.08.2021). I submit that whilst the case espouses an important principle that estoppel can be used even in cases where there is an alleged breach of a constitutional domestic provision, other parts of the tribunal's reasoning, which are beyond the scope of our inquiry,

case decided shortly before *Bankswitch*, as well as in *Webcor* where the tribunal upheld the validity of state contracts (and thus its own jurisdiction) despite them not being ratified by Gabonese parliament, in contravention of a constitutional domestic provision.[665]

4.5.2. Corruption-based illegality

An important reservation must be made upfront. My argument in favour of potential application of an estoppel is not applicable to cases of one-sided investor illegality of the type discussed in Section 4.3 as there is no room for an investor-friendly application of a general principle of law underpinned by good faith where the party claiming it engaged wilfully in conduct contrary to domestic laws without the (even imputed) knowledge, participation or condonation from the host state. The ambit of my contention is confined to situations where fault is, at least to a significant degree, mutual and, *a fortiori*, the graver cases where the political climate and investment conditions in the host state are such that corruption activity is invited or expected, and at any rate a necessary precondition for the making of an investment.

Cases involving corruption are fitting examples of illegality occurring on both sides of an investment. Corruption is two-sided by its nature even if the recipient is technically passive.[666] Where an arbitral tribunal refuses to consider a claim tainted by corruption, this could have the effect of depriving the investor of any recourse to a dispute resolution mechanism whilst reprieving host states whose officials engaged in bribery or other corrupt acts. The following quote from *Metal-Tech* shall serve as the point of departure:

> "While reaching the conclusion that the claims are barred as a result of corruption, the Tribunal is sensitive to the ongoing debate that findings on corruption often come down heavily on claimants, while possibly exonerating defendants that may have themselves been involved in the corrupt acts. It is true that the outcome in cases of

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should be approached with caution (estoppel was, *inter alia*, considered a principle of customary international law and the tribunal controversially applied it to a contract governed exclusively by domestic law). On the latter aspect, see: J. Arato, "The Private Law Critique of International Investment Law", 113(1) American Journal of International Law 2019, pp. 27-28.

[664] D. Charlotin, "In Now-Public Award, Arbitrators Interpret Ghana's Constitution and Disagree with Supreme Court's Reading of Key Provision; Gov't is Estopped From Arguing that Contract is Invalid due to Lack of Parliamentary Approval", "Investment Arbitration Reporter", 2 April 2017, available at: https://bit.ly/35FjGlA (accessed: 24.08.2021).

[665] D. Charlotin, "In *Webcor v. Gabon* Award, an ICC Tribunal Finds that State is Estopped from Contesting Validity of Contracts", "Investment Arbitration Reporter", 1 November 2018, available at: https://bit.ly/3xvK3oU (accessed: 24.08.2021).

[666] A. P. Llamzon, "On Corruption's Peremptory Treatment in International Arbitration: State Responsibility, Unclean Hands, and the Return of Corruption as a Jurisdictional Issue" (in:) D. Baizeau, R. Kreindler (eds), *Addressing Issues of Corruption in Commercial and Investment Arbitration*, International Chamber of Commerce 2015, pp. 35-37.

> corruption often appears unsatisfactory because, at first sight at least, it seems to give an unfair advantage to the defendant party. The idea, however, is not to punish one party at the cost of the other, but rather to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act".[667]

The tribunal in that case correctly noted the tension between, on the one hand, assuming jurisdiction over claims arising from investments procured via corruption and concerns for the rule of law, and, on the other, effective assistance that is tendered to host states by refusing to arbitrate. A few preliminary comments must be made in direct response to the foregoing. First, it is difficult to maintain that the rule of law is furthered by allowing host states to effectively benefit from their own corrupt behaviour. Second, the rule of law cannot, I submit, lead to effective promotion of egregious behaviour – a decision to refuse jurisdiction does nothing to deter host states from altering their corrupt practices. Third, this standpoint ignores the rigid economic realities foreign investors encounter. Among the sets of facts in reported arbitral cases there are situations where host states revealed their true intentions after the signing of the investment contract but prior to the commencement of the actual investment. It is one thing to argue that a foreign investor, seeing signs of a corrupt regime, should have refused to enter into a business relationship; it is quite another to demand from such an investor to back away from an already signed investment contract where such a decision constitutes a justiciable breach of contract capable g of giving rise to substantial damages.[668] Further, as a general point, the proposition that upholding public policy should be the objective of investment tribunals is debatable, with Paulsson once remarking that it is the enforcement of international agreements that tribunals should be principally preoccupied with, and propositions to the contrary are misplaced.[669]

A number of authors have accepted that estoppel should preclude a host state from raising objections to the jurisdiction of an arbitral tribunal based on the procurement of the investment through corruption where the host state participated in it or otherwise condoned it or complied with it.[670] Other doctrinal methods of limiting the host state's latitude have also

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[667] *Metal-Tech*, para 389.
[668] This reality was faced by the claimant investor in *World Duty Free*.
[669] J. Paulsson, *Denial of Justice in International Law*, Cambridge University Press 2005, p. 263.
[670] N.G. Ziadé, "Curing the Illness Without Killing the Patient: Prescribing Appropriate Remedies for Findings of Illegality in Investment Arbitration" (in:) A. Menaker (ed.) *International Arbitration and the Rule of Law: Contribution and Conformity*, Kluwer Law International 2017, p. 755; M.A. Raouf, "How Should International Arbitrators Tackle Corruption Issues?", 24(1) ICSID Review - Foreign Investment Law Journal 2009, p. 135; M. Reeder, "Estop That! Defeating a Corrupt State's Corruption Defense to ICSID BIT Arbitration", 27(3) Ameri-

been proffered,[671] including by authors sceptical about the use of estoppel in this context[672], and, at any rate, unbounded use of the corruption defence has been noted and warned against by numerous writers.[673] As regards arbitral practice, it was demonstrated above that estoppel has been discussed in such circumstances, albeit sparingly, and has not been successfully applied in a widely reported case.

What follows is a discussion of three accounts proffered in academic literature, which are aimed at precluding by means of estoppel corruption defences raised by participating or condoning states.

Lim, applying estoppel to the facts of *World Duty Free*, concluded that the host state, by its conduct, manifested sufficiently clearly its will (in other words, made a clear, unambiguous and unconditional representation) that they shall recognize a corruptly procured investment as being valid and entitled to protection and fair treatment. The state of affairs brought about by such representations, under which the investment is now to be considered legal under domestic law, is opposable to the host state which shall thus be estopped from subsequently raising the investor's acts of corruption as a basis for the investment's illegality. Lim argues that the preclusive effect of estoppel in this context should prevent the host state not only from raising objections to jurisdiction, but also from invoking corruption as a justification for improper acts of interference with the investment at the merits stage. Estoppel is activated by virtue of the investor's detrimental reliance upon the host state's representations regarding the notional domestic legality of the investment. The detriment would normally consist in incurring costs associated with the making of the investment, which is accompanied, on the side of the host state, with an advantage in the form of reaping the investment's economic benefits.[674]

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can Review of International Arbitration 2016, pp. 313-325; K. Lim, "Upholding Corrupt Investors' Claims…", see note 97, p. 630 et seq.; A.T. Bulovsky, "Promises Unfulfilled: How Investment Arbitration Tribunals Mishandle Corruption Claims and Undermine International Development", 118(1) Michigan Law Review 2019, pp. 136-141; C.N. Brower, J. Ahmad, "The State's Corruption Defence, Prosecutorial Efforts…" see note 659, pp. 466-468.

[671] See e.g.: J. Drude, "*Fiat Justitia, ne pereat mundus*: A Novel Approach to Corruption and Investment Arbitration", 35(6) Journal of International Arbitration 2018, pp. 695-716 (proposing, *inter alia*, waiver and acquiescence); C.N. Brower, J. Ahmad, "The State's Corruption Defence, Prosecutorial Efforts…" see note 659, pp. 468-481 (considering a number of methods, including specific treaty stipulations and arbitral review of findings of corruption made by host state municipal authorities); A.P. Llamzon, *Corruption in International Investment Arbitration*, Oxford University Press 2014, pp. 268-275 (discusses estoppel alongside acquiescence, waiver and consent).

[672] See e.g.: J. Hepburn, *Domestic Law in International Investment Arbitration*, Oxford University Press 2017, p. 160; B.K. Greenwald, J.A. Ivers, "Addressing Corruption Allegations…", see note 636, pp. 75-83.

[673] T. Meshel, "Use and Misuse of the Corruption Defence in International Investment Arbitration", 30(3) Journal of International Arbitration 2013, pp. 275-281; D. Baizeau, T. Hayes, "The Arbitral Tribunal's Duty and Power to Address Corruption Sua Sponte" (in:) A. Menaker (ed.) *International Arbitration and the Rule of Law: Contribution and Conformity*, Kluwer Law International 2017, p. 225 et seq.; A.I. Pulle, "Demand Side of Corruption and Foreign Investment Law", 4(1) Journal of International and Comparative Law 2017, p. 20 et seq.

[674] K. Lim, "Upholding Corrupt Investors' Claims…", see note 97, p. 664.

Notably, this view sidesteps the question of whether corrupt acts perpetrated by state officials are attributable to the state – instead, it relies purely on estoppel logic. A representation, on this account, would cover refraining from disputing the validity of a corruptly procured investment (and, by extension, the jurisdiction of an arbitral tribunal) irrespective of the source (i.e. the ranking of the state official(s) who participated) or basis of corruption. Attribution of corrupt activity is not necessary to successfully establish the estoppel claim as the representation is taken to consist in a statement of fact that the host state guarantees to be true irrespective of what actually transpires.

One reservation can be made to Lim's proposition. For he tends to classify the estoppel-inducing representation as a "manifestation of will to be bound". To the extent that this suggests an importation of the requirements enshrined in Principle 1 of the GPAUD, it is misplaced. For the preclusive effects of estoppel to arise no firm intention to be bound must be discernible in the representation.[675]

Reeder's approach is based on three assumptions:

(1) arbitral tribunals must reconsider and ultimately distinguish the 1963 dictum of Judge Gunnar Lagergren in *ICC Case No. 1110*;
(2) the understanding of estoppel adopted in the current ICSID case law is capable of accommodating a defeat of a corruption defence;
(3) a correct application of the strict view of estoppel could override the dicta in *World Duty Free* and *Metal-Tech*.[676]

These arguments will now be considered in turn.

(1) In *ICC Case No. 1110*, an international commercial arbitration between two private parties, Judge Lagergren declined jurisdiction as he inferred that 10% commissions to be paid on the basis of an agency agreement between an undertaking and an Argentine businessman represented exorbitant sums of money, some of which were to be paid as bribes to a public official. As such, the agreement was invalid and non-arbitrable as a matter of transnational public policy.[677] A contrary argument proceeds on the footing that, first, whilst the contract examined in the ICC case was unlawful, a host state's corruption defence will typically attach to an underlying investment that is legal. Second, as both parties to the agreement were private citizens, there was no disproportion of power that is

[675] This is addressed further in Section 1.3.1.
[676] M. Reeder, "Estop That! Defeating a Corrupt State's Corruption Defense…", see note 670, p. 313.
[677] The text of Judge Lagergren's award is reproduced in full in: J. Gillis Wetter, "Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren's 1963 Award in ICC Case No. 1110", 10(3) Arbitration International 1994, p. 277 et seq.

observable in investment arbitration. Each of the private parties that assented to the contract subject to the ICC arbitration borne equal and full risk of a breach. On the contrary, in investment arbitration claimants are always private parties which face sovereign states, therefore it is invariably the latter that stand to benefit from successfully raising a corruption defence and the private claimant that bears all the risk. Lastly, it is argued that the underlying public policy interests vary between private arbitration and investor-state arbitration. In the former case, it is immoral for private parties to ask an arbitration forum to validate an otherwise illegal contract, especially where both parties share a common corrupt purpose. In the case of investment arbitration, the primary objective is, Reeder contends, the protection of investors from abuses of state power. This is upended where, as a result of a successful corruption defence, the host state effectively gains additional power over investors beyond that granted thereto in a governing treaty or contract. It is the exact provenance of estoppel to prevent an agent from holding an adversary liable for breach whilst avoiding liability for its own breach.[678]

(2) Reliance is placed on *Fraport (Award)*, *Siag (Award)* and *Kardassopoulos* to argue that actions of corrupt officials should be attributed to the host state and knowledge of corrupt actions should be imputed thereto.[679] In *Siag (Award)*, the host state purported to object to jurisdiction on the grounds that the claimant lacked *ius standi* on account of him having been declared bankrupt by a local Egyptian court, which took away his legal capacity to consent to arbitration. The tribunal, relying on Draft Articles 4 and 7 of the DARSIWA and *Saipem*, imputed Egypt's judiciary's knowledge of the claimant's bankruptcy to the Egyptian state, and consequently assumed jurisdiction over the claim. Crucially, the tribunal asserted that even illegal conduct and conduct which transgresses the authority of a state organ is attributable to the state under Draft Article 7.[680]

(3) A clear division, Reeder contends, should be made between void *ab initio* and voidable contracts. Accordingly, investment contracts procured by corruption should be assigned to the latter category as their underlying terms are legal. *World Duty Free* is said to have conflated both types of contract and subjected them to the same all-or-nothing approach. Further, claimants should ask tribunals to apply Draft Article 7 of the DARSIWA in reliance upon the dictum in *Siag (Award)*. *World Duty Free* is at odds here as the conduct of the Kenyan President was effectively held to be incapable of being attributed to the state,

[678] M. Reeder, "Estop That! Defeating a Corrupt State's Corruption Defense…", see note 670, pp. 315-317.
[679] Ibid, pp. 318-320.
[680] *Siag (Award)*, para 195.

thus making it impossible to ever hold a state responsible for solicitation of corruption. A proper litigation strategy must also be adopted – it is for the claimant investor to admit upfront involvement in a corrupt scheme and implicate the host state in the same. A failure of the state to absolve itself of responsibility should ground a finding of jurisdiction and a successful estoppel claim.[681]

Bulovsky attaches more weight to the inconsistency in a host state's conduct where it engages in corrupt activity having made corruption illegal and having assented to international legal instruments setting out standards for the prevention of corruption. In such cases, estoppel would preclude the host state from invoking the law to escape its own liability. In effect, the broad concept of estoppel is endorsed, and its preclusive effect is aimed towards barring the host state from invoking its own illicit conduct to deprive the tribunal of jurisdiction.[682] Reference is made to *Fraport (Award)*, however only a fleeting mention is reserved for the detrimental reliance element and the ultimate principle advanced by the author appears to be limited, in essence, to the manifestation of *venire contra factum proprium*:

> "If bribery violates a state's laws and the state participates in a bribe, it not only knowingly overlooks the violation of its own laws—it effectively sanctions their violation. Therefore, a tribunal is empowered to estop the host state from invoking the corruption defense to deprive the tribunal of jurisdiction".[683]

On the other side of the spectrum, the use of estoppel against the host state in corruption cases has encountered scepticism. One critique concerns the fact that a contract tainted by corruption should be, for reasons of international public policy, considered void *ab initio*, which makes any estoppel claims unavailable. For this proposition a passage from *Fraport (Award)*, a dictum from which served above as support for allowing estoppel claims in cases of ordinary illegality, is often cited. For there, the tribunal asserted that estoppel cannot be open to a party which engaged in a covert arrangement unknown to state officials who may have approved the investment. The legal validity of any such approval would often be nullified on account of the covert (and thus illicit) nature of the arrangement.[684] As corruption violates both international public policy as well as internal policy of virtually all states, where an investor has procured its investment by virtue of paying a covert bribe, any affirmation by the host state of the domestic legality of the investment would be, at best, misinformed (and

[681] M. Reeder, "Estop That! Defeating a Corrupt State's Corruption Defense…", see note 670, pp. 321-324.
[682] A.T. Bulovsky, "Promises Unfulfilled: How Investment Arbitration Tribunals…", see note 670, pp. 137-139.
[683] Ibid, p. 138
[684] *Fraport (Award)*, para 347.

therefore not clear and unambiguous) and, at any rate, unauthorized.[685] As sovereign states have discretion, the argument continues, as to whether to prosecute or otherwise pursue persons engaged in corrupt activities, their decision not to prosecute cannot be held against them by virtue of estoppel. At any rate, even if such acquiescence is inferred, it cannot constitute a clear and unambiguous statement of fact.[686]

An express refusal to take account of questions of attributability of corrupt conduct at the jurisdictional stage can dispel with many of the objections presented above. The proposition from *Fraport (Award)* regarding the effect of covert (corrupt) arrangements upon the availability of estoppel, discussed in the previous paragraph, is only partially applicable. For it appears to be clearly limited to arrangements unknown to the state. In *Fraport (Award)*, it was discovered that the investor concealed the illegality of its investment.[687] This is a situation clearly distinguishable from corruption where, by definition, state officials are involved. Further, for the purposes of the estoppel argument we should be concerned primarily with the circumstances of the conclusion of the investment contract (making of the investment). If it is concluded that the state could be taken to have made a representation that the investment will be considered valid, with all of the attendant consequences of this corollary, this should be the end of discussion and attention should be moved to the remainder of estoppel requirements (whether the representation was voluntary, unconditional, authorized, and whether it was detrimentally relied upon by its representee(s)). To the argument that contracts tainted by corruption are void *ab initio*, which could serve as a bar to invoking estoppel, this is satisfactorily addressed by Reeder under point (1) above. I will return to this point shortly in Section 4.6. Next, the assertion that a statement as to the alleged legality of the investment would either be misinformed or unauthorized can be objected on two grounds, which address each of those charges. First, to emulate my point from above, corruption will in most cases not be "covert" within the understanding of *Fraport (Award)*, i.e. it will involve a state official. Even if corruption itself cannot be imputed to the state, to suggest that neither can knowledge about it is rather untenable. Second, if we are able to distil, as Lim did, from the course of conduct of the state a representation that the investment contract is to be upheld irrespective of whether it was tainted by corruption, the element of attribution is markedly easier to establish. It could be part and parcel of the investment contract itself or repeated statements expressed during the course of negotiations leading up to the conclusion of the same. State discretion to prosecute

[685] B.K. Greenwald, J.A. Ivers, "Addressing Corruption Allegations…", see note 636, p. 80.
[686] Ibid, pp. 77-80.
[687] *Fraport (Award)*, para 387.

corrupt officials is curtailed by numerous international conventions and instruments,[688] however even if the point is granted, it is of no consequence to the availability of estoppel.[689] The estoppel argument is not based upon a host state's failure to prosecute corrupt officials, but rather upon a representation (implied or express) that the investment contract will be upheld as valid. The final objection relates to a broader proposition that estoppel should be limited to sanctioning statements of fact. I submit this is too restrictive an account of the principle. We have seen in different parts of my analysis that estoppel has been held to attach to statements of law or, at a minimum, to statements representing a party's understanding or interpretation of the law.[690] For example, estoppel has been invoked, without the tribunal's objection as to its availability in principle, to preclude parties from re-arbitrating issues and arguments raised in prior proceedings, adopting inconsistent positions in different proceedings, in respect of construction of the term "investment" within the meaning of Article 25(1) of the ICSID Convention and other jurisdictional requirements, and a party's right to pursue a given dispute resolution forum in light of a forum selection clause. Putting aside the evident observation that questions of law and fact are often interconnected in this context, it is clear that tribunals have approached questions going to a party's understanding of how the law is to be applied in a given case. In the immediate context, I would submit that the host state's representation be understood as a manifestation of its interpretation of the legal consequences of a contract – a peculiar type of fact, a state of mind relating to how legal reality is to present itself.

Another objection to be addressed, the undertones of which can also be discerned in Judge Lagergren's decision, relates to the operation of the clean hands doctrine. In brief, an investor who has engaged in corruption should not have its claim considered because it has "unclean hands" – the claim itself is tainted by the investor's own wrongdoing, typically a serious violation of domestic law of the host state (our enquiry being limited to corruption), and should therefore be barred.[691]

The exact contours of the clean hands doctrine in international investment law are uncertain and there is significant debate as to its applicability in both doctrine and arbitral prac-

[688] These are discussed at length in: A.P. Llamzon, *Corruption in International Investment Arbitration*, see note 671, p. 43 et seq.
[689] Note that in *Wena Hotels (Award)* the tribunal was reluctant to declare an investment contract void on account of corruption since the host state failed to prosecute a state official allegedly involved in criminal acts. See: *Wena Hotels (Award)*, paras 116-117.
[690] For more, see Section 2.6.1.1.
[691] A. Llamzon, "*Yukos Universal Limited (Isle of Man) v The Russian Federation*: The State of the 'Unclean Hands' Doctrine in International Investment Law: *Yukos* as both Omega and Alpha", 30(2) ICSID Review - Foreign Investment Law Journal 2015, p. 316.

tice.[692] In *Yukos Universal Limited (Award)*, the tribunal denied the principle the status of a general principle of law within the meaning of Article 38(1)(c) of the ICJ Statute.[693] The question, panned as "ill defined",[694] was also sidestepped in *Niko Resources* which, however, endorsed the following test: (1) the breach must concern a continuing violation; (2) the remedy sought must be protection against further continuation of the same, not damages for past violations; (3) there must be a relationship of reciprocity between the obligations considered.[695] I submit that it is arguable that none of the requirements are met in the narrow type of case discussed here. The corruption that was involved in the making of an investment cannot be said to continue throughout the investment's existence; instead, it should be understood as a defect in its formation (voidability rather than voidness *ab initio*). Second, if it is granted that the corruption violation continues, an objection to jurisdiction based on alleged corruption is not geared towards stopping that. To the contrary, such an objection can be said to not challenge the corruption itself but the admissibility of the investment – it attacks the investment on the grounds of corruption. Finally, to the third requirement, there can be no reciprocity if the host state is itself implicated in the corruption. Fundamentally, as the corruption defence attaches to the procurement of an investment, by the time it is brought in the context of arbitration proceedings, the underlying investment allegedly tainted by corruption has been carried out, at least to a significant extent. A successful raising of the corruption defence does not have restitutionary effect – the immediate consequence is merely that any dispute that is persisting between the parties cannot be arbitrated but nothing changes in the factual scenario at hand; in the meantime, the investment may have even been finalized. Therefore, relief sought by the host state (rejection of an arbitration claim) is entirely different from the investor's claim (arbitration of a dispute in relation to a breach of an investment treaty or investment contract). Further, analogy can be drawn here with the *Diversion of Water from the Meuse* case, decided by the PCIJ, where the claimant state demanded that the defendant state refrain from making use of waters from the Meuse (acts which were alleged to be in breach of a treaty), whilst itself engaging in a similar, if not the same, act.[696] Judge Hudson in his Individual Opinion in that case likened the clean hands principle to the Latin principle of *exceptio*

[692] See note 645.
[693] *Yukos Universal Limited (Award)*, paras 1358-1359. Analogous findings to that in *Yukos Universal Limited (Award)* were made in *Hulley Enterprises (Award)* and *Veteran Petroleum Limited (Award)*, which were decided simultaneously.
[694] *Niko Resources*, para 477.
[695] Ibid, para 481.
[696] *Diversion of Water from Meuse*, p. 25.

non adimpleti contractus.[697] Cheng has interpreted *Diversion of Water from the Meuse* as justifying the proposition that the clean hands defence can we waived.[698] On this account it appears that the clean hands principle is inapposite in cases where both the investor and the host state can be said to be implicated. In such cases estoppel should operate to preclude a host state that has participated in or condoned investor corruption from raising the investor's unclean hands as an inadmissibility defence.[699]

On a related note, the threshold for proving unclean hands appears to be high. It is apposite, in this connection, to draw upon the case of *Awdi (Admissibility)* where an estoppel claim was used to counter an allegation of unclean hands on the part of the claimant investor. The host state, Romania, raised an issue going to the admissibility of the claim in relation to the investor's alleged criminal misconduct. Estoppel, on the other hand, was aimed to prevent, the investor argued, Romania from going against its previous representation that the present investment arbitration was not to be concerned with the investor's criminal liability, which should have made the unclean hands objection unavailable. The estoppel argument was rejected by the tribunal, however an assurance was made that the presumption of innocence understood as a rule of public international law will be taken into account at the merits stage when examining evidence pertaining to the investor's alleged criminal activity.[700] The unclean hands objection to admissibility was also dismissed (albeit at the merits stage) on the grounds that the host state failed to adduce sufficient evidence in support of its criminal allegations against the claimant investor.[701]

4.6. Analysis - preferred account

As a preliminary point, I consciously avoid discussing at length the issue of attribution of corrupt behaviour of public officials to the host state vis-à-vis the investor, for two broad reasons. First, a uniform answer to the question has not been established, and numerous problems have been identified in the literature as to relying for these purposes on the DARSIWA, particularly Draft Articles 4 and 7. Reeder, cited above and referring *Siag (Award)*, as well as Lim, joined by other commentators,[702] put special emphasis on the latter provision, which

[697] Ibid, Individual Opinion by Mr Hudson, p. 77
[698] B. Cheng, *General Principles of Law…*, see note 118, p. 157.
[699] K. Lim, "Upholding Corrupt Investors' Claims…", see note 97, p. 671.
[700] *Awdi (Admissibility)*, para 84.
[701] *Awdi (Award)*, para 212.
[702] K. Lim, "Upholding Corrupt Investors' Claims…", see note 97, pp. 656-657. A similar approach is adopted in: H. Raeschke-Kessler, D. Gottwald, "Corruption" (in:) P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press 2008, pp. 596-597; M. Halpern, "Corruption as a Complete Defense in Investment Arbitration or Part of a Balance?", 23(2) Willamette Journal of

conditions attribution on whether a person or entity empowered to exercise elements of the governmental authority acts in its official capacity (even if it exceeds its authority or contravenes instructions).[703] These authors opine that it is an artificial distinction to classify corrupt behaviour of a state official as private and not official (i.e. purporting to represent the host state, exercising public functions), and thus outside of the remit of the provision. Although dominant, this line of thought has been criticized by other academic writers.[704] No conclusive assistance can be gleaned from the ILC's commentary to the Draft Articles which proclaim that they purposely do not address questions related to the validity of transactions tainted with corruption, albeit corruption is singled out as a separate type of an *ultra vires* act. It is envisaged that under Draft Article 7 international responsibility could arise for the corrupting party, however, as for officials receiving the bribe, responsibility of the state they purport to represent could hardly arise, save for, conceivably, responsibility towards a third party.[705] Authors who favour effective attribution of conduct to the state tend not to analyse the intricacies of this portion of the commentary and proceed to apply Draft Article 7, contending that an act of accepting a bribery by a public official is an expression of official capacity and thus attributable. Writers taking the opposite view stress that the commentary limits the application of Draft Article 7 to potential issues of responsibility towards a third party, i.e. a party that was not involved in the corrupt act but was nevertheless harmed or prejudiced. Therefore, the provision cannot be utilized as a basis for attribution by a claimant investor seeking to invoke the principle when that investor is itself implicated in corruption.[706] One commentator has rejected the utility of the DARSIWA for this purpose altogether, attributing corrupt conduct of public officials to the host state on the basis of the GPAUD.[707] Kulick and Wendler have argued

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International Law and Dispute Resolution 2016, pp. 311-312; F. Haugeneder, C. Liebscher, "Investment Arbitration - Corruption and Investment Arbitration: Substantive Standards and Proof" (in:) C. Klausegger, P. Klein, F. Kremslehner, A. Petsche, N. Pitkowitz, J. Power, I. Welser, G. Zeiler (eds.), *Austrian Arbitration Yearbook 2009*, C.H. Beck, Stämpfli & Manz 2009, pp. 558-559; A.B. Spalding, "Deconstructing *Duty Free*: Investor-State Arbitration as Private Anti-Bribery Enforcement", 49 University of California, Davis Law Review 2015, pp. 485-487; I.C. Devendra, "State Responsibility for Corruption in International Investment Arbitration", 10(2) Journal of International Dispute Settlement 2019, pp. 264-271.

[703] This is analysed more comprehensively in Section 1.3.2.1.

[704] See e.g.: B.K. Greenwald, J.A. Ivers, "Addressing Corruption Allegations…", see note 636, pp. 75-77; A.P. Llamzon, "State Responsibility for Corruption: The Attribution Asymmetry in International Investment Arbitration", 10(3) Transnational Dispute Management 2013, pp. 56-57, available at: https://bit.ly/38Iy3HM (accessed: 24.08.2021).

[705] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Report of the International Law Commission on the work of its fifty-third session*, p. 46, footnote 150, available at: https://bit.ly/3nCE2ln (accessed: 24.08.2021).

[706] The different viewpoints are summarized conveniently in: A.P. Llamzon, *Corruption in International Investment Arbitration*, see note 671, pp. 259-264.

[707] J. Drude, "*Fiat Justitia, ne pereat mundus*: A Novel Approach…", see note 671, pp. 708-712.

for a balanced approach driven by public policy considerations and estoppel, presumably incorporating its own rules of attribution deviating from the DARSIWA.[708]

Considering the travails related to attribution of acts of bribery per se to host states, Lim's proposition is preferable.[709] The question of applicability of an estoppel argument should be entirely separate from attribution of the corrupt conduct itself. At the estoppel stage, we are only concerned with whether there has been a clear and unambiguous representation that is capable of being attributed. The argument advanced here is, in essence, one related to jurisdiction or admissibility of claim, depending on its classification by a given tribunal; it is not concerned with the merits of a given dispute. A decision on attribution of the conduct of public officials to the host state is one to be made by the tribunal at the merits stage, and it goes directly to the state's liability. In terms of the pertinent test, Lim's conceptualization perfectly captures the application of a strict view of estoppel to the facts of a typical case of corruption-based illegality. Particular appeal of the proposition lies in its notion of representation, understood as an implied recognition of a corruptly procured investment as being valid and entitled to protection and fair treatment. In this way the investor's estoppel claim becomes opposable to the host state. A clear and unambiguous representation is to be deduced from the host state's course of conduct culminating in the conclusion of an investment contract. Such a representation would be attributed to the host state on established principles, either by reference to the case law or Principle 4 of the GPAUD.[710] Crucially, the representation that the investment is to be considered valid is to be distinguished from the corrupt practices themselves.[711] The representation consists in an affirmation by the host state of the entire course of conduct that led to the conclusion of the investment contract. The representation must be voluntary, i.e. not forced or extorted by a blackmailing investor. Finally, the element of detrimental reliance will be present in a majority of such cases. The investor will proceed with executing the investment contract on an understanding that the respective rights and obligations of both parties shall be discharged in accordance with the letter of the contract and any other valid agreements between the parties. By executing the contract, the investor will natu-

[708] A. Kulick, C. Wendler, "A Corrupt Way of Handle Corruption? Thoughts on the Recent ICSID Case Law on Corruption", 37(1) Legal Issues of Economic Integration 2010, pp. 79-82.

[709] Despite my concurrence with Lim as to the conceptualization of estoppel in this context, to the extent laid out in this Section, it shall be noted that in his paper he goes on to consider also attribution to the host state of the corrupt conduct itself which, I submit, is unnecessary for the purposes of ascertaining whether estoppel can be used to defeat a corruption-based objection to jurisdiction raised by the host state.

[710] As argued in Sections 1.3.2 and 2.6.2.3, the GPAUD are the preferred reference point for ascertaining attribution of representations to host states, as opposed to the DARSIWA and Article 46 of the VCLT.

[711] Regrettably, in *World Duty Free* the claimant appears to have conflated these two aspects, which is why it was convenient for the arbitral tribunal to invoke lack of attributability of the Kenyan President's corrupt conduct to the state as an argument in favour of dismissing the estoppel claim. See: *World Duty Free*, para 185.

rally incur expenditures qualifiable as detriment. It is to be emphasized that typically by the time a claim is pursued before an ICSID arbitral tribunal, the underlying investment had been, at least to a significant degree, realized. In most cases analysed above, the claim pertained to alleged expropriation where the investor would have sustained sizable losses on two separate occasions – first at the time of development of the investment and again by virtue of having that investment expropriated.

My endorsement of Lim's conceptualization notwithstanding, certain observations made in the other two accounts are also worth discussing. It is difficult to discern Reeder's preference between the strict or broad concept of estoppel, albeit his support for *Fraport (Award)* and *Kardassopoulos* appears to lean towards the latter. An important contribution made by that author, however, relates to the concept of voidability of contracts procured by corruption. The assumption that an investment contract, at the time a jurisdictional objection is raised, remains valid, lends further credence to the acceptance of an estoppel plea where the requirements of the strict concept are made out. Under the current state of the law, it can be argued that an arbitral tribunal seized of a dispute, upon concluding that there is sufficient evidence to infer that an investment was procured by corruption, is merely declaring its invalidity which was already apparent by operation of law. By adopting the voidability framework, these vagaries are avoided, and the tribunal may move to consider the estoppel argument as one attaching to a valid and existing contract.

Besides the grounds which Reeder mentioned in favour of distinguishing international commercial arbitration case law (with which I agree), it should be added that domestic courts have recently been receptive to arguments that a contract procured by corruption (as opposed to contracts providing for corruption) is voidable and not void *ab initio*. An example from the High Court of England and Wales can be called upon to buttress the argument:

> "There is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe, on the basis that such contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct. The siren call of [counsel for the respondent], referring to recent international Conventions to outlaw bribery, and the increase of legislation to criminalise it, is attractive. But to introduce a concept of tainting of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy. There may be many contracts which have been preceded by undesirable conduct on one side or other or both – lies, fraud, threats and worse – but the Court would not interfere

with a contract entered into by such parties, even if one or more of those parties had committed criminal acts for which they could be prosecuted, unless the contract itself was illegal and unenforceable, or one or more of the acts of such parties induced the contract, in which case it might be voidable at the instance of an innocent party so induced".[712]

For reasons of systemic coherence, Bulovsky's proposition endorsing the broad concept of estoppel is to be rejected, especially since it was demonstrated above that the strict view is better suited to serve the purpose of estopping host states from frivolously raising corruption defences. Further, the broad notion of estoppel in this context could be subsumed under the principles of denial of justice, abuse of rights and abuse of process.[713] That said, it could be ventured that an alternative conceptualization of the representation element is possible – instead of a positive representation that the investment is legal and will be enforced, it could be limited to a representation that the state will refrain from contesting the validity of the investment contract and will perform it in accordance with its conditions.[714]

Finally, there are powerful policy arguments in favour of utilizing estoppel to bar objections to jurisdiction based on corruption, some of which have already been flagged up in passing. It has been observed in academic literature that host states have transformed the corruption defence into a powerful strategy aimed at evading costly investment disputes. Successful raising of an objection is likely not to motivate host states to change their corrupt domestic culture or the corrupt practices of their officials, and effectively allows them to profit from their own violations of international law.[715] The ability of host states to request the dismissal of a claim tainted by corruption should depend upon, it has been argued, demonstrating that they have implemented all necessary anti-corruption standards in their legal framework

[712] *National Iranian Oil Company (NIOC) v Crescent Petroleum Company International Ltd (CP)*, para 49, per Burton J.
[713] See: V. Lowe, "Overlapping Jurisdiction in International Tribunals", 20(1) Australian Year Book of International Law Online 2000, pp. 202-203; E. Gaillard, "Abuse of Process in International Arbitration", 32(1) ICSID Review - Foreign Investment Law Journal 2017, pp. 10-11; J.P. Gaffney, "'Abuse of Process' in Investment Treaty Arbitration", 11(4) Journal of World Investment & Trade 2010, p. 523 et seq.; F. Francioni, "Access to Justice, Denial of Justice and International Investment Law", 20(3) European Journal of International Law 2009, pp. 732-737.
[714] A 2021 decision of the High Court of England and Wales appeared to accept this formulation (classifying it, however, as waiver by election under domestic law) where it found, in set-aside proceedings between a private investor and the Pakistani State of Balochistan, that the latter cannot avail itself of a corruption-based objection to jurisdiction before the court as it had failed to raise it during a preceding investment arbitration. See: *Province of Balochistan v Tethyan Copper Company*, paras 267-282, per Knowles J.
[715] R.Z. Torres-Fowler, "Undermining ICSID: How the Global Antibribery Regime Impairs Investor-State Arbitration", 52(4) Virginia Journal of International Law 2012, p. 1000.

and prosecuted allegedly corrupt public officials.[716] Acceptance of the corruption defence by an investment arbitration tribunal, and thus the dismissal of the investor's claims, may deepen political instability in states which already have a weak government and corrupt officials, and hamper their future development.[717]

4.7. Chapter summary

Objections to arbitral jurisdiction based on the underlying investment's alleged illegality are normally based on the assumption that Article 25(1) of the ICSID Convention permits arbitration only in respect of those investments that were set up and are operated in compliance with the laws of the host state. The implied legality requirement within the framework of the ICSID Convention has been upheld in a number of cases, reaching a high point in *Phoenix Action*, however recent case law has been discernibly turning away from such categorical assertions. Alternatively, host states can rely upon relevant formulations contained within investment treaties and state contracts. It has been a growing trend in the recent treaty practice to insert necessary qualifiers into BITs and MITs to reserve the arbitral dispute resolution mechanism only to legal investments (via so-called "in accordance with host state law" clauses).

Two general types of illegality can be distinguished on the basis of the number of parties involved: (1) one-sided illegality; (2) two-sided illegality. The former category encompasses cases of so-called ordinary illegality where the investor is alleged to have failed to comply with all of the attendant administrative or regulatory requirements envisaged by the laws of the host state. In many cases investors seek to counter such objections by pointing to representations made, either before the investment was set up or thereafter (often in the process thereof), by host state officials to the effect that certain requirements such as, for instance, concession, consent or permission requirements are to be waived as means of inducing the private party to invest in the first place or enlarge an investment already commenced. Another type of one-sided illegality concerns cases of fraud such as *Churchill Mining (Award)*, where the investor, intentionally and of its own accord, acted in contravention of the host state's domestic laws with a view to obtaining its investment. Two-sided illegality within the understanding adopted herein includes cases of corruption which, it is submitted, is two-sided by its nature. Even where bribes are not expressly solicited, as it was notably the case in

[716] M. Habazin, "Investor Corruption as a Defense Strategy of Host States in International Investment Arbitration: Investors' Corrupt Acts Give an Unfair Advantage to Host States in Investment Arbitration", 18(3) Cardozo Journal of Conflict Resolution 2018, p. 827.
[717] T. Meshel, "Use and Misuse of the Corruption Defence…", see note 673, p. 279.

World Duty Free, the mere act of accepting a bribe must be taken to constitute a form of implied consent and factual participation.

Starting in 2007 with *Fraport (Award)* and *Kardassopoulos,* investment tribunals have grappled with estoppel claims brought under the conditions of one-sided ordinary illegality. Both panels enunciated the general principle that host states shall be estopped from having recourse to objections related to alleged violations of their own law where they knowingly overlooked them (or, which appears to be more usual in practice, granted express or implied inducements in the form of putative waivers of given requirements) and endorsed an investment which was not in compliance with its law. Nonetheless, only the latter tribunal applied the test successfully. In later awards, the test was invoked and applied intermittently. The law on the issue appears to be in a state of flux. *Karkey Karadeniz,* which expressly endorsed *Kardassopoulos,* is the most recent example of a case where the estoppel argument in the present context was successful. The *Kardassopoulos* test, however, has not commanded uniform acceptance among tribunals and alternative approaches are discernible. Unfortunately, on occasion arbitrators avail themselves of estoppel as a term of art but fail to explain its ramifications nor diligently apply it to the facts before them. The strict view has been followed, albeit rarely, with the estoppel claim failing every time. In *Churchill Mining (Award)*, a case involving fraud, the tribunal did not consider the estoppel claim, which the ad hoc annulment committee explained as a tacit admission that as fraud went to the core of the investment and constituted a primary vehicle for its procurement, the estoppel argument was not available.

In two-sided illegality scenarios where the underlying investment was procured via corruption, *de lege lata* tribunals have consistently refused to accept jurisdiction over such claims, principally for reasons of international public policy. On this account, one of the objectives of international investment law as a system is to further the rule of law and guard important public interests embedded in foreign investment. For those reasons, the estoppel argument was given short shrift by the tribunal in *World Duty Free*. The above arguments notwithstanding, tribunals have expressed regret that their refusal to accept jurisdiction effectively lets off corrupt officials of the host state and creates a perverse incentive whereby the host state may continue to reap benefits out of a corruption-procured contract over time whilst ignoring the conduct of its officials, and then terminate it, safe in the knowledge that the investor will have no effective recourse to arbitration.[718]

[718] L.A. Low, "Dealing with Allegations of Corruption in International Arbitration", 113 AJIL Unbound 2019, p. 342.

In terms of the concept of estoppel invoked, the overarching principle from *Fraport (Award)* and *Kardassopoulos* is best situated within the broad view, the reason being that no emphasis is placed in this formulation upon the reliance of the investor upon the implied admission of the investment by the host state despite non-compliance with its own laws. Therefore, cases which endorsed this test gravitate towards the broad concept: *Railroad Development Corporation*, *Mamidoil Jetoil* (where estoppel was expounded as a principle which, for reasons of material justice, renders a person hindered from exercising a right legally vested therein), *Karkey Karadeniz*. In other cases, no direction was disclosed as to the type of test applied: *Bernhard von Pezold*, *Cortec Mining*. The strict view was referenced in *Kim*. As alluded to above, in *Churchill Mining (Award)*, the tribunal made a point of not addressing the estoppel argument brought by the claimant (who relied on the strict view). The same approach was adopted by the *World Duty Free* tribunal. In that case, however, it appears that no extensive explanation was advanced by the claimant investor in support of its estoppel claim.

Despite the relative preponderance of the broad view of estoppel and minimal recourse to the detrimental reliance element, it is the strict view of estoppel that can, it is submitted, become a uniform instrument to assuage concerns engendered by frivolous invocations of illegality-based objections. Whilst there are no satisfying fairness-based reasons for permitting the operation of estoppel in cases of one-sided investor fraud, instances of ordinary illegality resulting from prior assurances of the host state regarding administrative and regulatory compliance are more susceptible to preclusion. Estoppel has already found some success in those cases and I submit that a consistent application of the strict view would help sharpen the *Kardassopoulos* test and fine-tune for the purposes of preventing states from going back on their assurances. Host states should be taken to, when entering into an investment contract or otherwise admitting an investment, represent that the investment in issue shall be considered as compliant with domestic law despite its actual non-compliance (the requirements indicated in the host state's clear and unambiguous representation would be taken to have been waived). In this way, a clear and unconditional representation attributable to the host state would operate to validate or remedy, as it were, domestic non-compliance and resulting voidability. In applying the strict view, tribunals should have regard to the following:

- whether the investor had any knowledge that the investment did not comply with the domestic requirements; if it did, then no good faith reliance can be established;
- whether the host state made representations that the investment will be considered legal or otherwise valid despite a failure to comply;

- whether the domestic requirements alleged by the host state to have been flouted are indispensable for the exact type of investment in issue;
- whether the investor enquired with the host state about the investment's compliance; whether it conducted any due diligence in relation to the conditions of doing business in the host state; the level of familiarity of the investor with the host state's legal, political and economic climate could also be drawn upon as an indicator of whether its reliance was in good faith.

The proposal made in this chapter as regards corruption-based, two-sided illegality is in its essence quite limited. It does not seek to exonerate investors from engaging in corrupt conduct, nor does it aim at scapegoating host states and burdening them with responsibility for the consequences of the acts of a few disparate "bad apples". Importantly, my argument does not depend on recourse to rules of attribution to attempt to attribute the behaviour of corrupt state officials to host states. It is recognized that such attempts are conceptually difficult. The argument advanced herein is limited to acknowledging that by entering into a state contract and admitting an investment into the country, the host state effectively impliedly consented to treating the investment as valid despite its potential underlying defects (by means of a specific legal fiction). The most my argument is assuming is that either (1) the knowledge of corrupt behaviour shall be imputed to the host state (which dispenses with the difficult conceptual exercise aimed at attributing the corrupt behaviour in and of itself); (2) the consent expressed by the host state by means of conclusion of a state contract consumes and overrides any corrupt behaviour that may have preceded the ultimate grant of an investment. The consent contained within a state contract would, as it were, validate *ex post* the corruption-tainted investment which, I submit, should not be considered void *ab initio* but only voidable. An argument so constructed offers an explanation that arbitral tribunals could rely on with a view to maintaining the validity (and therefore upholding jurisdiction in respect of disputes arising out of) investments where there is substantial contributory negligence on the part of the host state, so much so that it would fly in the face of justice to hold a given dispute inadmissible or outside of an arbitral tribunal's competence. An approach that would have the chance of striking a better balance between the rights and obligations of the parties, on the one hand, and concern for the rule of law and international public policy, on the other, would be to accept jurisdiction over corruption-tainted claims, at least where a degree of participation or condonation over the corrupt activity on the part of the host state is discernible, and proceed with a substantive balancing exercise at the merits stage. In other words, acceptance of jurisdiction or admissibility should not on any account be equated with siding

with the corrupt investor on the merits. It will only be for the arbitral tribunal to consider, on a case-by-case basis, the respective degrees of involvement of each of the parties to reach a conclusion whether, on balance, the investor deserves to succeed on its substantive claims concerning breaches by the host state of investor protection standards.

CHAPTER V. ISSUE ESTOPPEL AND DISTINCT QUESTIONS OF PROCEDURE

5.1. Introductory remarks

The legal consequence of estoppel – preclusion – can be extrapolated onto fields other than control over jurisdiction and admissibility of tribunals. Estoppel can equally be invoked to ensure fairness and transparency of arbitration proceedings by precluding parties from invoking arguments that had already been definitively decided and by limiting their rights to avail themselves of specific procedural prerogatives. In other words, the preclusive effect may be made to attach to bad faith exercises of procedural autonomy in investment arbitration. Within the context of forum selection clauses in the previous chapter, a mention was made of the principle of res judicata. This reference will be particularly helpful to now illuminate the operation of issue/collateral estoppel (issue preclusion),[719] a distinct type of estoppel whose purview is limited to the admissibility-related prohibition on re-arbitration of issues which had already been definitively decided.

To set the scene, the primary requirements of res judicata will be laid out, which will help better explain the more modest ambitions of issue estoppel. Next, the evolution of arbitral case law regarding issue estoppel will be sketched. What becomes apparent is that, following the ground-breaking award in *RSM Production*, and a cooling-off period during which tribunals grappled with the practical consequences of the bold propositions made in that case, the recent dictum in *Caratube II* signals an attempt to backtrack or, at a minimum, to constrain the ambit of the principle. Once the dissection of issue estoppel is concluded, focus shall turn to the potential impact estoppel can have on the exercise of selected procedural rights during an arbitral proceeding.

[719] In this dissertation, both terms are used interchangeably as, despite differences between the two concepts at domestic level, they are synonymous in international investment law (and in general international law). The convention mirrors that adopted in: J. Magnaye, A. Reinisch, "Revisiting Res Judicata and Lis Pendens in Investor-State Arbitration", 15(2) The Law & Practice of International Courts and Tribunals 2016, p. 279. Where possible, I will follow the terminology used in a given source (arbitral award, publication).

5.2. Issue estoppel

5.2.1. Systemic connection – res judicata

Res judicata, considered a general principle of law recognized by civilized nations[720] or "an essential and settled rule of international law",[721] dictates that a final adjudication by a court or arbitral tribunal shall be conclusive, and has a dual effect. First, a judgment or award is binding upon the parties and must be implemented thereby in good faith. Second, the case cannot be relitigated.[722] The application of res judicata is predicated on the fulfilment of a so-called triple identity test, whose origins can be traced back to the Dissenting Opinion of Judge Anzilotti in *Chorzów Factory Case (Interpretation)* – identity of parties (*persona*), object of the proceedings or claim (*petitum*) and cause of action (*causa petendi*).[723] Within the context of investment arbitration, the second prong (identity of object) would normally mean that the same relief is sought in the two subsequent sets of proceedings.[724] For a decision to acquire res judicata effect, it must be final (in that here is no further possibility of ordinary judicial appeal against it) and devoid of any legal defects which could deprive it of validity.[725] Such defects could include, *inter alia*, lack of jurisdiction in a given case, defects related to the composition of the tribunal, corruption or other illegal practices in connection with the handing down of the award, issuance of a decision in contravention of fundamental procedural principles and rights of parties.[726] The effect of operation of res judicata is a tribunal's acceptance of the binding character of the award previously issued and a refusal to consider the case anew. In other words, the relation between the parties under such circumstances may be likened to an individual precedent as the exclusionary effect is not in any way generalized or extrapolated – a decision affected by res judicata does not constitute a source of rights for third parties.[727] Additionally, it should be noted that determinations made by domestic courts

[720] *Chorzów Factory Case (Interpretation)*, p. 27.
[721] *Trail Smelter Case*, p. 1950.
[722] W.S. Dodge, "Res Judicata" (in:) Max Planck Encyclopedia of Public International Law, 2006, online, para 1, available at: https://bit.ly/396BMO6 (accessed: 24.08.2021).
[723] *Chorzów Factory Case (Interpretation)*, p. 23.
[724] H. Wehland, *The Coordination of Multiple Proceedings in Investment Treaty Arbitration*, Oxford University Press 2013, p. 202.
[725] V. Lowe, „Res Judicata and the Rule of Law in International Arbitration", 8 African Journal of International and Comparative Law 1996, p. 39.
[726] B. Cheng, *General Principles of Law…*, see note 118, p. 337; Y. Shany, *The Competing Jurisdictions of International Courts and Tribunals*, Oxford University Press 2003, p. 246.
[727] See Article 59 of the ICJ Statute, under a which decision of the Court has no binding force except between the parties and in respect of that particular case. Analogically, pursuant to Article 1136(1) of NAFTA, "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case". The provision was held by the investment tribunal in *Apotex Holdings* (para 7.9) not to bar pleadings of res judicata. Article 53(1) of the ICSID Convention is less direct, albeit conveys the same principle ("The

and tribunals are normally not binding on international forums, which one can justifiably refer to as a requirement of identity of dispute resolution forum.[728]

Res judicata has been applied in the field of international investment law where treaty claims are asserted in subsequent multiple proceedings.[729] The triple identity test has been applied conscientiously in most cases,[730] however there has been some academic debate revolving around the rigidity of understanding of the concept of identity. As regards the identity of parties, proposals have been put forward to extend the exclusionary effect of res judicata to attempts to re-arbitrate made by entities economically affiliated with the claimants in the original proceedings.[731] Further, Reinisch has promoted the idea that only "substantial identity" of relief sought in consecutive proceedings should be sufficient for the "identity of object" requirement to be met.[732] Liberalization of the notion of identity of cause of action has also been postulated, with the primary thrust of critique orientated against the formalistic view, under which it is required that necessarily the same legal rights and arguments be relied upon in different proceedings.[733] Here, proposals tend to gravitate towards focusing more on the substance (the type of substantive protection standard claimed) rather than the source of a claim (contract/treaty), postulating that if the substantive protection claimed in both cases is the same, the fact that the claims are brought under different legal instruments should be disregarded, thus making way for preclusion; this approach has been referred to as substantive or transactional.[734] It shall become clear below that issue estoppel is a response to those concerns, and, consequently, arbitral practice should embrace a relaxation of the strictures imposed by the triple identity test and advocate purposive interpretations of the facts.

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award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention").

[728] See e.g.: G.L. Walters, "Fitting a Square Peg into a Round Hole: Do Res Judicata Challenges in International Arbitration Constitute Jurisdictional or Admissibility Problems", 29(6) Journal of International Arbitration 2012, p. 657.

[729] *Vivendi (Jurisdiction)*, para 71; *Empresas Lucchetti (Annulment)*, para 86; *Waste Management (Preliminary Objection)*, para 39; *Bosh International*, para 277.

[730] See e.g.: *Inceysa*, para. 214; *AES Summit Generation*, para. 6.5.4; *Malicorp*, para 103.

[731] M. Dimsey, *The Resolution of International Investment Disputes*, Eleven International Publishing 2008, p. 91; A. Crivellaro, "Consolidation of Arbitral and Court Proceedings in Investment Disputes", 4(3) The Law & Practice of International Courts and Tribunals 2005, p. 381; K. Yannaca-Small, "Parallel Proceedings" (in:) P.T. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press 2008, p. 1011.

[732] A. Reinisch, "The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes", 3(1) The Law & Practice of International Courts and Tribunals 2004, pp. 62-64.

[733] C. McLachlan, *Lis Pendens in International Litigation*, The Pocket Books of The Hague Academy of International Law, Brill/Nijhoff 2009, p. 100.

[734] A. Crivellaro, "Consolidation of Arbitral and Court Proceedings…", see note 731, p. 415.

The exclusionary effect of res judicata traditionally applies only to the dispositive part of an award (*dispositif*),[735] however it was Judge Anzilotti who already recognized that it is almost always necessary to refer to the statement of reasons to understand clearly the operative part.[736] In investment arbitration, the default position has traditionally been that only the operative part of an award (to the exclusion of reasons and arguments raised by the parties in the original proceedings) is capable of giving rise to res judicata,[737] however the stringent requirements of the doctrine appear to have been relaxed by the introduction of issue estoppel.[738]

5.2.2. Issue estoppel – concept

Moving now to explaining the unique character of issue estoppel, it must be noted that whilst the purview of res judicata (claim preclusion) extends to claims that have never been litigated but should have been raised in a prior litigation or arbitration (on top of the classic case where a claim has been disposed of), issue estoppel (issue preclusion) bars matters that have already been litigated and decided although they would form part of a new claim.[739] Issue estoppel, therefore, is considered by academic commentators a narrower doctrine.[740] The overarching aim of issue estoppel is to put an end to arbitration of a particular issue or argument.[741] Issue estoppel prohibits recourse to legitimate rights when the exercise of those rights violates the public policy goals of finality and protection from successive or abusive litigation.[742] Whilst its effect is not to reduce multiple or parallel proceedings, it conduces to achieving greater consistency among arbitration awards rendered as against an entity and/or

[735] This limitation originated in the understanding of res judicata prevalent in civil law systems. See: P. Hovaguimian, "The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or Not to Bind?", 34(1) Journal of International Arbitration 2017, pp. 81-84.

[736] *Chorzów Factory Case (Interpretation)*, dissenting opinion of Judge Anzilotti, at p. 27, para 2. This part of Judge Anzilotti's opinion was cited in support of a finding of issue estoppel on the facts of *Apotex Holdings*. See below Section 5.2.3.3. See also: D.W. Bowett, "Res Judicata and the Limits of Rectification of Decisions by International Tribunals", 8 African Journal of International and Comparative Law 1996, p. 577 et seq.

[737] See e.g. *Waste Management (Preliminary Objection)*, para 43.

[738] It has been argued in the literature that common law lawyers are naturally, on account of their background, inclined to move progressively from traditional res judicata attaching to claims to issue estoppel. See: G. Griffith, I. Seif, "Work in Progress: Res Judicata and Issue Estoppel in Investment Arbitration" (in:) N. Kaplan, M.J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, Kluwer Law International 2018, p. 121.

[739] P. Janig, A. Reinisch, "General Principles and the Coherence of International Investment Law…", see note 492, pp. 250-251; B.M. Cremades, I. Madalena, "Parallel Proceedings in International Arbitration", 24(4) Arbitration International 2008, pp. 519-520.

[740] S. Farnham, "Claim Suspension and Issue Preclusion in Multiparty Investment Disputes: The Need for Autonomous, International Principles" (in:) I.A. Laird, B. Sabahi, F.G. Sourgens, T.J. Weiler (eds.), *Investment Treaty Arbitration and International Law*, vol. 9, JurisNet 2014, p. 210.

[741] C. Brown, "A Comparative and Critical Assessment of Estoppel…", see note 29, p. 375.

[742] J.D. Branson, "The Abuse of Process Doctrine Extended: A Tool for Right Thinking People in International Arbitration", 38(2) Journal of International Arbitration 2021, p. 190.

its privies.[743] The crucial elements are twofold: (1) issue estoppel sanctions determinations already made,[744] in other words: decisions on matters brought previously by a party or its privy in another proceeding; (2) as the name suggests, the preclusive effect is limited to issues and does not extend to claims, it is therefore potentially more pointed. This differentiates issue estoppel not only from res judicata, but also from *lis pendens* and *ne bis in idem* claim-based doctrines,[745] and is the reason why issue estoppel is considered separately and not together with issues going to jurisdiction. The standalone character of issue estoppel has been largely recognized and supported in arbitral practice.[746] The principle has also been confirmed to be compliant with the ICSID Convention Arbitration Rules. Specifically, Rule 47, which mandates that an award shall contain a statement of the facts as found by the tribunal, does not prohibit a tribunal, when ascertaining the facts necessary to decide a case in issue, from incorporating into this determination its final and binding decisions concerning issues disposed of by another ICSID tribunal in a related case, a principle which has been extended to determinations of jurisdiction.[747]

The relation between issue estoppel and res judicata in investment arbitration has been summarized as follows:

> "Instead of insisting on the exact fulfilment of the requirements of a strict 'triple identity test' investment tribunals have accepted looser standards of sameness, on the one hand, and acknowledged that also parts of a decision, including the determination of

[743] V. Korzun, "Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance", 40(1) University of Pennsylvania Journal of International Law 2018, p. 245.
[744] This is the general rule. See, however, my discussion of such cases as *Mytilineos Holdings* and *Nova Scotia Power* in Section 5.2.4, where attempts were made to extend estoppel to instances where a given issue was not decided – where a party had an opportunity to raise a given argument in the original proceedings but failed to do so.
[745] F. Fontanelli, "Jurisdiction and Admissibility in Investment Arbitration…", see note 537, p. 94.
[746] *RSM Production*, para 7.1.2; *Apotex Holdings*, para 7.18; *Caratube II*, para 464 (the issue of applicability of collateral estoppel was left open, however the tribunal appeared to have recognized it as a principle separate from res judicata); *Lao Holdings*, para 109 (the tribunal declined to apply issue estoppel on the facts, however it was clearly distinguished from res judicata); *Tethyan Copper Company*, para 667 (the case was decided on other grounds, but the tribunal appeared to accept the claimant's assertion, relying on *RSM Production*, that issue estoppel was a distinct doctrine); *Tokios Tokelės*, paras 98, 112 (issue estoppel considered a standalone principle separate from res judicata); *Peter A Allard*, para 275 (issue estoppel was not necessary to decide the dispute, but it was distinctly mentioned). Cf. *Al Tamimi*, para 131 (describing collateral estoppel as a doctrine "subsidiary" to res judicata); *Eskosol*, para 171 (doctrine "similar" to res judicata); *Mobil Investments Canada*, para 206 (issue estoppel as a "branch" of res judicata). Issue estoppel is also treated as a distinct principle in pleadings before ICSID tribunals. Notably, see: *Chevron Corporation (2013 First Partial Award)*, paras 48, 60 (invoked by both the claimant and the host state); *Swisslion*, para 114 (raised by Macedonia); *Waste Management (Preliminary Objection)*, para 45 (raised by Mexico).
[747] *Caratube II*, para 463.

some separate issues, may have a binding effect on subsequent tribunals, on the other hand".[748]

As shall be demonstrated below, the loosening of the triple identity test has been achieved in manifold ways. Notably, the concept of privies was introduced, which has allowed arbitral tribunals to extend the preclusive effect of issue estoppel to proceedings partaken by persons or entities related to the parties in past proceedings. Tribunals have also attempted to stretch the concept of identity of cause of action, upholding on occasion the preclusive effect of issues considered by arbitral tribunals deciding under different arbitral rules or under different treaties and even matters decided by national courts or arbitrations conducted under domestic law. Where there is an umbrella clause in the relevant treaty, under which breaches of the investment contract are simultaneously taken to give rise to treaty claims, proving identity of causes of action may prove easier. Once the triple identity test is met, a finding concerning a right, question or fact cannot be re-litigated (re-arbitrated, being binding on a subsequent arbitral tribunal) if, in a prior proceeding:

- it was distinctly put in issue;
- the court or tribunal actually decided it;
- the resolution of the question was necessary to resolving the claims before that court or tribunal.[749]

Issue estoppel has undergone a peculiar evolution as regards its acceptance as a principle applicable to international investment arbitration and, crucially, its substantive reach. Initially introduced as an import from U.S. procedural law and signalled in brief in several cases, notably *Tokios Tokelės*, it acquired a high profile as it was hailed a general principle of international law in *RSM Production*. What followed was a period in which various tribunals attempted to fully grasp the precise contours of application of the principle aimed at precluding re-arbitration of specific issues. The status of issue estoppel was finally questioned in *Caratube II*. The tribunal there appeared to accept the standalone character of issue estoppel as opposed to res judicata, however the issue whether the former principle is applicable to investment arbitration was left open. The next Section follows the ebb and flow of arbitral consideration of issue estoppel and offers insights into its parameters.

As a final preliminary point, two reports of the International Law Association on res judicata and issue estoppel, which are relevant to the inquiry into the status and content of

[748] P. Janig, A. Reinisch, "General Principles and the Coherence of International Investment Law…", see note 492, p. 263.
[749] *RSM Production*, para 7.1.1.

issue estoppel under international law, must be mentioned. The reports have since been cited in investment arbitral awards,[750] although *prima facie* they were intended to apply merely to international commercial arbitration. The 2004 Interim Report[751] provided a definition of issue estoppel, specifying that the "issue" in question, namely an assertion, whether of fact or of the legal consequences of facts, must constitute an essential element of the cause of action or defence. This precept was later adopted in investment arbitration.[752] Further, issue estoppel was said not to apply to procedural decisions, and a proposition was made that a plea of estoppel can be defeated if the respondent can point to previously undiscovered factual material (and one that could not have been accessed by that party acting with due diligence) that is relevant to the correctness or incorrectness of the assertion.[753] These contentions were fleshed out and solidified in the Final Report.[754] The Final Report reiterated most of the findings of the Interim Report (including the requirement that an issue affected by preclusion must be "essential or fundamental" to the arbitral award)[755] and offered a few new observations. Notably, the rationale for the recognition of issue estoppel – procedural efficiency and finality – was clearly articulated.[756] Importantly, it was posited that the principle should apply not only to issues within one claim but also to different claims in further arbitral proceedings.[757]

5.2.3. Evolution of arbitral practice

5.2.3.1. Inception – *Petrobart*

In *Petrobart*, an arbitration decided under the rules of the SCC on the basis of the Energy Charter Treaty, the host state pleaded res judicata or, alternatively, collateral estoppel, in proceedings concerning, *inter alia*, a violation thereby of the FET standard. Kyrgyzstan argued that at least two final determinations had been handed down which addressed the claims and issues pursued by the investor – a judgment of a domestic court and an ad hoc international arbitration award issued pursuant to the UNCITRAL Arbitration Rules; as no attempt was made at those two junctures to raise its claims, Petrobart should thus be estopped in the

[750] *Apotex Holdings*, para 7.15; *Caratube II*, para 377.
[751] F. de Ly, A. Sheppard, "ILA Interim Report on Res Judicata and Arbitration", 25(1) Arbitration International 2009, pp. 35-66.
[752] *RSM Production*, para 7.1.1 (the term "essential" was replaced with "necessary").
[753] F. de Ly, A. Sheppard, "ILA Interim Report…", see note 751, pp. 41-42.
[754] The text was adopted at the 72nd International Law Association Conference on International Commercial Arbitration, Toronto, Canada, 4-8 June 2006. See: F. de Ly, A. Sheppard, "ILA Final Report on *Res Judicata* and Arbitration", 25(1) Arbitration International 2009, pp. 67-82.
[755] Ibid, para 56, p. 78.
[756] Ibid, para 56, p. 79.
[757] Ibid, para 57, p. 79.

present proceedings.[758] The investor dismissed the applicability of collateral estoppel (which it erroneously termed "claim preclusion"), a "purely American statutory procedural doctrine" to the case.[759] In the alternative, however, Petrobart submitted that the issues decided by the local court and the UNCITRAL arbitration, on the one hand, and in the immediate proceedings, on the other, were in fact different – the former concerned the question whether the investment contract concluded between the parties qualified as an "investment" under domestic Kyrgyzstani foreign investment legislation, whilst the new proceedings alleged a breach of a multilateral international treaty.[760]

The tribunal, albeit not expressly, recognized potential relevance of collateral estoppel to international law, noting that similar procedural rules exist in other jurisdictions, thus employing a reasoning geared towards sustaining a positive classification as a general principle of law *pro foro domestico*.[761] The collateral estoppel argument was dismissed on two principal grounds: (1) there was no "fork-in-the road" provision in the ECT which would restrain the investor from pursuing more than one dispute resolution mechanism;[762] (2) there was no identity of cause of action as the claims previously pursued before local courts and in the UNCITRAL arbitration arose from the domestic law of the host state.[763] In line with the ILA's propositions cited above, the tribunal carved out an exception whereby the effect of collateral estoppel could be excluded (and reconsideration of an issue permitted) provided that new evidence is uncovered.[764]

Petrobart is the first reported investment arbitral award in which collateral/issue estoppel was a ground of determination of a claim.[765] Regrettably, the tribunal did not cite any

[758] *Petrobart*, para VII.2.B, p. 41.
[759] Ibid, para VII.3.A, p. 56.
[760] Ibid, para VII.3.A, p. 57.
[761] Ibid, para VIII.5, pp. 66-67.
[762] Please refer to the discussion of "fork-in-the-road" clauses and estoppel in Section 3.4 where, *inter alia*, the case of *SGS v Philippines* is analysed. A dictum from the case was cited in *Petrobart in extenso* at para VIII.5, p. 67.
[763] *Petrobart*, para VIII.5, pp. 67-68. See also: K. Hobér, "Investment Arbitration and the Energy Charter Treaty", 1(1) Journal of International Dispute Settlement 2010, p. 178.
[764] *Petrobart*, para VIII.4, p. 64. The tribunal in *Tokios Tokelės* re-examined a previously arbitrated issue (necessity to prove damage to a physical asset to bring a claim in relation to an investment under the Ukraine-Lithuania BIT) and, having determined that the new claim is merely a re-formulation of an issue definitively decided, found issue estoppel. See: *Tokios Tokelės*, paras 97-112. Also see Article 51(1) of the ICSID Convention under which either party may request revision of an award by an application in writing addressed to the Secretary-General on the ground of discovering some fact of such a nature as decisively to affect the award, as long as the fact was unknown to the tribunal at the time the award was rendered and the applicant's ignorance of that fact was not owing to negligence.
[765] The first mention in a party pleading appears to have been made by the host state in *CME Czech Republic*, para 175.

international material in support for its propositions,[766] which created an impression that the broad concept of collateral estoppel was transposed directly from U.S. law of procedure.[767] Further, it appears that the reasoning based on the letter of treaty and the absence of a "fork-in-the-road" clause in the ECT was, in the eyes of the tribunal, the predominant reason for refusing Kyrgyzstan's objection. The tribunal devoted the majority of its reasoning to a treaty interpretation, and supported its findings by citing an extensive passage from *SGS v Philippines*. Finally, the host state pleaded both res judicata and collateral estoppel, which probably prompted the arbitral tribunal to address both heads of claim. Kyrgyzstan challenged the entire claim, therefore I submit that it was erroneous on its part to plead issue estoppel separately. Unfortunately, this was overlooked by the tribunal. On the facts of *Petrobart*, it was impossible to reach different conclusions on res judicata and issue estoppel because the host state's objection targeted the entirety of the investor's claim. This follows from the nature and objectives of both principles. A successful plea of res judicata would have rendered collateral estoppel a moot point.

5.2.3.2. Ascension – *RSM Production*

Collateral estoppel found its fullest exposition in the saga of *RSM Production*, where the claimants pursued parallelly contract- and treaty-based proceedings. The facts presented themselves as follows:[768] RSM Production Company, a U.S. corporation ("RSM") and the host state entered into a written petroleum exploration agreement dated 4 July 1996, pursuant to which RSM were to apply for, and Grenada were to grant, a petroleum exploration licence within 90 days of the agreement's effective date. When RSM finally made an official application in 2004, it was refused as untimely, and Grenada purported to terminate the agreement. RSM subsequently initiated arbitration proceedings under the agreement (which contained an ICSID arbitration clause). In 2009, an ICSID panel dismissed all of RSM's substantive claims concerning contractual breaches. In response, RSM applied for annulment under Article 52 of the ICSID Convention. In the meantime, with the annulment proceedings still pending, RSM, in tandem with its shareholders, initiated another arbitration on the basis of the United States-Grenada BIT. The investor alleged, *inter alia*, that: Grenada's refusal of the exploration li-

[766] P. Dumberry, "The Emergence of the Concept of 'General Principle of International Law' in Investment Arbitration Case Law", 11(2) Journal of International Dispute Settlement 2020, p. 208.
[767] P. Janig, A. Reinisch, "General Principles and the Coherence of International Investment Law…", see note 492, p. 267.
[768] A fuller account of the facts is given in: P.C. Reed, "International Economic Law in North America: Recent Developments in Dispute Resolution Under Regional Economic Agreements", European Yearbook of International Economic Law 2012, pp. 478-479.

cence amounted to an expropriation of the investment; the investment was not granted full protection and security, contrary to Article II(2) of the BIT; denial of RSM's application for an exploration license constituted a breach of the FET standard.[769] At the core of the final claim was an allegation that the host state's conduct was motivated by bribes paid to some of its most senior officials.[770] The respondent urged the tribunal to dismiss RSM's claim on two grounds: (1) as "manifestly without legal merit" under Rule 41(5) of the ICSID Convention Arbitration Rules; (2) under the principle of collateral estoppel, positing that the principle is "well established as a general principle of law applicable in international courts and tribunals".[771] Specifically, the argument hinged upon the 2009 arbitration award whose *dispositif*, the host state contended, promulgated that in failing to issue an exploration license and terminating the agreement no contractual obligations were breached.[772] Addressing pre-emptively the argument that estoppel could not apply as there was no identity of the parties between the two proceedings, the host state surmised that, for one, the shareholders were not parties to the exploration agreement and they purported to claim damages for loss allegedly indirectly suffered and hence too remote, and second, crucially, that the shareholders acting as parties to the present proceedings together held 100% of RSM's stock and as such must be, to the extent necessary, identified with the company itself and be subject to defences that are available against the corporation, including collateral estoppel.[773] The claimants countered that there was no identity of cause of action and the question put in issue, supposedly barred by collateral estoppel in the present proceedings, in the concluded arbitration arose out of the exploration agreement and not the BIT. Further, the allegations of corruption were not raised in the prior proceedings. Also, the shareholders of RSM argued that they had independent standing before the tribunal despite their investment having been made indirectly through RSM (therefore, there was no identity of the parties).[774] On the whole, the triple identity test was *prima facie* not satisfied as regards the three shareholders as neither *persona* nor the *petitum* or *causa petendi* between the two sets of proceedings were identical.

The tribunal, having acknowledged that neither of the parties disputed the applicability of collateral estoppel nor its requirements, made two sweeping propositions. First, a three-pronged test was proffered, limiting the ambit of collateral estoppel to matters distinctly put in issue in prior proceedings that were actually decided, and the resolution of which was neces-

[769] *RSM Production*, paras 3.2.1-3.2.8.
[770] A.P. Llamzon, *Corruption in International Investment Arbitration*, see note 671, pp. 185-186.
[771] *RSM Production*, para 4.6.5.
[772] Ibid, paras 4.4.1-4.4.2.
[773] Ibid, para 4.6.8.
[774] Ibid, paras 5.3.5-5.3.6.

sary for the resolution of claims.[775] Second, collateral estoppel was proclaimed a general principle of law applicable in international investment arbitration.[776] Notwithstanding, only an extensive passage from a U.S. Supreme court case was cited in support.[777]

The tribunal extended the concept of identity of parties by considering RSM's shareholders as its privies, effectively piercing the corporate veil in a manner observable in U.S. corporate law.[778] The tribunal agreed with the host state that as the shareholders effectively controlled the company, they had acted in concert with the same and had their interests represented in the first proceeding, and as such should be held to the results thereof. At the same time, the tribunal was careful to underscore that its findings do not necessarily preclude shareholders from pursuing claims in investment arbitration, but rather establish a rule that they must be subject to defences that would be available against their parent corporation.[779] The finding is largely consistent with the tenor of a number of recent investment treaties under which shareholders are treated as having direct rights that are engaged whenever an injury is inflicted upon a company in which they have invested.[780]

Although the basis of this juncture of the award was collateral estoppel as a general principle of law, the tribunal was careful to reserve that to reconsider the issues raised by the claimants would contravene Article 53 of the ICSID Convention, which mandates the binding character of an award on the parties and prohibits any appeal other than the measures envisaged in the Convention (notably, the limited avenue of annulment under Article 52). Further, annulment proceedings do not permit a new comprehensive review of the factual and legal findings – Article 52(1) exhaustively enumerates possible grounds for an annulment application.[781]

Further, albeit not expressly, the tribunal accepted, on the facts of the case, that there was identity of cause of action even though the issues pursued by RSM in the present arbitration were based upon a BIT whilst the claims previously dismissed in the first proceedings were contractual in nature. To that extent, it appears that the tribunal contradicted the findings in *Petrobart*, however that case was not mentioned in *RSM Production*. Subsequent case law

[775] The test is laid out in Section 5.2.2.
[776] Ibid, paras 7.1.1-7.1.2.
[777] See Section 2.7 where I analyse this and other analogies made in the context of estoppel between domestic and international law.
[778] A selection of similar cases under municipal law where the activation of collateral estoppel necessitated piercing the corporate veil is discussed in: G.M. Gottlieb, "Res Judicata and Collateral Estoppel beneath the Corporate Veil", 66(5) California Law Review 1978, pp. 1100-1103.
[779] *RSM Production*, paras 7.1.6-7.1.7.
[780] V. Lowe, "Injuries to Corporations" (in:) J. Crawford, A. Pellet, K. Parlett, S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press 2010, p. 1015.
[781] *RSM Production*, paras 7.1.9-7.1.10.

has confirmed that where both awards are of international nature, there is identity of cause of action. In determining a dispute under the United States-Egypt and Germany-Egypt BITs, the tribunal in *Ampal-American (Liability)* upheld the exclusionary effect of an ICC award which had disposed of a contractual dispute between the parties. The tribunal adopted a number of factual and legal findings made by the ICC tribunal, including the conclusion that the investment contract in question had been wrongfully terminated.[782] The exclusionary effect of the ICC arbitration was held to bind not only the investor party to a dispute, but also its shareholders, the latter being regarded as in privity with the former.[783]

Controversially, the tribunal in *RSM Production*, in a passage supportive of a dictum in *Helnan*, accepted the exclusionary effect of collateral estoppel under international law in respect of final arbitral awards rendered under municipal law, unless it is apparent that denial of justice occurred.[784] This flies in the face of the commonly accepted mantra that whilst the exclusionary effect of domestic decisions applies within the domestic legal system, the interpretation of investment agreements and international investment contracts is, in contrast, a matter of international law.[785] Above all, it must be emphasized that the tribunal in *Helnan*, even if it could be argued that it permitted res judicata effect with regard to domestic awards, ultimately refused to accept an issue preclusion argument on the grounds that the claims pursued in two separate proceedings had a different basis – claims in one were contractual, whilst in the other they were derived from treaty:

> "The comparison of the respective claims and counterclaims in each of the proceedings shows that even if the subject matter of the disputes is the same, i.e. the Management Contract, the relief sought is not identical, although it is globally aiming at the same result: allowing HELNAN to continue to be in charge of the management of the Shepheard Hotel, obliging the owner of the Hotel to renovate it and obtaining compensation for alleged damages. Furthermore, those reliefs are not based on the same legal grounds or the same causes of actions. In the Cairo Arbitration, HELNAN's action was grounded on the Management Contract as it purported to enforce its contractual rights. In the instant ICSID arbitration, HELNAN's actions are grounded on the Treaty: it contends that it and its investment were subject to unfair, discriminatory and inequitable treatment by EGYPT. The issues could not have and were not submitted to

[782] *Ampal-American (Liability)*, para 253.
[783] Ibid, paras 260-261.
[784] *RSM Production*, paras 7.1.11-7.1.14.
[785] J. Magnaye, A. Reinisch, "Revisiting Res Judicata and Lis Pendens…", see note 719, p. 272.

the Cairo Arbitration which would have been incompetent to deal with them. They definitely fall within the jurisdiction of this ICSID tribunal".[786]

The tribunal in *RSM Production* did not cite this passage in its decision. The dictum in *Helnan* could be, it is submitted, directly applicable to the present case. The tribunal favoured a moral balancing exercise (as it clearly considered the company's claims as inadmissible) over a rigid application of the doctrine which demands the identity of cause of action (basis of claim) for a very important reason. For it is entirely conceivable that even in the absence of a contractual breach, there nevertheless could have been a violation of the underlying BIT as standards applied to both instruments could differ.[787] In fact, it is precisely the invention and practice of umbrella clauses that has led to elevating investment contract breaches onto breaches of international law.[788] The corollary is true even considering the fact that both arbitral tribunals and scholars have been increasingly more inclined to construct dispute resolution clauses in investment treaties purposively, inferring ICSID jurisdiction over contract claims based upon general, sweeping arbitration clauses written into BITs and MITs, without the need for inclusion of specific references to contracts.[789]

Finally, in *RSM Production* the ambit of collateral estoppel was extended to also cover the corruption allegations against the host state. The claimant, the tribunal held, could have raised the corruption issue in the original arbitration through a revision proceeding or even by means of reopening the original proceedings to introduce evidence of the alleged corruption

[786] *Helnan*, para 130.
[787] See, *inter alia*: S.A. Alexandrov, J. Mendenhall, "Breach of Treaty Claims and Breach of Contract Claims: Simplification of International Jurisprudence" (in:) A.W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2014*, Brill/Nijhoff 2015, p. 25; F.D. Simões, "UNCITRAL's Work on Concurrent Proceedings in Investment Arbitration: Overcoming the 'Treaty/Contract Claims' Gap" (in:) M. Ramaswamy, J. Ribeiro (eds.), *Harmonising Trade Law to Enable Private Sector Regional Development*, UNCITRAL Regional Centre for Asia and the Pacific, New Zealand Association for Comparative Law 2017, p. 66; S. Hariharan, "Distinction between Treaty and Contract: The Principle of Proportionality in State Contractual Actions in Investment Arbitration", 14(6) Journal of World Investment and Trade 2013, pp. 1021-1022. Cf. C. Schreuer, "*Calvo*'s Grandchildren: The Return of Local Remedies in Investment Arbitration", 4(1) The Law & Practice of International Courts and Tribunals 2005, p. 12 (who admits that treaty and contractual claims are conceptually different and that they engage different standards of protection, however argues that, for reasons of efficiency and judicial economy, it would be impractical "to dissect the relationship into different legal segments and to pursue remedies simultaneously in separate fora").
[788] The origins and rationale of umbrella clauses are conveniently summarized in: M.E. Footer, "Umbrella Clauses and Widely-Formulated Arbitration Clauses: Discerning the Limits of ICSID Jurisdiction", 16(1) The Law & Practice of International Courts and Tribunals 2017, p. 89 et seq.
[789] *Salini Costruttori*, para. 59; J. Crawford, "Treaty and Contract in Investment Arbitration", 24(3) Arbitration International 2008, p. 362; Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press 2009, pp. 238-240.

(no new evidence having emerged since then), but failed to do so.[790] Conveniently for the argument that issue estoppel is a peculiar sub-species of estoppel proper rather than a subsidiary principle of res judicata, the tribunal emphasized that there was ample opportunity for the claimant to raise the corruption allegations beforehand.

There are a number of issues of systemic coherence related to the award in *RSM Production*. The tribunal relied overly on the consensus the parties seemed to have reached with respect to a number of vexatious issues of law. As a result, an international principle of collateral estoppel was "invented" without citing much support in international legal materials or domestic legal systems. Further, the tribunal enunciated the test for collateral estoppel and then failed, it is submitted, to apply it methodically to the facts before it. The issue of interrelation between collateral estoppel, res judicata and estoppel proper within international investment law was also ignored.

The tribunal activated both the gap-filling and the interpretation functions of estoppel by permitting preclusion within the bounds delineated by the United States-Grenada BIT and the ICSID Convention. Once the existence and applicability of collateral estoppel as a general principle of law was established, estoppel was applied to the facts (gap filling). At the same time, as an alternative *ratio decidendi*, or as a means to buttress its conclusion achieved by utilizing the gap-filling function, the tribunal availed itself of an estoppel-influenced interpretation of Article 53 of the ICSID Convention. Although the letter of the provision does not appear to address issue preclusion (the "award is binding" language has traditionally been taken to refer to claim preclusion), the tribunal extended it to accommodate the needs of fairness and justice, and to balance the rights and obligations of the shareholders of the company. These undertones and objectives are also discernible in the tribunal's reasoning on privies. A potentially coordinating function of collateral estoppel in investment arbitration jurisprudence is also discernible. The objective of the principle, as a specialized and specific species of estoppel, is to combat procedural abuse manifested in the initiation and conduct of multiple or parallel proceedings, but strictly with regard to specific issues. As such, jurisdiction of the arbitral tribunal is not questioned where issue estoppel is activated, but instead – only consideration of certain delineated matters is precluded as between a given configuration of parties. As issue estoppel entails a relaxation of the triple identity test, arbitral tribunals may hesitate to deny jurisdiction but the doctrine can operate to align arbitral determinations of specific

[790] *RSM Production*, paras 7.1.15-7.1.30. The tribunal's conclusions have been accepted as correct in the literature. See: K. Betz, *Proving Bribery, Fraud and Money Laundering in International Arbitration: On Applicable Criminal Law and Evidence*, Cambridge University Press 2017, pp. 100-101.

issues.[791] It could be tentatively posited that issue estoppel could conceivably perform an important structural role within international investment law as a system which has not developed the concept of *stare decisis* and does not know of a firm notion of precedent. A more expansive interpretation of issue estoppel could help introduce into the system a surrogate of *stare decisis*, the process, however, should be approached with caution lest it come at the expense of individual fairness. For it should not be forgotten that a successful plea of issue estoppel effectively precludes reconsideration of an issue. Whether an arbitral panel has to do with a consideration or re-consideration lies at the core of many a dispute. In determining such conundrums arbitral tribunals are best advised to exercise circumspection and adopt a reasonably restrictive approach, particularly as regards identity of cause of action.

It is to be emphasized that the privity argument in *RSM Production* was advanced against a factual background where the claimant shareholders held 100% of the shares in the company. The tribunal did not address other hypotheticals, notably where the claimant shall be a majority and not whole shareowner. At any rate, the expansion of the concept of "party" could be perceived as being related to the fairness and justice implications of estoppel, an indicator of whether it is fair to apply estoppel in the particular case. This concept of privity was expounded upon by Judge Robert Megarry in the English case of *Gleeson v J Wippell & Co Ltd*:

> "[T]here must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'".[792]

The introduction of the concept of privy is defensible on account of the openness that investment treaties tend to show in recent years in favour of permitting shareholder claims.[793] Authors of an authoritative textbook welcomed the tribunal's approach on privies, noting that it should be the interest in pursuing a claim, not a strict identification as a separate legal entity or person, that should govern the application of collateral estoppel.[794] A number of commentators have also proposed that shareholder standing before international arbitral tribunals has

[791] F. Fontanelli, "Jurisdiction and Admissibility in Investment Arbitration…", see note 537, pp. 94-95.
[792] *Gleeson v J Wippell & Co Ltd*, p. 515.
[793] D. Gaukrodger, "Investment Treaties and Shareholder Claims: Analysis of Treaty Practice", *OECD Working Papers on International Investment, 2014/03*, OECD Publishing 2014, available at: https://bit.ly/2MgUlYo (accessed: 24.08.2021).
[794] C. McLachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, see note 556, p. 146.

acquired the status of a rule of customary law,[795] a contention that has been challenged.[796] The ICJ in *Barcelona Traction (Second Phase)*, relying on custom, denied shareholders standing by holding that Belgium, the state of nationality of the majority shareholders of a company incorporated in Canada, was unable to pursue claims against Spain for damage done to the company. In that judgment, the ICJ conceded that rules of customary law were probably insufficient to accommodate the rapidly changing economic reality, recommending that, to assuage those concerns, "recourse be had to treaty stipulations or special agreements directly concluded between the private investor and the State in which the investment is placed".[797] In fact, the dictum was a primary catalyst for the proliferation of BITs.[798] Doubtless, the increasing number of investment treaties has prompted more general questions about the impact the same have on the development of customary international law, with some authors claiming a wide-reaching inter-relation and synergy.[799] Whether grounded in custom or treaty,[800] the strengthening of the standing of shareholders was countervailed in the present case by imposition of burdens and obligations binding on parties to investment arbitrations by virtue of recognition of collateral estoppel as a general principle of law. Procedural rights should not come without strings attached. On this account, collateral estoppel should be understood as an instrument of balancing shareholder rights and obligations in investment arbitration.[801]

5.2.3.3. Immediate reception

Despite the ground-breaking character of the award in *RSM Production,* it went largely unnoticed in investment arbitration literature. The almost axiomatic acceptance of the une-

[795] See e.g. I.A. Laird, "A Community of Destiny: The *Barcelona Traction* Case and the Development of Shareholder Rights to Bring Investment Claims" (in:) T. Weiler (ed.), *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law*, Cameron May Ltd. 2005, pp. 86, 96.
[796] P. Dumberry, "The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?", 18(3) Michigan State Journal of International Law 2010, pp. 365-372.
[797] *Barcelona Traction (Second Phase)*, p. 47, para 90.
[798] R. Dolzer, A. von Walter, "Fair and Equitable Treatment: Lines of Jurisprudence on Customary Law" (in:) F. Ortino, L. Riberti, A. Sheppard, H. Warner (eds.), *Investment Treaty Law. Current Issues II*, British Institute of International and Comparative Law 2007, p. 99.
[799] S.M. Schwebel, "The Influence of Bilateral Investment Treaties on Customary International Law", 98 Proceedings of the Annual Meeting (American Society of International Law) 2004, pp. 27-30; B. Kishoiyian, "The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law", 14(2) Northwestern Journal of International Law & Business 1993, p. 327 et seq.; M.C. Porterfield, "An International Common Law of Investors Rights", 27 University of Pennsylvania Journal of International Law 2006, p. 79 et seq.
[800] The tribunal in *CMS Gas* opined that the strict separation between a company and its shareholders under customary international law shall not be applicable to investment arbitration and latitude must be accorded to treaty definitions of "investment" and "investor". *Barcelona Traction (Second Phase)* was also limited only to the availability of diplomatic protection and was without prejudice to any rights that may be accorded to shareholders by virtue of treaty. See: *CMS Gas*, paras 43-48.
[801] S. Farnham, "Claim Suspension and Issue Preclusion in Multiparty Investment Disputes…", see note 740, p. 227.

quivocal introduction of collateral estoppel into international investment law[802] was paired with the silence on the issue that dominated arbitral awards for more than 3 years.[803] The dictum in the case was finally scrutinized in *Apotex Holdings*, where the parties, contrary to the situation in *RSM Production*, disagreed as to the scope of the res judicata doctrine and applicability of collateral estoppel in international investment arbitration, with the claimant contending that the exclusionary effect attached only to the *dispositif* of the award.[804] The tribunal referenced the early inter-state arbitration decision in *Orinoco Steamship Company*, *Pious Fund Arbitration* and, relying on Lowe's view, *Amco (Jurisdiction in Resubmitted Proceeding)*, as well as the jurisprudence of the ICJ and the CJEU, to make a point that issue estoppel, even if it had not been mentioned by name, had been utilized in practice by international arbitral tribunals.[805] Next, the tribunal asserted that whilst there may be, as submitted by the claimants, differences in the understanding of issue estoppel between civil law and common law systems, this is not a "sharp divide". Reference was made here to the aforementioned ILA Interim Report.[806] The tribunal then turned to the UNCITRAL Arbitration Rules, which governed the proceeding in the first arbitration that produced the award whose preclusive effect was being asserted. A construction of Rules 32(2) and 32(3) (which stipulate that, respectively, an award shall be final and binding on the parties (Rule 32(2)) and that the arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given (Rule 32(3)))[807] supported, in the tribunal's view, a broad view of issue preclusion.[808] It was of no consequence that the new set of proceedings was governed by the ICSID Convention.

A related issue decided in *Apotex Holdings*, and an important component of the tribunal's reasoning, was the qualification of the claimant as a privy of the claimants in prior proceedings, Apotex-US and Apotex Inc., of which it was the ultimate owner.[809] The tribunal then, in line with the foregoing findings, looked to the reasons proffered in awards in prior

[802] See: P.C. Reed, "International Economic Law in North America…", see note 768; A. Diop, "Objection under Rule 41(5) of the ICSID Arbitration Rules", 25(2) ICSID Review - Foreign Investment Law Journal 2010, p. 325; S. Schaffstein, *The Doctrine of Res Judicata before International Arbitral Tribunals*, PhD thesis defended at University of London and University of Geneva, 2012, pp. 82-86, available at: https://bit.ly/2XoWnrm (accessed: 24.08.2021).
[803] Notably, collateral estoppel was raised in the pleadings of both parties in one of the Chevron cases, the point, however, went unaddressed in the award. See *Chevron Corporation (2013 First Partial Award)*.
[804] *Apotex Holdings*, para 7.17.
[805] Ibid, paras 7.18, 7.24-7.29.
[806] Ibid, paras 7.22-7.23.
[807] These are Articles 34(2) and 34(3) in the 2010 revised version of the Rules.
[808] *Apotex Holdings*, paras 7.33-7.36.
[809] Ibid, paras 7.37-7.40.

proceedings and, having concluded that there was identity of object and identity of cause of action, dismissed the claims as being barred under issue estoppel.[810]

Apotex Holdings, although arbitrators in that case refrained from assessing the reasoning of the tribunal in *RSM Production*, effectively accepted collateral estoppel as a general principle of law, however that conclusion was reached in a more principled manner. The existence of a general principle was inferred by reference to judgments ad decisions from a range of courts and tribunals, including the International Court of Justice.[811] It must be noted, however, that the tribunal relied more on the identity of *reasons* given by a tribunal in its decision rather than the identity of arguments of the parties raised in the original proceeding. In doing so, the tribunal assumed, perhaps overly optimistically, that reasons proffered by an international court or tribunal always address all junctures of the claimant's argument. This premise is probably a product of necessity as the tribunal would have found it much more difficult to draw upon holdings confirming the corollary that preclusion applied to issues or arguments raised by the parties. I submit that the tribunal took it as an axiom that for collateral estoppel to arise, resolution of an argument distinctly put in issue must have been necessary to resolving the claims before that court or tribunal (the final requirement of collateral estoppel as enunciated in *RSM Production*). It was sufficient to refer to the dicta of international courts and tribunals to the effect that in a new set of proceedings it is permitted that the court or tribunal have regard to the reasons of the original award and extend exclusionary effect thereto, since the insertion of a resolution of an issue advanced by the claimant in the original proceeding would be sufficient to meet the third requirement of collateral estoppel. Further, the *ratio decidendi* of *Apotex Holdings* tribunal was interpreted in *Caratube II* as an affirmation of resorting to the reasons of an award and the parties' arguments to determine the full scope of the operative part of the judgment. This, the tribunal in *Caratube II* opined, is different from applying the exclusionary effect directly to the parties' arguments.[812] Again, the preclusion effected by issue estoppel applies only to those issues, which were distinctly argued before an arbitral tribunal and which were necessary to the resolution of the underlying dispute (both requirements must be fulfilled cumulatively), which creates a strong presumption that these issues shall be recorded in the tribunal's reasons. *Caratube II* tribunal's

[810] Ibid, paras 7.41-7.60.
[811] The tribunal, it is submitted, sought to classify issue/collateral estoppel as a general principle of international law, rather than a general principle law recognized by civilized nations *pro foro domestico* within the meaning of Article 38(1)(c) of the ICJ Statute. This is supported by the reasoning of the tribunal and the authorities it selected to strengthen its arguments (pronouncements of international dispute resolution fora and international practice rather than domestic legal systems).
[812] *Caratube II*, para 460.

reasoning, it is submitted, attempts to make too fine of a distinction which appears to be accommodated by the comprehensiveness of the issue estoppel test.

The award in *Apotex Holdings* was interpreted as bolstering the position of the substantive/transactional approach to issue preclusion, so much so that the tribunal failed to even countenance a formalistic argument on the traditional limits of the exclusionary effects of claim preclusion.[813] With the endorsement of the principle of collateral estoppel, it appears that the jurisdictional threshold for bringing claims under investment treaties (with *Apotex Holdings* having been initiated under the NAFTA) is being lifted increasingly higher.[814] One commentator implied that issue estoppel in this case performed an important gap filling role which was necessary because the early res judicata cases decided, *inter alia*, by the ICJ, did not address certain questions that have become relevant with the advent of modern economy.[815] On another view, that the tribunal thwarted the investor's attempt to split its claims in order to circumvent the formalistic account of res judicata shall conduce to finality, legal security, as well as judicial economy by preventing the costly and time-consuming re-litigation of repeated claims.[816] The latter aspect was heavily underscored as a rationale of issue estoppel by the tribunal itself.[817]

Three further cases examined the limits of the concept of "privies" for the purposes of inferring the identity of the parties. The rule espoused in *RSM Production* that shareholders representing 100% of shares in a company were considered as having a privity of interest with the latter was effectively applied on analogous facts in *Orascom*, however the tribunal, in estopping wholly owned subsidiaries within a capital group from pursuing parallel claims, cloaked its conclusion in terms of "abuse of the system of investment protection".[818] However, it was not until the decision in *Eskosol*, where the limits of the precept were truly tested. In that case, initiated under the Energy Charter Treaty and challenging a regulatory measure in

[813] C.T. Kotuby, Jr., J. Egerton-Vernon, "*Apotex Holdings Inc and Apotex Inc v The Government of the United States of America*: The Adoption by International Tribunals of a Substantive/Transactional Approach to Res Judicata—A New Paradigm in International Dispute Resolution?", 30(3) ICSID Review - Foreign Investment Law Journal 2015, p. 497. For arguments in support of a transactional approach to claim and issue preclusion within investment arbitration, see: P.J. Martinez-Fraga, H.J. Samra, "The Role of Precedent in Defining Res Judicata in Investor–State Arbitration", 32(3) Northwestern Journal of International law & Business 2012, pp. 447-450.
[814] C.T. Kotuby, Jr., J. Egerton-Vernon, "*Apotex Inc v The Government of the United States of America*: Will Barriers to Jurisdiction Inhibit an Emerging Trend?", 30(1) ICSID Review - Foreign Investment Law Journal 2014, pp. 25-29.
[815] N. Yaffe, "Transnational Arbitral Res Judicata", 34(5) Journal of International Arbitration 2017, pp. 795-800.
[816] N. Thornton, "*Apotex III*'s Application of Res Judicata Ensures Finality, Legal Security and Judicial Economy", Kluwer Arbitration Blog 2014, available at: https://bit.ly/38lLvAZ (accessed: 24.08.2021).
[817] *Apotex Holdings*, para 7.59.
[818] *Orascom*, para 545.

the field of renewable energy,[819] Italy objected, under Rule 41(5) of the ICSID Convention Arbitration Rules, to an arbitration commenced by Italian company Eskosol S.p.A. following a separate arbitration which was brought against Italy and lost by the investor's majority shareholder, Blusun S.A. By the time the arbitration proceedings were launched by Eskosol, 80% of its shares were owned by Blusun and the remaining 20% by two natural persons. One of the host state's objections was grounded in collateral estoppel, alleging that the triple identity test was met and that the claimant sought to re-arbitrate issues previously resolved.[820] The investor attacked all heads of Italy's objection, notably rejecting the concept of privies altogether.[821]

The collateral estoppel claim failed as the tribunal held there was no identity of parties since Blusun could not be considered a privy of Eskosol. The facts of the present case were distinguished from those of *RSM Production* and *Orascom* where claims were brought by the 100% shareholders of a local company. Further, in contrast with *RSM Production*, Eskosol was not joined by Blusun, its majority shareholder, as a formal party to the new proceedings.[822] The tribunal conceded that it could be considered unfair to the host state that they stand to deal again with claims successfully staved off in previous proceedings, however the ICSID system does not require that all shareholders of an entity affected by a challenged state measure must be heard in a single forum at one time nor is there any requirement that an entity pursuing its claims must join to the proceeding all potentially affected stakeholders:

> "[a]bsent such a system — which States have the power to create if they so wish — it would not be appropriate for tribunals to preclude arbitration by qualified investors, simply because *other* qualified investors may have proceeded before them without their participation".[823]

The collateral estoppel argument was re-argued at the merits stage where, in an award rendered in September 2020,[824] the tribunal upheld the crux of all of its previous findings.[825] One important argument was adduced, however. For it was made clear that the fact that the

[819] On the public policy context of the case, see: Y. Levashova, "Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law", 67 Netherlands International Law Review 2020, p. 242.
[820] *Eskosol*, paras 43, 136-149.
[821] Ibid, paras 150-165.
[822] Ibid, para 168.
[823] Ibid, para 170.
[824] *Eskosol (2020)*.
[825] Ibid, paras 262-268.

minority shareholders of Eskosol were Italian nationals and therefore had no standing against Italy, was of no consequence.[826]

That the privity argument is heavily fact-specific is proven by the case of *Ampal-American (Liability)* where the tribunal appeared to have further loosened the attendant requirements. Issue estoppel was in that case applied to a shareholder of a corporation that was party to the original proceedings even though it did not wholly own the company. A substantive test was brought into the fold – it was concluded that the shareholder's claims existed exclusively through the company and since it had derived a benefit out of the investment and had *ius standi* before a tribunal, it must also be exposed to the same defences that apply to the actual investor.[827] It has been posited in the doctrine that this relaxed test of privity could find application especially where an investor has incorporated multiple entities in one host state to comply with its requirements, however remains in control of the investment and benefits therefrom.[828]

Basing the operation of issue estoppel on the use of the concept of privies generates a degree of interplay between estoppel and the ability of shareholders to claim for reflective loss they suffered as a result of damage done to the primary investor.[829] Where the provisions of a treaty are permissive of multiple claims and grant standing to stakeholders, including companies with seats in the host state,[830] issue estoppel should fail to preclude such claims. There is no gap to fill, therefore it seemingly has no function to play in this context. Nonetheless, *RSM Production* teaches us that this is not necessarily correct precisely because of the concept of privies. Where a 100% stakeholder or potentially a lesser shareholder (following *Ampal-American (Liability)*) seeks to have an issue re-arbitrated, on the *RSM Production* analysis they would be precluded from doing so even though *prima facie* they would be within their rights as granted to them by treaty. It is difficult to assert the gap-filling role of estoppel here, nor does it appear to be a use of estoppel in the interpretation of a treaty. Consequently, it is submitted that the point of departure in *Eskosol* is an interpretation of the Energy Charter Treaty and the ICSID Convention, under both of which Eskosol has a *prima facie*

[826] Ibid, para 266.
[827] *Ampal-American (Liability)*, paras 266-268.
[828] G. Griffith, I. Seif, "Work in Progress: Res Judicata and Issue Estoppel…", see note 738, p. 128.
[829] V. Korzun, "Shareholder Claims for Reflective Loss…", see note 743, pp. 245-246.
[830] See Article 26(7) of the Energy Charter Treaty. Provided that the shareholder being a local company can establish foreign control, it has *ius standi*. An analogous conclusion is to be drawn on the basis of Article 25(2)(b) of the ICSID Convention.

right to pursue a claim separate to Blusun.[831] Departures from the letter of a treaty should be considered extraordinary, only in cases of blatant abuse of process, and presumably only where issue estoppel's effect is reconceptualized as taking away a party's right (to have an issue arbitrated) and not as a derogation from a rule of international public policy (finality and certainty of arbitration).

5.2.3.4. Re-evaluation of issue estoppel – *Caratube II*

As it can be inferred from the discussion above, issue estoppel was positively received in the practice of international investment tribunals. That said, the status of the principle was re-evaluated in *Caratube II*, which decided a claim brought under an international investment contract. In the new set of proceedings Kazakhstan contended that the claimant investor and Mr. Hourani, its shareholder, were estopped from invoking ICSID jurisdiction as a previous award appeared to deny the latter *ius standi* on account of Mr. Hourani's lack of control over the company (want of the "foreign control" element enshrined in Article 25(2)(b) of the ICSID Convention).

The tribunal voiced criticism over the reasoning in *RSM Production* and distinguished it on the fact that none of the parties in that proceeding contested the application of issue estoppel. Further, the reference in that case to *Amco (Jurisdiction in Resubmitted Proceeding)* was dismissed as erroneous as the tribunal in that case was said to have denied the application of res judicata to reasons or preliminary or incidental determinations, or, at a minimum, not to have confirmed such an extension.[832] The tribunal also refused to assent to the view that collateral estoppel is "firmly established" in international law and was critical of the direct application in international law of collateral estoppel as understood under U.S. law.[833] More credence, however, was given to the *obiter* comments of the tribunal in *Apotex Holdings* and references to international law authorities therein, as well as the ILA reports mentioned above. Ultimately, the tribunal concluded that in its autonomous decision on jurisdiction it may defer to the final and binding determinations on identical issues of another ICSID tribunal.[834]

With regard to the identity of issues, the tribunal noted that the first claim (*Caratube I*) was a treaty claim based on the United States-Kazakhstan BIT. Article VI(8) concretizes an ICSID tribunal's jurisdiction in respect of local companies controlled by foreign investors

[831] Although this was not articulated by the tribunal expressly, and a sizable portion of the discussion was devoted to the applicability of the privy concept to the facts, this is what the tribunal in *Eskosol* started with at para 166.
[832] *Caratube II*, para 459.
[833] Ibid, paras 460, 462.
[834] Ibid, para 463.

within the meaning of Article 25(2)(b) by providing that the latter's "foreign control" requirement shall be considered met if, immediately before the occurrence of the event or events giving rise to the dispute, the investment in dispute was an investment of nationals or companies of the other contracting state. This interplay between the BIT and the ICSID Convention compelled the tribunal in *Caratube I* to interpret the term "control", for the purposes of ascertaining Mr. Hourani's position, by looking jointly at both texts, and it concluded that he failed to establish that the investment in dispute was an investment of a U.S. national under the BIT. This cannot be extended, however, to automatically bar jurisdictional claims based on contract where Article VI(8) of the BIT is no longer applicable:

> "[T]he jurisdictional issues decided in the *Caratube I* award are not identical to the issues to be determined in this arbitration. In particular, the Tribunal finds that the *Caratube I* tribunal did not decide such jurisdictional issues as "stand-alone" or objective issues, independently of the underlying consent-granting instrument. To the contrary, the *Caratube I* tribunal expressly stated that it could not examine the jurisdictional requirements of Article 25(2)(b) of the ICSID Convention independently of the requirements set forth in the BIT. What is more, as was seen above, the *Caratube I* tribunal distinguished in this regard the situation prevailing under an investment treaty as opposed to the situation where the consent-granting instrument is a contract, as is the case here".[835]

Accordingly, the collateral estoppel plea was dismissed due to the lack of identity of object (*petitum*) and the failure of the host state to establish that the issue was actually finally decided, i.e. the first prong of the issue estoppel test.[836]

The sceptical standpoint of the *Caratube II* tribunal notwithstanding, it appears that the evidence cited in *Apotex Holdings* from the practice of international courts and tribunals points strongly towards recognizing collateral/issue estoppel as a general principle of international law applicable in investment arbitration. None of the arbitral tribunals which have considered issue estoppel post-*Caratube II* mentioned the case nor have they questioned the applicability of estoppel, even if they declined to apply it on the facts or used another legal principle to achieve the desired objective; more than that, tribunals have generally applied the

[835] Ibid, para 471.
[836] Ibid, paras 473-474.

issue estoppel test, even if the principle was not mentioned by its name.[837] It is plausible to argue that the tribunal in *Caratube II* attacked the messenger (*RSM Production* and the legal weight of its reasoning) rather than the actual message as although the question of status of collateral estoppel was ultimately left open, the tribunal went on to effectively apply its requirements to the facts before it.[838] One refinement *Caratube II* might have added is the recasting of the third requirement of issue estoppel by proposing that the precluded issue must have been "fundamental" (and not "necessary" as held in *RSM Production*) to the decision rendered in the first arbitration.[839] The distinction is yet to be noticed or given any weight by investment tribunals.

One issue which remains unclear following *Caratube II* is the availability of issue estoppel where claims in the consecutive proceedings are brought on different bases (contract/treaty). As explained above, the *RSM Production* tribunal implied that this was of no consequence, allowing for the extension of the reach of issue estoppel even to domestic arbitration awards. The *Caratube II* tribunal was adamant that there could be no identity of claims (object) in such cases.[840] The latter view is preferred for reasons of systemic coherence of the investment arbitration regime, however if estoppel were to be applied reasonably and sparingly, there could be a convincing argument for allowing the substance of a claim prevail over its basis. Nonetheless, it is submitted that *RSM Production* and *Caratube II* could be reconciled or distinguished on the grounds that, in the former case, the issue allegedly barred by issue estoppel would have been the same under both contract and treaty. In other words, the treaty, unlike in *Caratube II*, did not impose any additional requirements nor did it particularize any applicable jurisdictional thresholds resulting from the ICSID Convention. Therefore, under the substantive/transactional approach, the outcome of *RSM Production* is defensible. Equally, the same approach would, I submit, fail on the facts of *Caratube II* since it is a plausible position to argue that the contract and the BIT could have employed different definitions of "(foreign) control". This residual doubt justified the tribunal in its conclusion that it was ap-

[837] *Mobil Investments Canada*, paras 187-206; *Lao Holdings*, paras 105-117. Issue estoppel was pleaded in *Clayton* but was not mentioned in the tribunal's decision.
[838] The test advanced by the host state, which the tribunal accepted, conditioned the exclusionary effect of a judgment on the following: (a) it was made by a court of competent jurisdiction; (b) it is a final and conclusive decision on the merits; (c) it necessarily decided an issue that is directly or substantially at issue in the current case and (d) the current case involves the same parties or privies of those parties. See: *Caratube II*, para 465.
[839] *Caratube II*, para 467.
[840] The tribunal's approach on this point has been accepted as doctrinally sound in the literature. See: S. Alekhin, D. Bayandin, "Cherry-Picking or Cherry-Biting? The Res Judicata Doctrine and the Limits of Permissible Parallel and Consecutive Proceedings in Investment Arbitration", 5 New Horizons of International Arbitration 2019, p. 405.

posite to reconsider jurisdiction, even if, ultimately, the same conclusion were to be reached under the investment contract and under the treaty.

5.2.3.5. Future prospects of issue estoppel in international investment law

The ICJ has recently handed down two pertinent judgments – *Nicaragua v Colombia* (2016) and *Costa Rica v Nicaragua* (2018). To the extent that issue estoppel is concerned, a dictum from the former case, approved in the latter, was cited in *Mobil Investments Canada*.[841] In particular, the ICJ appeared to have endorsed the notion of issue estoppel (not mentioning it by name, but operating within the umbrella of res judicata), provided that: (1) the case at issue is clearly identified; (2) the triple identity test is met; (3) it must be evident that the issue, which is alleged to be precluded in the second set of proceedings, has been definitely settled.[842] Albeit by a different route, the similarities between this test and the one enunciated in *RSM Production* are discernible. It could be, however, that the focus the ICJ put on finality of decisions and the requirement that the issue must have been definitely settled will have profound effects on arbitral awards, even if not in principle then surely on the weight given and space devoted to this requirement. This was definitely the case in *Mobil Investments Canada* which marked the first time an investment tribunal put finality of the original decision at the forefront of the discussion, concluding that it was not final and therefore no issue estoppel applied.[843]

Although the ICJ panel in *Nicaragua v Colombia* was split down the middle, with 8 votes for and against, and the judgment was adopted on the casting vote of the President of the Court, it appears that the statement of principle enunciating the test for issue estoppel (as laid out in the preceding paragraph) won universal approval.[844] As noted by academic commentators, practical application of the test, which was the primary tenor of the dissenting opinions, is riddled with different interpretations of *petitum* and *causa petendi*, coupled with the inconsistent determinations by the Court on whether an issue has already been disposed of.[845] That said, as the ICJ, the authoritative source of interpretation of general international law and investment tribunals appears to be broadly in accord as to the requirements of the

[841] *Mobil Investments Canada*, para 191.
[842] *Nicaragua v Colombia*, paras 59-60, p. 126.
[843] *Mobil Investments Canada*, paras 195-205.
[844] M. Sarzo, "Res judicata, Jurisdiction *ratione materiae* and Legal Reasoning in the Dispute between Nicaragua and Colombia before the International Court of Justice", 16(2) The Law & Practice of International Courts and Tribunals 2017, pp. 233-238.
[845] B.S. Kantor, M.E.Z. Achurra, "The Principle of res judicata before the International Court of Justice: in the Midst of Comradeship and Divorce between International Tribunals", 10(2) Journal of International Dispute Settlement 2019, p. 300.

principle, even if different names and disguises are used (res judicata, issue estoppel, issue preclusion), this portends quite well for the future of the principle in international investment arbitration, provided that arbitrators follow further guidance that is given by the ICJ in future cases.

5.2.4. Analysis – issue estoppel reconceptualized within the strict concept of estoppel

The dissertation takes the view that issue estoppel is a distinct type of estoppel whose purview is limited to the admissibility-related prohibition on re-arbitration of issues which had already been definitively decided. However, a handful of preliminary propositions will be made to make issue estoppel conform to the strict view by reconceptualizing its elements. What follows could well be interpreted as an attempt at contorting issue estoppel into the constraints of the strict view, but, I submit, the analogies made are defensible and conduce to fleshing out a coherent picture of estoppel's applicability within international investment law. It is submitted further that there is a subjective, consent-based undertone of issue estoppel, manifesting itself in the fact that the ambit of the doctrine appears not to cover issues, reasons or arguments discussed or determined by the tribunal *proprio motu*. What triggers the operation of the principle is a repeated attempt to have the same issue resolved under the circumstances where, to use the parlance of the strict view of estoppel, the other party to the proceedings could have in good faith relied that, for reasons of systemic coherence of international investment arbitration, a prior determination of the same issue was final and would remain uncontested. This reliance, it could be said, is even stronger than in a classic case of estoppel. For in the latter scenario the rationale for the preclusive effect lies in the estopped party's contradiction of the principle of good faith and, relative to the particular relations between the parties, the other party's trust. In the case of issue estoppel, these considerations must be accompanied by an additional factor, that is a formal, systemic, constitutional principle of the system which should operate regardless of the estopped party's intention. On another account, it could be contended that in an issue estoppel hypothetical detrimental reliance will often be imputed. The other party to the proceedings may actually be interested in having a given issue reconsidered (for opportunistic, subjective reasons), however it will be taken (one could say – by employing a legal fiction) to justifiably place reliance in the integrity of the international arbitral system at large, and hence the attempt to have an issue re-arbitrated will be dismissed. On the other hand, such a manoeuvre will have to be classified as a manifestation of bad faith. What appears to be most problematic are the finding of a consistent course of conduct or a representation as well as the issue of attribution. I shall dissect the latter aspect first. Where

re-arbitration is pursued by a host state, the requisite element of authorization must be taken to be present. Organs of the state, proxies and counsel representing before arbitral tribunals must be taken to voice the host state's views and, as a consequence, incur obligations and suffer legal consequences on its behalf.[846] Similarly as regards the investor – it is a reasonable expectation that persons or corporate bodies (or counsel) which advance its arguments before a tribunal are possessed of relevant authorizations to clear the threshold imposed by the international rules of attribution. As for a clear, unambiguous and unconditional representation, I submit that this could be inferred from inaction or a long-standing pattern of conduct consisting in refraining from challenging determinations already made. Where any express representations are in fact made, such as a commitment from a party (particularly the host state) to not contest a given arbitral decision, issue estoppel could serve as a shield in future proceedings if re-arbitration is pursued.

It is apposite to recall the approach to corruption allegations taken by the tribunal in *RSM Production*. The panel underscored that corruption allegations were to be precluded by virtue of issue estoppel notably because the claimants had ample opportunity to pursue alternative avenues to hold the host state accountable. The tribunal was particularly adamant that this objective could have been achieved by instituting revision proceedings under Article 51 of the ICSID Convention. Further, the claimant was assessed to have been, substantively speaking, possessed of sufficient evidence of the alleged corruption activities to maintain a viable judicial challenge by initiating court proceedings in New York as early as in 2006. Albeit not expressly, the tribunal intimated that by, on the one hand, instituting annulment proceedings instead of revision under the ICSID Convention and, on the other, by declining to put corruption in issue as part of formal judicial proceedings, the claimant was now to be estopped from pursuing this head of claim in the present investment arbitration.[847] Although the tribunal stressed that the corruption allegations did not clear the established test for issue estoppel, it is submitted that the reasoning could be taken to suggest a reliance-based notion of the principle, one that is stripped from the modalities of the triple identity test. The tribunal was careful to underscore all of the junctures at which the claimant could bring corruption allegations (as it had sufficient *prima facie* knowledge thereof) but nonetheless failed to do so. This was considered as detrimental to its case, and ultimately the claims were barred. This can

[846] See a sweeping proposition made by Abi-Saab in his Dissenting Opinion in the tribunal's decision on Respondent's request for reconsideration in *ConocoPhillips* who went as far as to refer to an academic publication penned by "three senior Counsel for the Claimants *in casu*" in arguing that the claimants' arguments were inconsistent and should therefore be estopped under the broad concept. *ConocoPhillips*, Decision On Respondent's Request for Reconsideration: Dissenting Opinion of Georges Abi-Saab, para 48.
[847] *RSM Production*, paras 7.1.18, 7.1.19, 7.1.28.

be reconceptualized within the framework of estoppel, i.e. the claimant, by failing to argue the issue of corruption within a reasonable time after becoming aware of grounds for such a submission, represented to the other party, in the given circumstances, that such charges will no longer be pursued. Proof of detrimental reliance would ground a successful estoppel plea.[848]

In a confidential 2017 award in *Mytilineos Holdings*, the tribunal agreed, in principle, that a party could be estopped from arguing an issue it failed to raise in the original proceedings, however this shall not be a question to be resolved in the abstract, and each determination to such an effect must be fact-specific. Qualifying this proposition, the tribunal was careful to add that not every failure to argue an issue would have a preclusive effect, but only "reproachable or incomprehensible conduct of the party, which renders it procedurally unfair or even abusive that the argument is raised only in a subsequent proceeding".[849] Notably, the issue estoppel argument was partially successful in that case, the tribunal concluding that the host state was precluded from raising a defence. What we know of the reasoning of the tribunal accentuates the doctrinal origins of collateral estoppel (which, it appears, the tribunal situated nearer estoppel proper than res judicata) and focuses heavily on such elements as good faith, consistency and detrimental reliance. The tribunal was adamant that Serbia's representation in the subsequent proceedings went against the parties' good faith mutual understanding of their respective positions.[850] The connection the tribunal makes between issue estoppel and the good faith underpinning of estoppel proper facilitates a conceptualization of estoppel as a complex doctrine, albeit one with a potential of having a clear cut test for application across all of its potential permutations. The strict view of estoppel was applied in *Nova Scotia Power* in response to a claim that the host state adopted inconsistent positions regarding jurisdiction in two different arbitration proceedings involving different parties. The tribunal did not look into the requirements of issue estoppel, but instead examined the applicability of the strict view, which it confirmed, however the claim failed on lack of good faith reliance.[851] The approach of the tribunal, although capable of being classified as unprincipled in light of the discussion above (as the triple identity test was patently not met, even under the relaxed version

[848] This recasting of issue estoppel would bring it close to the defence of abuse of process, in respect of which it is accepted that the assertion of claims in a later proceeding, which could have been raised in earlier proceedings, does not amount to an abuse of process as long as it was not motivated by bad faith. See: J.P. Gaffney, "'Abuse of Process' in Investment Treaty Arbitration", see note 713, p. 521 et seq.

[849] Reported and quoted per: D. Charlotin, „*Mytilineos v Serbia*: Previously-Unseen 485 Page Award Reveals How Sachs, Bishop and Vaseljevic Dealt with Res Judicata Effect of Prior Award, Collateral Estoppel, Difference between Counsel and Agent, and Weight of a "No-Prejudice" Attempt at Settlement", "Investment Arbitration Reporter", 30 September 2019, available at: https://bit.ly/3hYINor (accessed: 24.08.2021).

[850] Ibid.

[851] *Nova Scotia Power*, paras 141-143.

endorsed in *RSM Production*, specifically the privies argument was unavailable), is interesting in that it could show the way forward when it comes to the development of the principle. Perhaps tribunals will consider dispensing with the strictures of the issue estoppel test in favour of a uniform strict view of estoppel which would be potentially applicable irrespective of the identity of the parties or the underlying causes of action.[852] It is also notable that issue estoppel was traditionally taken to apply to issues actually decided in the original proceedings (this was one of the tenets of the *RSM Production* test), however the dicta in *Mytilineos Holdings* and *Nova Scotia Power* could suggest an extension to cases where a party failed to plead a given issue at all, so long as this was subsequently detrimentally relied upon and insistence of the party on raising the same issue during a new set of proceedings would be considered unconscionable or otherwise abusive.[853]

Further, the recasting of issue estoppel within the framework of the strict view of estoppel proper is largely consistent with the reasoning of the tribunal in *Petrobart*. The tribunal appeared receptive, albeit only in passing, to the expansive, uniform notion of estoppel encompassing issue preclusion:

> "The Arbitral Tribunal observes that, while the doctrine of collateral estoppel seems to have primarily developed in American law, other legal systems have similar rules which in some circumstances preclude examination of an issue which could have been raised, but was not raised, in previous proceedings. A doctrine of estoppel is also recognised in public international law. The Kyrgyz Republic's argument on this point may indeed be understood as raising the question whether the fact that the Treaty–related issues were not relied on in previous proceedings should prevent Petrobart from raising them in the present proceedings".[854]

Also, it is evident that the tribunal availed itself of the interpretation function of estoppel in investigating the permissibility of collateral estoppel in the regime of the Energy Charter Treaty:

> "A fundamental question in this case is therefore whether the Treaty can be interpreted in such a manner as to deprive an investor — or an alleged investor — of his proce-

[852] Roots of such a universal approach could be traced to cases disposed of by the Iran-United States Claims Tribunal - *International Schools Services*, *RayGo Wagner* and *Golshani*. For more, see: J.R.G. Weeramantry, "Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct…", see note 550, pp. 122-128.
[853] See, however, *Victor Pey Casado*, para 277, where it was reserved that the tribunal would not make conclusions regarding its own jurisdiction solely on the basis of the fact that a party failed to raise an argument in earlier proceedings.
[854] *Petrobart*, para VIII.5, pp. 66-67.

dural rights under the Treaty due to the fact that he failed to raise the relevant Treaty issues in a previous case of litigation or arbitration".[855]

In sum, a reconceptualization of issue estoppel as a particular species of estoppel proper would move issue estoppel away from res judicata. Most importantly, it would import into the test for issue estoppel the element of detrimental reliance and would espouse a purposive notion of "representation". Plus, it would shift focus towards the intention and bad faith of parties that may seek to re-arbitrate issues definitively decided elsewhere. Further, my proposal would give the concept of issue estoppel autonomy within international investment law, thus detaching it from its strong municipal law roots.

5.3. Other questions of procedure

Estoppel has been raised on occasion as a legal instrument intended to prevent a party from availing itself of a procedural right accorded thereto by the ICSID Convention Arbitration Rules or other arbitral rules governing given proceedings. The argument has been advanced in respect of the exercise of procedural prerogatives only on several occasions. Never has an arbitral tribunal expressly denied the applicability of estoppel, however no consistency is to be discerned in how the principle was handled – in terms of whether its requirements were discussed and applied to the facts and, if they were, in terms of the concept preferred by the given tribunal.

No objection was raised in principle to an attempt to use estoppel to preclude a proposal to disqualify an arbitrator pursuant to Article 57 of the ICSID Convention and Rule 9 of the ICSID Convention Arbitration Rules in *KS Invest*. The proposal, filed by the host state and directed against Professor Hobér, listed two potential grounds for disqualification: (1) acting as counsel in a related arbitration which created a conflict of interest; (2) drawing up of a dissenting opinion in another proceeding pertaining to, the respondent contended, like issues. The dissenting opinion was argued to evince the arbitrator's opinion on a number of issues to be considered in the present arbitration, which generated a risk of bias.[856] The claimant countered that Spain failed to lodge its objection promptly after Hobér's involvement in a related arbitration was disclosed,[857] waiting about six weeks to file a proposal to disqualify. As a re-

[855] Ibid, para VIII.5, p. 67.
[856] *KS Invest*, paras 24-39.
[857] Rule 9(1) of the ICSID Convention Arbitration Rules stipulates that: "A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor."

sult, it should be estopped from raising the objection in the present proceedings.[858] The estoppel argument was not considered on its merits by the Chairman of the ICSID's Administrative Council seized of the case, however the proposal was nevertheless held to have been filed in a timely fashion. The conclusion was reached by reference to a comparison with other arbitral awards as no clear standard emerges from the letter of the ICSID Convention or the ICSID Convention Arbitration Rules.[859] A failure to squarely address an estoppel argument must be interpreted, if not as an implied acceptance of its applicability, then as leaving the question open. No arguments were advanced as to the suitability of the concept in the present case, neither was its potential application disputed by the host state which had filed the proposal to disqualify.

In *Canfor Corporation*, an estoppel argument arose in the context of the host state's request that a consolidation tribunal be established in accordance with Article 1126(5) of NAFTA. Three arbitrations had been filed against the United States by Canfor Corporation, Tembec Inc (along with subsidiaries) and Terminal Forest Products Ltd. All three claimants were producers of softwood lumber based in Canada. The claims challenged a number of countervailing duty and antidumping measures adopted by the host state. The proceedings concerned a complex question of whether three separate arbitration proceedings instituted under Article 1120 of NAFTA could be consolidated into one under Article 1126, the scope of which goes beyond that of our inquiry,[860] however, pertinently, Tembec asserted that estoppel was applicable to the procedural question at hand,[861] an argument which was approved by the other claimants yet not pursued by them specifically. The crux of the claimant's claim was that the host state knowingly delayed in requesting consolidation while the claimant heavily invested in the prosecution of their claims before the tribunals originally instituted under Article 1120. The host state misrepresented its intention not to seek consolidation, conduct on which Tembec relied.[862] The tribunal accepted the strict concept of estoppel as applicable to the present case, it found, however, that there was no clear and unambiguous representation on the part of the host state that it abandoned its right to consolidation and that, at any rate, there could be no reasonable reliance of the investor even though the United States wavered with a final decision for as long as 18 months:

[858] *KS Invest*, paras 47, 53.
[859] Ibid, paras 64-71.
[860] Helpful discussion of the case and the underlying issues is provided in: L.C. Reif, "Desperate Softwood Lumber Companies?: The Canada–U.S. Softwood Lumber Dispute and NAFTA Chapter 11", 45(2) Alberta Law Review 2007, p. 357 et seq.
[861] *Canfor Corporation*, paras 39, 50.
[862] Ibid, paras 163, 167.

> "Tembec has attached undue weight to the United States' indications that it did not intend at a given time to seek consolidation by classifying them as misrepresentations warranting equitable relief. In light of the various exchanges between the Claimants and the United States, it is not possible to say that the United States wholly abandoned its rights under Article 1126, or led the Claimants reasonably to rely to their detriment that the United States would never invoke such rights. During the first 18 months of defending against Tembec's claims, the United States may very well have intended not to seek consolidation. However, there is no denying that the Canfor and Tembec cases were filed 18 months apart, but proceeded at different paces with Tembec's claim catching up to Canfor's by March 2005 when one of the Canfor arbitrators recused himself. As mentioned, the United States at that point wasted no time in deciding to exercise its right to request consolidation. The Tribunal does not view such decision as having been made in bad faith. Therefore, the Tribunal declines to bar the consolidation request by operation of the doctrine of estoppel".[863]

In *Siag (Award)*, an attempt was made to invoke estoppel to preclude the investor from alleging that the host state failed to bring a jurisdictional objection within a time limit fixed by the tribunal, in contravention of Rule 41(1) of the ICSID Convention Arbitration Rules.[864] The objection pertained to alleged lack of jurisdiction *ratione voluntatis* – Egypt contended that due to the claimant investor's bankruptcy he had no *ius standi* before an arbitral tribunal (he had no legal capacity to consent to arbitration). The host state countered that the investor shall be estopped from pleading waiver because he acted in bad faith by not revealing his bankrupt status at an earlier stage of the proceedings.[865] The tribunal barred the objection alternatively under Rule 26 (as having been lodged after the prescribed time limit lapsed) or Rule 27 (considering the objection as having been impliedly waived). The tribunal addressed the estoppel argument although it concluded that the investor was not in fact bankrupt at the material time and so the preliminary objection going to jurisdiction had been baseless. It was accepted, by reference to the evidence available, that the investor was unaware of his actual situation and believed in good faith that he was not bankrupt. As both parties agreed that bad

[863] Ibid, para 169.
[864] An estoppel argument was raised in similar circumstances, but under the UNCITRAL Arbitration Rules, in *Frontier Petroleum*. The case is not discussed separately as the reasoning of the tribunal was akin to that in *Siag (Award)*, with the tribunal additionally asserting that a failure to countenance a jurisdictional objection brought in an untimely manner would have flouted Article 15(1) of the Rules under which the tribunal enjoys a broad discretion to conduct the arbitration in such a manner as it considers appropriate (to the extent that both parties are treated equally and fairly). See: *Frontier Petroleum*, paras 201-207.
[865] *Siag (Award)*, para 205.

faith of the representor shall consider an element of the estoppel test, the claim failed on lack of such bad faith.[866] As argued in Section 2.6.1.1 *in principio*, on the strict view of estoppel advanced herein, it is not necessary for the representor to exhibit bad faith at the moment the original representation is given. It appears that the estoppel claim in that instance should have failed nevertheless, albeit for want of good faith reliance. The bankruptcy proceedings were conducted in Egypt and the knowledge of that fact could uncontroversially be imputed to the host state for which, in effect, it should have been no defence to rely on the investor's representation as regards a fact that should have been known thereto *ex officio*.

Estoppel has only on occasion been invoked in decisions on applications for annulment under Article 52 of the ICSID Convention, and is yet to assume a powerful role in a tribunal's reasoning. There is, however, potential for its successful invocation in order to preclude frivolous and abusive applications for annulment. To this end, tribunals have applied the rule on waiver pursuant to Rule 27 of the ICSID Convention Arbitration Rules. In *Fraport (Annulment)*, the ad hoc annulment committee asserted that the right to annulment under Article 52(1)(d) (a serious departure from a fundamental rule of procedure) could be deemed forfeited if the investor failed to raise an objection during the proceedings upon obtaining knowledge of a breach.[867] Rule 27 has been invoked by arbitral tribunals to emphasize that an objection must be raised during the proceedings or immediately thereafter.[868] An attempt has been made in academic writing to reconceptualize this approach of arbitral tribunals towards violations of a party's right to be heard as a specific type of estoppel. Wyatt and Landbrecht have proposed that a party should be estopped from successfully lodging an application for annulment if the following requirements are met:

- a party allegedly suffers a violation of its right to be heard;
- the party is aware or should be aware (using objectified criteria) that such a violation occurred;
- the violation is apparent at a stage of the proceedings at which the violation (1) can be raised with the arbitral tribunal; and (2) can still be remedied.[869]

The writers do not cast their proposal in terms of the strict concept of estoppel, focusing more on organizational and procedural aspects of efficiency of awards. This appears to be a matter

[866] Ibid.
[867] *Fraport (Annulment)*, para 206.
[868] In *Total SA (Annulment)*, the tribunal rejected Argentina's application for annulment as it was filed three years after the issuance of the award on the merits. See: *Total SA (Annulment)*, para 153.
[869] J. Wyatt, J. Landbrecht, "Strict Estoppel for Complaints that the Right to be Heard has been Violated? An ICSID-Annulment Inspired Approach to Increase Efficiency of International Arbitration", 2 Belgian Review of Arbitration 2018, p. 243.

of degree and not of kind, however, as questions of fairness and balancing the respective procedural rights of the parties are inextricably connected, a point conceded by the authors themselves.[870] Silence could, in certain circumstances, be classified as an actionable representation where the *Mamidoil Jetoil* test is fulfilled (see Section 2.6.1.1). As for detrimental reliance, it appears plausible to argue that a party is within its rights to assume, and to guide itself accordingly in its dealings with third parties, that a failure to promptly lodge an objection to the procedural propriety of the proceedings (either during or immediately after their conclusion) shall, in due time, be capable of producing preclusive effects. The proposal for estoppel in this context is all the more appropriate considering the narrow grounds for annulment under the ICSID Convention and its unique character distinct from a traditional appeal procedure on the merits.[871]

5.4. Chapter summary

Issue estoppel is a principle which precludes the reconsideration (re-arbitration) of issues or arguments which had already been determined or otherwise decided upon. As opposed to res judicata (claim preclusion), issue estoppel is more specialized as it pertains to individual matters raised in a given proceeding by an arbitral tribunal. Importantly, the application of issue estoppel is predicated upon the fulfilment of two distinct sets of requirements, i.e. the triple identity test imported from the jurisprudence of international courts and tribunals concerning res judicata, and a second group of detailed requirements peculiar to issue estoppel. The triple identity test consists in identity of parties (*persona*), object or claim (*petitum*) and cause of action (*causa petendi*). Further, for issue estoppel to arise and preclude a party from having a given matter reconsidered, it must have been distinctly put in issue in the prior proceedings; the court or tribunal must have actually decided it; and the resolution of the question was necessary to resolving the claims before that court or tribunal.

Mentioned in passing and alluded to in *Petrobart*, the principle was imported lock, stock and barrel from U.S. procedural law by the tribunal in *RSM Production*. Despite having little to no recognition in prior investment arbitrations, the *RSM Production* tribunal proclaimed issue estoppel as a general principle of law applicable widely across all sub-systems of international law. Further, the tribunal substantiated its findings by offering a relaxed ac-

[870] Ibid, p. 248.
[871] P. Bernardini, „Annulment of Awards" (in:) A. Gattini, A. Tanzi, F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration*, Brill/Nijhoff 2018, pp. 180-188; C. Schreuer, "From ICSID Annulment to Appeal Half Way Down the Slippery Slope", 10(2) The Law & Practice of International Courts and Tribunals 2011, p. 211 et seq.

count of the triple identity test. Specifically, the requirement of identity of parties was to be interpreted flexibly as the claimant investor was effectively assimilated with its shareholders in a manner that doctrinally resembles piercing of the corporate veil. The shareholders, as agents who controlled the company, were taken to have been represented by the same in the first proceedings (to which only the company itself was party), which allowed the tribunal to infer that the test of identity of party was met. Another contentious issue related to identity of cause of action as the matters pursued in the first arbitration, although the same in substance as in the present proceedings, were based on contract and not on the BIT. The tribunal applied a substantive, transactional approach to identity of cause of action, concluding that their identity in substance is sufficient. The tribunal, however, went further and, relying upon the award in *Helnan* (erroneously, I submit), accepted in principle the exclusionary effect of arbitral awards rendered under domestic law, thus violating the dogma established in general international law jurisprudence that res judicata covers only determinations made under international law.

The tribunal in *RSM Production* evidently activated both the gap-filling and the interpretation functions of estoppel by permitting preclusion within the bounds delineated by treaty and the ICSID Convention. In addition, a coordinating function of issue estoppel is discernible. Where the principle is applicable to the facts of a given case, it is not the jurisdiction of a tribunal per se that is questioned. Rather, only consideration of certain delineated matters is precluded as between a given configuration of parties. In this way, the principle can operate to align arbitral determinations of specific issues. There is also room for allowing issue estoppel to inject into the system of international investment law certain elements of a precedent-based system, stopping short, however, of developing a fully-fledged doctrine of *stare decisis* as known in domestic law.

Whilst the relaxation of the identity of party requirement is justified within clearly defined bounds, it appears that identity of cause of action should be limited to authorities operating on the basis and within international law, to the exclusion of domestic law. In *Ampal-American (Liability)*, the tribunal confirmed that identity of cause of action is present where previous proceedings were an international arbitration conducted before the ICC. In the same case, a purposive construction of the concept of privy was offered. Contrary to *Eskosol*, a case decided almost concurrently where the operation of issue estoppel was refused in respect of a claim brought by a shareholder holding 80% of the shares in the claimant investor party to the original proceedings, in *Ampal-American (Liability)* the fact that the proceedings were initiated by a non-whole shareholder did not prevent the tribunal from finding issue estoppel. This

conclusion flies in the face of not only *Eskosol* but also *RSM Production*, which stood for the limited proposition that the concept of privy extended only to 100% shareholders. It should be remembered that expansive application of issue estoppel runs the risk of depriving otherwise deserving claimants of the right to be heard and having their claims resolved. It is pertinent to note that issue estoppel should not serve as a bar to considering claims which have indeed been considered but which only impacted a clearly defined class of agents. Where the claimant in new proceedings does not *prima facie* belong to that category of affected parties, tribunals should be reluctant to apply issue estoppel. The overarching rationales of the principle – judicial economy, procedural fairness and efficiency – should be reasonably balanced with the important objective of international investment arbitration that is the achievement of individual justice.

Issue estoppel faced a challenge in *Caratube II*, where its status as a general principle of law was put into question, albeit rather tentatively, as the matter was ultimately left open. The tribunal, nonetheless, went on to apply issue estoppel on the facts, broadly following the test enunciated in *RSM Production*. Despite the objections raised by the *Caratube II* tribunal, the most recent investment arbitration where issue estoppel was considered at length, *Mobil Investments Canada* in 2018, confirmed the principle's relevance within international investment law. It appears that issue estoppel has become relatively firmly entrenched, a trend that is only bolstered by the fact that the principle has been recently endorsed in two judgments of the International Court of Justice - *Nicaragua v Colombia* (2016) and *Costa Rica v Nicaragua* (2018).

Concluding my consideration of issue estoppel, I sketched the contours of a conceptual framework, attempting to situate the principle within the strict view of estoppel. Despite its close links and origins within res judicata, issue estoppel, I submit, has become, within international investment law, a standalone principle whose recent explanations, since its firm transposition into the system in *RSM Production*, bring it closer towards the traditional account of estoppel and away from res judicata. Key to my argument is the corollary that issue estoppel is a relational principle in that its successful invocation depends, to a large extent, upon the conduct of one party (the representor) towards its opponent in given arbitration proceedings (the representee). As arbitral tribunals have the obligation to consider all arguments and points raised by any party, it could be generalized that the operation of issue estoppel is highly dependent upon the will (consent) of the parties and it is their strategies and choices of arguments to pursue that determine whether issue preclusion shall be applicable. Further, reliance involved in issue estoppel could be even stronger than in a classic case of estoppel as in

the latter scenario the rationale for the preclusive effect lies in the estopped party's contradiction of the principle of good faith and, relative to the particular relations between the parties, abuse of the other party's trust. In the case of issue estoppel, these considerations must be accompanied by an additional factor, that is a formal, systemic, constitutional principle of the investment arbitration system which should operate regardless of the estopped party's intention.

The approach advanced in the dissertation has been impliedly floated in a number of investment arbitral tribunals, if not applied under the guise of the traditional notion of issue estoppel which continues to adhere to, albeit in a more flexible manner than in the case of res judicata, the triple identity test. The watershed case appears to be *Nova Scotia Power*, which could augur a new approach whereby arbitrators will consider dispensing with the strictures of the issue estoppel test in favour of a uniform strict view of estoppel which would be potentially applicable irrespective of the identity of the parties or the underlying causes of action. A major development of this new approach would be the expansion of the purview of issue estoppel beyond issues which were distinctly put in issue by a party and decided in arbitral proceedings to cover also instances where a party deliberately and abusively elected not to raise a given issue or argument originally, only to advance it in the new set of proceedings, where the original silence (qualifiable as a representation) was detrimentally relied upon by the representor's adversary.

Arbitral practice knows also of applications of estoppel to matters of procedure. The principle been raised in an attempt to preclude a proposal to disqualify an arbitrator under Article 57 of the ICSID Convention and Rule 9 of the ICSID Convention Arbitration Rules. The tribunal failed to squarely address the estoppel issue, which should be, I submit, interpreted as permission, in principle, of consideration of estoppel claims in such contexts. In *Canfor Corporation,* one claimant investor asserted an estoppel claim to preclude the host state from bringing a request to consolidate pending arbitration proceedings. Importantly, the tribunal accepted the applicability of the strict view of estoppel. Estoppel has also been used to preclude the investor from alleging that the host state failed to bring a preliminary objection to jurisdiction within a time limit fixed by the tribunal, thus falling foul of Rule 41(1) of the ICSID Convention Arbitration Rules. Further, although not yet discussed in a reported arbitral award, it has been proposed in the doctrine to that estoppel could be had recourse to where annulment proceedings under Article 52 of the ICSID Convention are initiated frivolously, without any reasonable grounds, or in an untimely manner.

CHAPTER VI. PROTECTION OF SUBSTANTIVE RIGHTS AND LEGITIMATE EXPECTATIONS

6.1. Introductory remarks

In preceding chapters, emphasis was predominantly on estoppel arguments raised within a jurisdictional or procedural setting. Now the attention is shifted towards those instances where estoppel shall have tangible consequences in the realm of substantive rights and obligations, including international liability of the host state.

As a preliminary point, a failure of an estoppel argument can have profound effects on arbitral determinations in various areas on the merits. In one case, the investor unsuccessfully argued that the host state was estopped from denying that administrative requirements governing the grant of mining exploitation concessions were to be waived. The claimant pursued estoppel as one avenue towards proving they had a legitimate expectation or, alternatively, a proprietary right capable of expropriation. As the estoppel argument failed, the tribunal accordingly ruled that no expropriation could have taken place because the investor had no right that could have been expropriated.[872] The tribunal's reasoning is dissected further in Section 6.3 *in principio*.

The chapter groups a number of types of circumstances where estoppel has been raised, within the context of investment arbitration proceedings, to regulate or otherwise impact, directly or indirectly, broadly understood substantive rights and obligations of the parties involved beyond the procedural arbitral framework in issue. Estoppel has been invoked by host states as a purported defence to liability, with a view to precluding the investor from denying an allegedly recognized fact, which could have direct impact upon a finding of liability. Further, investors have attempted to have recourse to estoppel as a means of acquisition of rights, attaching preclusive effects to host state conduct to infer tangible rights, such as the successful grant of an administrative consent or concession. Investors have also attempted to rely on estoppel to generate legal effects akin to that of proprietary estoppel under domestic law. Finally, the inter-connections between estoppel and protection of legitimate expectations under the FET treaty standard shall be examined. The attention shall be zeroed in upon one prong of legitimate expectations, that is potential liability of host states by virtue of going back on a specific inducement (in the form of a representation manifesting itself as a state-

[872] *Pac Rim Cayman*, paras 10.4–10.5. See more: L.Y. Zielinski, ""You Cannot Lose What You Never Had": The Law Applicable to Property Determinations in ICSID Arbitration", 17(1) The Law & Practice of International Courts and Tribunals 2017, p. 283 et seq.

ment, silence or conduct) to make an investment. It is in this context that parallels with estoppel can be drawn. An analysis of the relative positions of the two doctrines will be sketched, with both similarities and dissimilarities accentuated. The picture appears to be very complex, with both convergencies and divergencies often being interwoven even within one class of legal characteristic.

6.2. Estoppel and liability

Estoppel has been argued in connection with defences to liability under investment treaties. In *Chevron Corporation (2010 Partial Award)*, the investor alleged, *inter alia*, that Ecuador, the host state, committed a denial of justice under customary international law either on the basis of undue delay or manifestly unjust decisions or, in the alternative, a breach of Article II(7) of the United States-Ecuador BIT which imposed on the host state an obligation to provide effective means of asserting claims and enforcing rights with respect to underlying investments, investment agreements, and investment authorizations, as well as violations of the FET and full protection and security standards.[873] Municipal Ecuadorian courts incurred significant delays (about 14 years) in considering seven cases brought by the investor's subsidiary before domestic courts. One of the host state's counterclaims relied on estoppel – Ecuador alleged that Chevron was to be precluded from raising its claims pertaining to denial of justice and undue delay on the basis of prior statements made by the company before U.S. municipal courts to the effect that Ecuadorian courts were reliable and independent. Ecuador cited a number of statements allegedly made by the investor in support of the efficiency of its judiciary, pleadings and affidavits attesting to the fairness and competence of Ecuadorian courts. Further, at the time these statements were made the investor was to possess knowledge of a twenty-year backlog of cases before domestic courts in Ecuador.[874] The investor, relying on the test of estoppel from the Dissenting Opinion of Judge Spender in *Temple of Preah Vihear* (strict view), countered that the statements before domestic courts could not be classified as clear and unambiguous statements of fact for the purposes of applying the preclusive effects of estoppel. Further, the claimant disputed the facts as laid out by the host state, specifically to the effect that the most recent statement was made in 2000, long before the quality of the judiciary in Ecuador, Chevron argued, began to markedly deteriorate. Finally, even if Ecuador's allegations were conceded, a mere fact that a party predicted in good faith that the Ecuadorian judiciary was to effectively and fairly dispense with its claims, does not then pro-

[873] *Chevron Corporation (2010 Partial Award)*, paras 27-28, 166-177, 188-194, 205-217.
[874] Ibid, paras 338-347.

vide the host state with a licence to commit a denial of justice or otherwise breach investor protections under the BIT.[875]

The tribunal sided with the investor on the facts that the most recent statement qualifiable as an endorsement of Ecuadorian judiciary was made in 2000 at the latest. As the statements made at the time could not, on account of the subsequent collapse of the host state's judiciary system, hold any currency at the time of the proceedings, the investor was not estopped from contradicting itself in light of new factual evidence. The host state also failed to showcase any actual reliance or detriment – at any rate, reliance on such statements by a domestic court in an unrelated litigation was insufficient.[876] Substantively, the tribunal asserted that the effective means standard derived from Article II(7) of the United States-Ecuador BIT imposes a more onerous standard of conduct on the host state than does customary international law in relation to denial of justice,[877] and inferred a breach of that standard due to the investor's subsidiary's claims virtually staying dormant for years in Ecuadorian courts.

6.3. Estoppel as a means of acquisition of rights

In *Pac Rim Cayman*, an arbitration in which the investor claimed compensation for the effects of a *de facto* moratorium on the continuation of mining activity in El Salvador, the claimant argued that the host state made a promise that an exploitation concession would be granted even where the resident legal requirements were not met. According to the investor's pleadings, in 2004 El Salvador appeared to have made an admission, in response to an application for interpretation of municipal mining law, that relevant provisions concerning the prerequisites for eligibility for an exploitation concession (mandating applicants to obtain the authorization of all owners of the surface lands over which mineral deposits were found before a concession could be issued) were unclear and impractical. Subsequently, a proposal was put forward within the Salvadoran government to amend the law (promoted by the Bureau of Hydrocarbons and Mines within the Salvadoran Ministry of Economy), with which the investor agreed. Pac Rim proceeded to organize its affairs accordingly in reliance upon that representation as it concluded that no further actions were needed therefrom – the under-

[875] Ibid, paras 333-337.
[876] Ibid, paras 348-354.
[877] B. Sabahi, N. Rubins, D. Wallace, Jr., *Investor-State Arbitration*, see note 288, p. 672. The treaty clause was effectively considered *lex specialis* relative to denial of justice under custom. See: R. Dolzer, C. Schreuer, *Principles of International Investment Law*, 2nd edition, Oxford University Press 2012, p. 182. The interpretation of Article II(7) was later challenged by Ecuador in an inter-state arbitration. See: P. Bhagnani, "Revisiting the Countermeasures Defense in Investor-State Disputes: Approach and Analogies" (in:) A.K. Bjorklund (ed.), *Yearbook on International Investment Law and Policy 2013–2014*, Oxford University Press 2015, pp. 469-470.

standing was that either an amendment shall be exacted or the authorities will refrain from demanding the fulfilment of the concession requirement. Silence ensued, and no progress was made on the legislative front before a moratorium, amounting to an effective ban on exploration, was imposed in 2008. El Salvador denied that either representation was made. On its account, there was no clear and unambiguous representation as to the waiver of domestic requirements regarding the grant of concessions, nor as to the intention to amend the legislation – at any rate, silence (inaction) in response to an initial draft or legislative idea could not amount to estoppel.

The tribunal sided with the host state, finding, on the balance of evidence, that Pac Rim misconstrued El Salvador's representations concerning the concession requirements. Nonetheless, the reasoning proffered with regard to the legislative process of amending the law in question is worth analysing. The tribunal sidestepped the question whether silence could give rise to a representation for the purposes of estoppel, and failed to address the convergency on this point between estoppel and acquiescence. Instead, the argument made proceeded as follows: (1) the Bureau of Hydrocarbons and Mines did support the amending legislation; (2) the proposal was also supported for years by another Salvadoran ministry and by the president; (3) this support notwithstanding, at no point did the executive branch ensure that the respondent's legislature would enact such an amendment; (4) therefore, for lack of further assurances, there was no representation and reliance of Pac Rim was unreasonable.[878]

I submit that the tribunal's reasoning is flawed. The implied admission that there was clear support of one ministry for the amending legislation should have been sufficient to establish the existence of a sufficiently qualified representation. What the estoppel claim appears to have failed at is attribution, which conclusion is also debatable – the ministry, let alone the Salvadoran President, who made a representation by conduct, comprised part of the executive branch of El Salvador, or at least it was reasonable for the investor to think so. The tribunal appears to have proceeded upon the notion that the representation could not have been clear and unambiguous before it was confirmed by certain specific persons or entities within the executive branch of government. This is an unwarranted conflation of the requirements, and a greater degree of methodological rigidity would be recommended. Clarity and unambiguity goes exclusively to the quality of the representation itself. Reasoning concerning this prong of the estoppel test only falls to be obfuscated by references to persons of entities by whom these representations were formulated. Under the strict view of estoppel proposed in

[878] *Pac Rim Cayman*, para 8.49.

this dissertation, this issue would fall to be considered later on in the inquiry, especially since *prima facie* there appears to be an argument for attribution – save for extraneous circumstances, promises made by ministries (within their substantive jurisdiction) and the head of state would be held to be binding.[879] On a separate note, it appears, by reference to the facts, that there was a positive representation only followed by a period of silence. Such an interpretation would not constitute a bar to clearing the "clear and ambiguous representation" threshold of estoppel.[880]

The estoppel claim raised in *Pac Rim Cayman* could be compared to estoppel-based counterclaims brought by investors in cases analysed under the one-sided ordinary illegality heading in Chapter IV (see Sections 4.2 and 4.5.1) concerning host states' objections to jurisdiction and admissibility on the grounds of the investment's domestic illegality. Interestingly, the arguments appear similar in substance, yet they are typically formulated differently. In a *Pac Rim Cayman* scenario, the contention pursued by the claimant investor is that the host state in fact made a representation that a particular right shall be granted (prescriptively). In an ordinary illegality case, in arguing that the host state shall be estopped from pursuing a preliminary objection the claimant investor in effect contends that a given right (typically a right granted under an administrative concession, permission or consent) has been in fact already granted or that a given administrative requirement (constituting an obligation to obtain an administrative concession, permission or consent) has been impliedly waived. The formu-

[879] In contrast to *Pac Rim Cayman*, in *Duke Energy* the tribunal concluded that support for a tax interpretation of the executive branch of the state was unequivocal although this was at some point contradicted by the state's tax authority. With various agencies of the state adopting inconsistent positions, the tribunal inferred that, as one representation was dominant and it was followed up with active encouragement to invest directed at the claimant, Peru had to bear the risk of internal conflicts of opinion. See: *Duke Energy*, paras 438-440. Subjection of representations to extensive formal requirements (such as issuance of a specific statutory communication using prescribed words) was criticised in *Desert Line Projects*, at para 119:

> "It would be preposterous in the circumstances to require or expect the Head of State or the Prime Minister to issue formalistic qualifications to their encouragements and approvals, such as explicitly referring to the BIT (or even technical regulations of Yemeni law); when they welcomed and approved the Claimant's investment, they did so with all that it entailed. It would offend the most elementary notions of good faith, and insulting to the Head of State, to imagine that he offered his assurances and acceptance with his fingers crossed, as it were, making a reservation to the effect "that we welcome you, but will not extend to you the benefits of our BIT with your country"".

[880] An interesting question arises as to whether public policy considerations should (and whether they did) influence evaluations of state decisions impacting the environment and economic development. Perhaps a countervailing public policy argument quashing estoppel could have been that in the presence of any uncertainty concerning the actual meaning of communications between the investor and the host state (and representations made), these should be overridden by the thrust of government-devised strategies on dealing with the environment. See: A. Telesetsky, "International Investment Law and Biodiversity" (in:) K. Miles (eds.), *Research Handbook on Environment and Investment Law*, Edward Elgar 2019, p. 143; A.R. Hyppolyte, "ICSID's Neoliberal Approach to Environmental Regulation in Developing Countries", 19(4-5) International Community Law Review 2017, p. 431 et seq.; G. Mayeda, "Integrating Environmental Impact Assessments into International Investment Agreements: Global Administrative Law and Transnational Cooperation", 18(1) Journal of World Investment & Trade 2017, pp. 138-143.

lation of the *Fraport (Award)* test is decidedly one-sided in that it accentuates neglect and overlooking of violations of its own internal law by the host state. The "overlooking" element should be understood as a waiver of concrete administrative or regulatory requirements enshrined in domestic law. On this account, an arbitral tribunal poised to accept an estoppel argument to preclude a host state from advancing a jurisdictional objection on account of domestic illegality must invariably infer, if only impliedly, that in fact the host state had granted a right that forms the cause of alleged illegality or waived its statutory character. In this sense the function estoppel discharges in an arbitral tribunal's reasoning and explanation of the facts is similar in ordinary illegality and *Pac Rim Cayman*-type cases. It could be posited that in the former case, to use the parlance of English contract law regarding promissory estoppel, estoppel is used as a shield whilst in the latter case – as a sword, however, to a similar end.[881]

Estoppel has been held by one tribunal as being incapable of creating property rights where these are not apparent under domestic law. *Vestey Group Limited*, a case which arose under the United Kingdom-Venezuela BIT, concerned an alleged expropriation of an investment (cattle farming operations) in Venezuela by means of changes to legislation, regulatory processes, and forceful executive actions. The parties had a long-standing business arrangement, with Vestey's activity in the territory of the host state stretching for over a century, when the first lease agreements were concluded. The investor carried out its business via a locally registered subsidiary, Agroflora. Once the claim was brought, Venezuela challenged the jurisdiction of the tribunal, alleging, *inter alia*, that the investor did not have legal title over land which was thought to be owned by Agroflora and on which a significant part of its business activity was conducted, and thus the preconditions for treaty protection under Article 13 of the BIT were not met.[882] One of the grounds on which the claimant countered was that, due to prior recognition of the investor's title to the land (by virtue of alleged representations made in various contracts and administrative conduct consisting in the issuance of productivi-

[881] A rule originally established in the 1951 English Court of Appeal case of *Combe*, it consists in a proposition that estoppel cannot be used as a standalone cause of action. The rule is still held to be applicable, albeit with exceptions, the most notable being proprietary estoppel, often referred to in doctrine as "offensive" estoppel as it can be used to generate or transfer rights previously unrecognized. See, in the context of the laws of England and Wales: M.P. Thompson, "From Representation to Expectation: Estoppel as a Cause of Action", 42(2) Cambridge Law Journal 1983, p. 257 et seq. In Australia, the rule against treating estoppel as a separate cause of action (a "sword") was abandoned in the landmark 1988 case of *Waltons Stores*. See also: D. Butler, "Equitable Estoppel: Reflections and Directions", 6(2) Corporate & Business Law Journal 1994, pp. 249-253. Similar discussions have persisted also in American and Australian jurisprudence. See, as regards American law: D.W. Henkin, "Judicial Estoppel-Beating Shields into Swords and Back Again", 139(6) University of Pennsylvania Law Review 1991, p. 1711 et seq. As to Australia, see: A. Silink, "Can Promissory Estoppel Be an Independent Source of Rights?", 40(1) University of Western Australia Law Review 2015, p. 39 et seq. The adage does not seem to apply to issue/collateral estoppel under domestic U.S. law. See: J. Mahoney, "A Sword as Well as a Shield: The Offensive Use of Collateral Estoppel in Civil Rights Litigation", 69(2) Iowa Law Review 1984, p. 469 et seq.

[882] *Vestey Group Limited*, para 158.

ty certificates to Agroflora's farms) and "decades of peaceful possession", the host state should now be estopped from denying the validity of the legal title to the land.[883]

The tribunal rejected the concept that property rights could arise, either under domestic or international law, by operation of international estoppel. No express mention was made of the proprietary estoppel doctrine, which is capable of creating property rights under English law under limited circumstances.[884] The tribunal concluded that to have a claim under a treaty arising from expropriation, the investor must hold legal title to the land in accordance with relevant domestic law. Where such rights do not exist, international estoppel cannot fill that void.[885]

A question arises as to the grounds on which *Vestey Group Limited* could be distinguished from *Pac Rim Cayman* (if at all) as in both cases it appears *prima facie* that estoppel was alleged by claimant investors as a means to positively acquire a substantive right. The former case pertained, however, to a proprietary right in land whilst the latter to a right stemming from an administrative decision concerning the manner of exploitation of land. The cases also appear to concern breaches of different investor protection standards (expropriation and FET, respectively). In both cases allegations were made by the host state that only its domestic law should be applicable to the issue of right creation. Whilst this was accepted in *Vestey Group Limited* in respect of rights in land, in *Pac Rim Cayman* the tribunal was ready to apply international estoppel as a device through which a substantive right could be derived. It is submitted that the reasoning here is related to the concepts of implied consent or implied waiver – if the requirements of estoppel had been made out, the *Pac Rim Cayman* tribunal should have inferred that, under a framework of a peculiar legal fiction, that either: (1) the mining concession shall be deemed to have been granted; or (2) the concession requirement shall be deemed to have been waived by virtue of the host state's inactivity which was detrimentally relied on by the claimant investor. There is a parallel to this extent between this case and cases where the host state alleged non-compliance with the requirements of domestic law as an objection to jurisdiction. The *Vestey Group Limited* tribunal emphasized the nature of the right concerned, which could lead to a divergence in the case law if reiterated in future cases. It was demonstrated in Section 4.2 that arbitral tribunals are warming up to the idea that

[883] Ibid, para 180.

[884] Under English property law, where party B relies on party A's assurance that there is a binding agreement between A and B, under which A is to grant B a right, that expectation will be protected under proprietary estoppel. See: S. Bright, B. McFarlane, "Proprietary Estoppel and Property Rights", 64(2) Cambridge Law Journal 2005, pp. 460-462. See also notes 147 and 881.

[885] *Vestey Group Limited*, para 257. Note that Cheng envisaged potential applicability of estoppel in similar cases, as a manifestation of good faith: See: B. Cheng, *General Principles of Law…*, see note 118, p. 144.

estoppel could operate to preclude host states from objecting to jurisdiction on account of non-compliance with domestic requirements, particularly of administrative nature (such as permissions, concessions, consents, etc.) but *Vestey Group Limited* appears to suggest that the ambit of the principle does not cover proprietary rights in land. Alternatively, perhaps estoppel could be available in relation to land where a breach of the FET standard is alleged but not as a counter to an expropriation claim, as this is another aspect that appeared to have weighed heavily in the *Vestey Group Limited* tribunal's decision.

6.4. Contractual stability commitments

In the absence of a specific representation or commitment, estoppel will not operate to preclude the host state from exercising its regulatory powers.[886] Where such a commitment is expressly made, be it by virtue of a unilateral declaration, contract or in the host state's domestic law, estoppel can operate to preclude the host state from changing course when confronted with detrimental reliance on the part of the investor. Cases involving stability commitments are a fertile ground for doctrinal discussions concerning the interplay between estoppel and the principle of protection of legitimate expectations. Whilst it is typically the latter doctrine that is nominally applied by arbitral tribunals in such contexts[887] (as protection of legitimate expectations generated by stability commitments has been held to be included within the FET standard), in one notable case the tribunal applied estoppel. For the avoidance of doubt, this section should be interpreted as a bridge to the following discussion concerning the inter-connections between estoppel and protection of legitimate expectations within the FET standard.

In *Duke Energy*, the tribunal analysed the applicability of estoppel to a contractual legal stability commitment made by the host state. The facts of the case are convoluted, therefore a distillation will be proffered of those tenets of the factual scenario which are relevant for the operation of estoppel at this juncture of my argument.

Through two subsidiaries, the claimant in *Duke Energy* acquired control over a Peruvian company named DEI Egenor from a state company, Electroperú, which had emerged out of a comprehensive privatization programme which the electricity sector in the state underwent in the early 1990s. Previously, the entity had been owned by another U.S. entity, Dominion Energy, which executed a merger of DEI Egenor with another entity, also controlled by

[886] *United Utilities*, paras 756-757.
[887] See e.g.: *REEF Infrastructure*, paras 314-399; *InfraRed*, paras 406-456; *AES Summit Generation*, paras 107-117; *SunReserve*, paras 680-731, 787-810; *Novenergia II*, paras 641-697.

Dominion. The merger was effected primarily for tax reasons as it triggered a revaluation of DEI Egenor's assets (their book values were increased to reflect a higher market value). In 1996, DEI Egenor entered into a 10-year legal stability agreement with the government of Peru. The claimant eventually purchased DEI Egenor in 1999 and by 2001 it concluded two new legal stability agreements ("LSAs") with Peru (nominally through two of its Peruvian subsidiaries).

In 2000, a political crisis erupted in Peru, as a result of which sweeping reforms were ushered in, and the fiscal and economic policies of the previous government were evaluated and investigated. A tax audit of DEI Egenor in the period of 1996-1999 conducted by Peru's tax authorities revealed severe tax underpayments and, under the auspices of the new government which came into power in mid-2001 (within days of the signing of the new LSAs with the claimant's subsidiaries), a fine was imposed of USD 12.4 million plus nearly USD 40 million in interest and penalties. In particular, the state tax agency determined that the merger was a "sham transaction" whose sole aim was to circumvent the law. The second issue involved the application of a general depreciation rule instead of the specific rule applicable to DEI Egenor before privatization.[888]

The investor contested those determinations, arguing, *inter alia*, that the legal stability agreement signed covered not only the letter of the laws but also their interpretation and that, at any rate, the host state should be estopped from changing course considering the fact that assurances were made, at the time the merger of DEI Egenor was approved and subsequently effected, that its consequences, including tax, would not be reversed. Further, the merger was approved by the shareholders' meeting of DEI Egenor and by Electroperú. The host state countered by asserting that many of the interpretations and assurances regarding the tax consequences of the merger were issued by incompetent agencies and entities whose statutory purview did not extend to tax. Therefore, such representations could not be attributed to the host state, and no estoppel could arise.

The tribunal agreed with the claimant, noting that the host state extended its promise of stability to the interpretation of tax laws by state authorities on the condition that, at the time when the guarantee was granted, the application of the existing rules resulted in a consistent interpretation.[889] The promise of stability in this respect constituted a commitment not

[888] L. Cotula, "Pushing the Boundaries vs. Striking a Balance: The Scope and Interpretation of Stabilization Clauses in Light of the *Duke v.Peru* Award", 11(1) Journal of World Investment & Trade 2010, pp. 32-33.
[889] *Duke Energy*, para 219. The tribunal also reserved a prohibition of arbitrary change (standard of arbitrariness for illegality). See: A. Umirdinov, "The End of Hibernation of Stabilization Clause in Investment Arbitration: Reassessing Its Contribution to Sustainable Development", 43(4) Denver Journal of International Law & Policy

to change the interpretation and application of the laws to the detriment of the investor.[890] Moreover, the tribunal proposed a nuanced differentiation between a promise of stability and operation of estoppel:

> "[S]tatements or actions of a State agency that merely imply a specific interpretation or application of the law do not, in the Tribunal's opinion, provide a sufficiently sound basis upon which to conclude that a stable interpretation of the law existed. That is not to say, however, that such statements or actions could not provide a sufficient basis to engage the State's liability under the theory of estoppel (*la doctrina de los actos propios*). This is a different issue, involving an inquiry into whether such statements or actions were sufficient to lead the investor to the reasonable conclusion that such an implied interpretation or application of the law would not be modified in the future".[891]

Therefore, estoppel was considered by the tribunal as a safety valve thanks to which the host state could be precluded from asserting a divergent tax interpretation even if the claimant was unable to adduce "compelling evidence" in support of the existence of a stable interpretation consisting of, *inter alia*, clear case law, well established practice and generally accepted legal doctrine.[892]

The tribunal effectively conflated both the strict and broad concepts of estoppel in its reasoning.[893] The initial statement of principle appeared to espouse the strict view, albeit not in its fully developed form, as it was asserted that estoppel involves conduct of one party that induces reliance of another, "irrespective of whether that conduct is legal or not", and that the host state through its representations commits not to change course.[894] Detriment was not mentioned at this juncture, but featured prominently in the formulation of the extent of the stability commitment[895] and in the reasoning laid out in the Partial Dissenting Opinion.[896] On balance, the tribunal carved out a middle ground between the strict and the broad concept, in effect applying the broad view supplemented by the concept of reliance yet devoid of detriment.

2020, pp. 484-485; L. Cotula, "Pushing the Boundaries vs. Striking a Balance…", see note 888, p. 37; J. Gjuzi, *Stabilization Clauses in International Investment Law: A Sustainable Development Approach*, Springer 2018, p. 353.

[890] *Duke Energy*, para 227.

[891] Ibid, para 221.

[892] Ibid, para 220.

[893] See also note 359.

[894] *Duke Energy*, paras 245-246.

[895] Ibid, paras 227, 231.

[896] *Duke Energy*, Partial Dissenting Opinion of Arbitrator Dr. Pedro Nikken, para 5.

Further, the tribunal put at the centre of its analysis the question of attribution and made bold inferences therefrom.[897] Notably, the fact that a given representation could be validly attributed to the host state (that is, there was a reasonable appearance that a given representation was binding and the person or entity making it did not manifestly lack competence) had a bearing upon whether reliance placed upon the same by the representee could be considered reasonable. A manifest lack of competence would render reliance inherently unreasonable, irrespective of the representee's actual reaction.[898]

The tribunal went on to invoke the term of "climate of confidence" to denote the effect that the representations made by Peru's state agencies could reasonably have had on the investor.[899] The tax agency which ultimately imposed a fine on the investor, having reassessed the tax footprint of the merger, had knowledge (as it was advised by another agency) that at the time the merger was made the investor could have reasonably relied on the legal stability agreement even if it was contrary to statutory Peruvian tax law.[900] Further, it appeared that the claimant was unaware of this position, and therefore it could not anticipate that the merger would be challenged, which, in turn, reinforced the conclusion that its reliance was in good faith.[901]

Crucially, the merger tax reassessment was considered by the tribunal to be contrary to earlier state assurances and the state's unequivocal support for the merger. A report made available to the claimant investor in 1999 made no mention of any issue going to the validity of the merger or to any outstanding tax contingencies related thereto.[902] As a consequence, the tribunal upheld the estoppel claim and precluded the host state from challenging the tax consequences of the merger, thus effectively quashing the tax reassessment and the penalties imposed in 2001.

Arbitrator Pedro Nikken, the host state's appointee, dissented on the application of the estoppel test as enunciated by the tribunal to the facts of the case. His central contention was that the claimant investor's reliance on various assurances considering the validity of the merger and lack of outstanding tax contingencies was unreasonable. He attempted to build into the estoppel test a duty on the part of the investor to complete a measure of due diligence before the investment was made. The investor should have had, Arbitrator Nikken argued, a requisite degree of fundamental knowledge regarding those aspects of the domestic law of the

[897] Issues related to attribution as decided in the case are discussed in Section 2.6.2.3.4.
[898] *Duke Energy*, para 434.
[899] Ibid, para 436.
[900] Ibid, para 438.
[901] Ibid, para 437.
[902] Ibid, paras 439-440.

host state which were liable to affect it or its investment, considering the latter's character, nature and extent.[903] Whilst agreeing with the "manifest lack of competence" threshold of attribution, he inferred that it was reached on the facts and no reasonable investor would have relied on representations made, *inter alia,* by a state company (the seller of DEI Egenor) and a host of agencies, none of which was the national tax service. Another argument raised was that Peru was within its rights, under domestic law, to question the tax assessment as this was permitted by the letter of the contracts signed by the parties involved and consistent with "normal practice in privatizations".[904] In particular, the seller of DEI Egenor, Electroperú, assumed, under the sale contract, responsibility for any hidden tax liabilities, which shall be taken to expose it, even later on, to potential reassessments by state authorities. The arbitrator, however, accepted the tribunal's conclusions on breach of the legal stability agreement and therefore concurred as to the outcome.[905]

To summarize the analysis in *Duke Energy*, several propositions may be made. The binding nature of stability commitments was not directly explained by reference to estoppel, however the principle could operate to hold the host state to its original promise regarding the letter and interpretation of its tax laws. Estoppel performs in this context an ancillary role – it is the contract that serves as a source of liability, however estoppel is there to preclude the host state from denying the validity and binding character of the contractual promise. This point is not contested by Arbitrator Nikken who objected to the application of this reasoning to the facts. This corollary can prove helpful when conceptualizing the relation between estoppel and legitimate expectations. Legal stability agreements have been typically analysed within the context of the latter principle and one can mount a cogent argument that estoppel in such contexts is underutilized.

Another corollary of *Duke Energy* can be said to further contribute to confusion related to issues of attribution and reasonable reliance. It appears the award is investor-friendly in that the threshold of reasonable reliance (manifest lack of competence of a person or entity purporting to act on behalf of the host state) is rather lax, considering that investors must be taken to have done a degree of due diligence prior to making a significant investment in a foreign country. The tribunal's reasoning permitted reliance upon representations going to tax liabilities made by entities and agencies not directly concerned with tax. Further, it could be argued that at least some of the persons and entities that approved the merger had a conflict of

[903] *Duke Energy*, Partial Dissenting Opinion of Arbitrator Dr. Pedro Nikken, para 10.
[904] Ibid, paras 11-12.
[905] Ibid, paras 17-19.

interest – it was in their own self-interest to issue an opinion approving of the merger and confirming the absence of tax contingencies. The connection made between the two seemingly discrete requirements of estoppel, attribution and reasonable reliance, is highly debatable. I engaged with the tribunal's statements of principle in this respect in Section 2.6.

To draw briefly on another example, the claimant investor attempted to use estoppel in *OperaFund* to conceptualize the preclusive effect of stability commitments. The claimant relied heavily on representations made before the making of the investment by high-ranked Spanish state officials, including the state's minister of energy. Having argued for the clarity and unambiguity of the representations and attributed them to the host state,[906] the investor contended that: (1) the reliance upon the promises on its part was legitimate and reasonable as the representations were repeated by various high ranking officials; (2) the investor, in legitimate reliance upon those representations, made a significant investment in the energy sector in Spain; (3) in such circumstances, any regulatory change must consider the acquired rights of investors in order to be consistent with the state's international obligations; (4) as the host state acted in breach of those rights and upset the legitimate expectations engendered in the investor, it shall now be estopped from disregarding its commitment to respect and apply the law whose stability was contractually guaranteed.[907] The tribunal ultimately failed to consider this line of argument as it was satisfied that the letter of relevant domestic legislation gave rise to an express stability commitment which, on the facts of the case, was not revocable as against the investor.[908] Nonetheless, a representation could give rise to the preclusive effects of estoppel and thereby balance the investor's legitimate expectations with the host state's sovereign right to regulate.[909]

6.5. Estoppel and protection of legitimate expectations

Protection of legitimate expectations within the FET standard, considered by some commentators to constitute a standalone general principle of law applicable in international investment arbitration,[910] performs an important role in the overall system of protection grant-

[906] This aspect of the case is discussed in Section 2.6.2.3.3. There, also the facts of the case are described.
[907] *OperaFund*, para 560.
[908] Ibid, paras 485-489.
[909] S. Xu, Y. Wu, H. Hailong Jia, "Investment Law's Roots in Customary International Law: Why Investment Law and Trade Diverge Regarding the Right to Regulate" (in:) L.E. Sachs, L. Johnson (eds.), *Yearbook on International Investment Law and Policy 2015–2016*, Oxford University Press 2018, p. 241.
[910] Note that the ICJ denied legitimate expectations the status of a general principle of law in its recent judgment in *Bolivia v Chile* (2018), suggesting that the concept applied within international investment law should be analysed strictly as a creation of treaty. See: *Bolivia v Chile*, p. 559, para 162. Academic positions regarding the

ed by investment treaties. Expectations of a given entity or company are instrumental in making an initial decision to invest in a particular host state and under a specific regulatory regime. On the facts of many investment disputes, these factors are pitted against the host state's sovereign right to regulate.

Many tribunals have distinguished legitimate expectations as an autonomous element of FET, with some declaring it a "major" component.[911] Legitimate expectations can be generated in response to three broad patterns of governmental conduct: (1) a contractual commitment; (2) a unilateral binding statement; (3) controversially, maintenance of a stable regulatory framework.[912] Unless otherwise stated, this portion of the discussion will be engaged with category (2) as with it the most apt comparison with estoppel can be made. An invocation of the test for protection of legitimate expectations arising from host state assurances, enunciated in the case of *Micula*, only serves to amplify the overall *prima facie* impression as to the close relation of the concepts: (1) making by the host state of a promise or assurance; (2) reliance of the investor on that promise or assurance as a matter of fact; (3) the reliance (and expectation) should be reasonable.[913]

It is in their most specific form that legitimate expectations refer to expectations engendered by the foreign investor's reliance on specific host state conduct or statement. Such statements may comprise oral and written representations, and will typically constitute promises or other forward-looking commitments relating to the making of an investment. In practice, these are often referred to, in doctrine and arbitral case law alike, as inducements. Reliance, on the other hand, in the case of legitimate expectations typically takes the form of the actual making of an investment, i.e. the commitment of financial and organizational means, or, alternatively, the expansion of an existing one. It is this incarnation of legitimate expectations, that is reliance in response to a specific inducement in the form of a promise or forward-looking commitment, it is argued in doctrine, that will bear the most resemblance to estoppel as well as the doctrine of unilateral acts, primarily acquiescence and waiver, and the codified principles of state responsibility.[914]

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status of legitimate expectations are reviewed in: T. Wongkaew, *Protection of Legitimate Expectations in Investment Treaty Arbitration: A Theory of Detrimental Reliance*, Cambridge University Press 2019, p. 18 et seq.

[911] *EDF (Services)*, para 216.

[912] M. Potestà, "Legitimate Expectations in Investment Treaty Law…", see note 307, pp. 89-90.

[913] *Micula (Award)*, para 668.

[914] A. Newcombe, L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International 2009, p. 279.

The principle of estoppel has been said to provide specific protections of legitimate expectations.[915] The tribunal in *Total SA (Liability)* remarked generally:

> "Under international law, unilateral acts, statements and conduct by States may be the source of legal obligations which the intended beneficiaries or addressees, or possibly any member of the international community, can invoke. The legal basis of that binding character appears to be (…) in part related to the concept of legitimate expectations—being rather akin to the principle of "estoppel". Both concepts may lead to the same result, namely, that of rendering the content of a unilateral declaration binding on the State that is issuing it".[916]

The observation made in the final sentence of the quote encapsulates the sentiment that both estoppel and legitimate expectations have the effect of holding host states accountable for their unilateral promises. In the literature, it has been argued that the two concepts share a common rationale which creates a strong relation therebetween.[917] They are said to be both based on the notion that statements or conduct attributable to a representor can give rise to enforceable rights where conduct is foreseeably and reasonably relied on to the detriment of the representee or the benefit of the representor.[918] Academic commentators have noted the potential for estoppel that lies within the ambit of protection of legitimate expectations. Kotuby and Sobota have argued that protection of legitimate expectations within the FET standard constitutes a vibrant affirmation of estoppel.[919] Another view posits that the FET standard is relevant with regard to the scope and content of the test for the strict view of estoppel to apply, particularly as regards the requirements that a representation be clear, unambiguous and authorized.[920] Dolzer has noted that FET incorporates and is in all material respects concomitant with the broad implications of good faith as understood in the process of general investment treaty interpretation. One significant aspect of the FET standard so reconstrued is to embrace the related notions of *venire contra factum proprium* and estoppel.[921]

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[915] *Besserglik*, para 424.
[916] *Total SA (Liability)*, para 131.
[917] S. Xu, Y. Wu, H. Hailong Jia, "Investment Law's Roots in Customary International Law…", see note 909, pp. 242-243; C. Annacker, "Role of Investors' Legitimate Expectations…", see note 88, p. 237.
[918] L. Johnson, "A Fundamental Shift in Power: Permitting International Investors to Convert Their Economic Expectations into Rights", 65 UCLA Law Review Discourse 2018, p. 111.
[919] C.T. Kotuby, L.A. Sobota, *General Principles of Law and International Due Process…*, see note 269, p. 125.
[920] P. Dumberry, *A Guide to General Principles of Law…*, see note 135, p. 170, para 4.59.
[921] R. Dolzer, "Fair and Equitable Treatment: A Key Standard in Investment Treaties", 39 International Lawyer 2005, p. 91.

Differences in application of the two principles should also be signalled upfront. Fundamentally, whilst the preclusive effect of estoppel can attach to both parties to an arbitration proceeding, only the legitimate expectations of investors are protected under the FET standard. Further, mere estoppel cannot normally lead directly to liability under an investment treaty or investment contract by virtue of a breach of an investor protection standard, as opposed to legitimate expectations, a violation of which triggers state responsibility. Further, protection of legitimate expectations appears to sanction only a specific type of representation, i.e. assurances or promises as to the future intentions of the host state regarding, in most cases, regulatory endeavours. In this sense, the potential applicability of estoppel is broader as it encompasses a wider range of statements and conduct. As a general rule, proof of detrimental reliance will serve to further the investor's claim for breach of legitimate expectations. I submit, however, that this element is more prominent and pronounced in arbitral case law and jurisprudence on estoppel. Another difference noted in doctrine is that estoppel, as opposed to legitimate expectations, is a private law doctrine and as such presupposes interaction between equal parties.[922] Finally, the viability of use of estoppel as an interpretative tool in the context of deciding upon an FET standard claim has been questioned.[923]

The section will comprise an analysis of a selection of cases straddling the line between estoppel and protection of legitimate expectations. The primary research aim is to verify a number of tentative hypotheses regarding the synergies and divergencies between the two doctrines. Above all, it appears that, despite a number of differences in scope, estoppel serves an important procedural role in enforcing and strengthening the protection of legitimate expectations. In other words, the protective edge of legitimate expectations would markedly depreciate in effectiveness if it were not for the use of estoppel to preclude host states from denying their breaches of the FET standard.

6.5.1. Common rationale

Estoppel and legitimate expectations share a common rationale in that they have the effect of holding host states accountable for their unilateral promises. Just as is the case with estoppel, where no requirements as to the form of representation are envisaged,[924] protection afforded to legitimate expectations under the FET standard has been extended by arbitral tri-

[922] J. Ostřanský, "An Exercise in Equivocation: A Critique of Legitimate Expectations as a General Principle of Law under the Fair and Equitable Treatment Standard" (in:) A. Gattini, A. Tanzi, F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration*, Brill/Nijhoff 2018, p. 352.
[923] Ibid.
[924] Other than it being clear and unambiguous, yet these requirements pertain more to the quality of the representation and not to its form. Estoppel can attach to statements regardless of their form (oral/in writing).

bunals to informal representations. In *Waste Management II*, the tribunal was adamant that to infer a breach of the FET standard it must be ascertained whether there the treatment the investor was subjected to by the host state entailed a breach of specific representations made by the latter, which were subsequently detrimentally relied on by the former.[925] In later jurisprudence, the statement of principle from *Waste Management II* was reiterated and emulated. In *Glamis Gold*, the tribunal confirmed that representations made in order to induce an investment may be binding on states if those representations give rise to objective expectations.[926] In *Parkerings*, the category of representations capable of giving rise to legitimate expectations was further developed and diversified:

> "[An] expectation is legitimate if the investor received an explicit promise or guaranty from the host-State, or if implicitly, the host-State made assurances or representation that the investor took into account in making the investment".[927]

The range of representations capable of triggering a breach of legitimate expectations is worth noting. Express promises and guarantees as well as implied representations are within the ambit of the principle. However, the host state's statement or conduct intended to induce the making of an investment must have indeed been taken into account by the investor when deciding on the actual investment representing a financial and organizational commitment. Presumptions may reasonably be made as to whether a given representation actually induced an investment. Regard may be had to the investor's conduct at the time the representation in issue was made as well as afterwards, and external evidence could be adduced to objectify and ascertain the investor's motivations.

Investors do not have a *prima facie* right to regulatory stability. A breach of legitimate expectations in this regard is triggered by a retraction or unwarranted modification of an original assurance or promise. Such situations can be reconceptualized, at least to an extent, as estoppel situations. In *Micula*, the tribunal opined that the FET standard does not generate an independent right to regulatory stability. Sovereign states have an inherent right to regulate, and investors must acknowledge and adapt to legislative changes, which are imminent in the absence of a clear stabilization clause or commitment, or another specific assurance giving

[925] *Waste Management II*, para 98.
[926] The tribunal went on to set a high threshold for expectations, noting that they should be of "quasi-contractual" nature. See: *Glamis Gold*, para 799.
[927] *Parkerings*, para 331. A statement of principle to a similar effect was made in: *Arif*, para 535.

rise to a legitimate expectation of stability.[928] Considerations related to legitimate expectations (and estoppel) begin to arise as soon as such an assurance or commitment is made.

6.5.2. Basis and normative character

Despite the common rationale, the interpretative role of estoppel has been argued to be limited because whenever a tribunal is seized of an FET claim, it shall be primarily concerned with the interpretation of the underlying international treaty and its application to the facts at hand.[929] This could be extrapolated. Systemically, protection of legitimate expectations is derived from the letter of an investment treaty, whilst estoppel will almost invariably be, at least under the current state of the law, an extraneous element,[930] applicable only within the scope traditionally attributed to general principles of law (gap-filling and interpretation functions). It follows that where a tribunal is faced with an FET claim under treaty, protection of legitimate expectations will be the first port of call as a concept which is subsumed under the FET standard. Recourse to estoppel is more difficult, even if it appears to be potentially applicable to a wider range of representations (not only forward-looking promises and assurances concerning the legal and regulatory intentions of host states).

Discussion of the correct approach to adopt where a treaty-derived FET standard incorporating legitimate expectations is available is *Occidental*, decided on the basis of the United States-Ecuador BIT pursuant to the LCIA Arbitration Rules.[931] In 1999, the claimant investor, a multinational conglomerate active in the oil industry, and Ecuador signed a participation contract, thus granting Occidental an exclusive licence to carry out exploration and production of oil in the host state, as well as an ownership share of the oil produced. This arrangement replaced a prior one, under which Occidental was merely a supplier of oil and co-producer to Ecuador's state-owned oil enterprise, Petroecuador. Pursuant to the new contract, Occidental's legal status was elevated to that of a standalone exporter of Ecuadorian oil products abroad. Between 1999 and 2001, Occidental, in accordance with its own interpretation of domestic tax law, largely informed by the newly acquired status, applied for VAT refunds on goods used in the production of oil for export. Although initially those refunds were granted, in 2001 the host state objected, claiming that a refund was already consummated by the "participation factor", a formula envisaged and agreed in the participation contract. Not only were

[928] *Micula*, para 666. See also: *ICW Europe Investments*, para 545.
[929] J. Ostřanský, "An Exercise in Equivocation: A Critique of Legitimate Expectations…", see note 922, p. 352.
[930] See my discussion of the ways in which estoppel as a general principle of law can be introduced into the regime of international investment law in Section 2.2.
[931] London Court of International Arbitration, *LCIA Arbitration Rules*, available at: https://bit.ly/3co1792 (accessed: 24.08.2021).

applications for further refunds rejected but Ecuador also attempted to demand from Occidental payment of now overdue tax contingencies in the amounts of the VAT refunded in previous years.

The claimant argued that the VAT refunds, which were granted pursuant to special resolutions of state authorities, created a legitimate expectation which, in turn, provided an incentive for further investments on top of the initial commitment. The investor based its claim on estoppel, contending that the host state should be precluded from now shielding itself behind the investor's non-compliance with domestic laws which was impliedly consented to and in fact invited by public authorities.[932] The host state countered that it is within its rights under international law to rectify mistaken interpretations of tax law to bring them in line with domestic regulations.[933] The tribunal sided with the investor, emphasizing its right to a stable regulatory framework. Since the claim succeeded under the legitimate expectations prong of the FET standard, the estoppel argument raised by the claimant was left open:

> "[The claimant investor] undertook its investments, including its participation in the pipeline arrangements, in a legal and business environment that was certain and predictable. This environment was changed as a matter of policy and legal interpretation, thus resulting in the breach of fair and equitable treatment. This breach relates to the effects of both revoking the Granting Resolutions and denying further VAT refunds. The rights of the Claimant are therefore protected under the fair and equitable treatment standard required by the Treaty and enforced by the Tribunal, independently of any estoppel. This last issue therefore becomes moot".[934]

It should be noted that *Occidental* was not analysed on the basis that the authorities proffered a representation which was then reasonably and detrimentally relied on. Instead, the tribunal adopted a "stable regulatory framework" analysis which is prong (3) as mentioned above in Section 6.5 *in principio*. It is submitted that this was incorrect and there was a clearly discernible representation on the facts in the form of Ecuador's consistent practice of granting VAT refunds under the participation contract.[935] Nonetheless, the tribunal's analysis goes to

[932] *Occidental*, para 194.
[933] Ibid, para 195.
[934] Ibid, para 196.
[935] T. Wongkaew, *Protection of Legitimate Expectations…*, see note 910, pp. 214-215, who also notes that it is contested whether legitimate expectations can be derived from an obligation not to alter the legal and business environment in the absence of a representation to that effect. The writer suggests the principle of non-arbitrariness as a more suitable alternative. See also: S. Maynard, "Legitimate Expectations and the Interpretation of the 'Legal Stability Obligation'", 1(1) European Investment Law and Arbitration Review Online 2016, p. 106; F. Ortino, "The Obligation of Regulatory Stability in the Fair and Equitable Treatment Standard: How Far

show that where protection of legitimate expectations under the FET standard is available, it should be taken account of first, and only in the event of a negative verification should the tribunal move to analysing the requirements of the strict view of estoppel. In other words, treaty standards should be consulted before general principles of law.

Occidental can be contrasted with *Duke Energy*, a case analysed in Section 6.3, which also pertained to the stability of tax interpretation. The latter arbitration was contract-based, and due to the controversies surrounding the status of legitimate expectations as a general principle of law,[936] the tribunal correctly resorted to estoppel as a device which guaranteed the achievement of fairness and justice on the facts of the case. A juxtaposition of these two cases shows that tribunals are aware of the different normative bases and sources from which the principles are derived, and of their respective purviews.

Another corollary flowing from the different normative characters of estoppel and legitimate expectations (general principle of law vs. treaty standard) is that in certain situations estoppel could operate to preclude the investor from pleading a breach of legitimate expectations. In this sense estoppel is a "larger" and more universal doctrine in that it can affect the applicability of legitimate expectations. Although I have not found a case where this effect of estoppel is observable in the reasoning of a tribunal, such a preclusive effect must be permissible at least in theory as it is precisely one objective and consequence of estoppel that it prevents parties from availing themselves of their formal (including, to a limited extent, treaty-derived) rights. In a conceivable situation, an investor could represent that they will not assert their recognizable rights flowing from protection of legitimate expectations. Provided that the host state could prove detrimental reliance on the strict view of estoppel, the *prima facie* case appears plausible.[937]

6.5.3. Personal scope

Legitimate expectations is a one-sided principle in that it imposes obligations (and potential liability) only on the host state. This aspect is a consequence of the fact that protection of legitimate expectations is subsumed under the FET standard which, by its nature, constitutes a necessarily one-sided measure of investment (and investor) protection, with its pro-

Have We Come?", 21(4) Journal of International Economic Law 2018, pp. 846-852. More generally, see: D. Zannoni, "The Legitimate Expectation of Regulatory Stability under the Energy Charter Treaty", 33(2) Leiden Journal of International Law 2020, p. 451 et seq.

[936] See note 910.

[937] In *Mamidoil Jetoil*, the Albanian government raised an estoppel from pleading legitimate expectations against the claimant investor, the plea was however unaddressed by the tribunal. See: *Mamidoil Jetoil*, para 91, recounting para 251 of Respondent's Counter-Memorial.

tective edge directed exclusively towards the investor. Estoppel, on the other hand, is a two-edged sword, functioning as a universal general principle of law, which can be availed of by any party (a recognized subject of international investment law), provided that its substantive requirements are met. Estoppel can and has been invoked by host states against investors. For example, in *Pan American Energy*, the host state alleged the claimant should be estopped from initiating an international investment arbitration where they had previously made a choice to submit the dispute between the parties before a local court.[938] In another case, the investor was to be estopped from bringing a claim because of a prior representation regarding the validity of a transfer agreement by virtue of which a change of control over a disputed undertaking was effected.[939] In *Getma International*, the investor was alleged to be estopped from arguing that a specific provision of a concession agreement concluded with the host state was inapplicable.[940] An estoppel claim has also been invoked in an attempt to preclude the investor from objecting to the host state's counterclaims on the grounds of *lis pendens* six years after their introduction.[941] Finally, the claimant natural person in *Binder* was to be precluded from relying on his permanent residence status in Germany to establish his standing as an investor "of the other Contracting party" under the Czechoslovakia-Germany BIT.[942]

6.5.4. Types and qualities of representations

It has been opined in arbitral case law that legitimate expectations would be angled to protect forward-looking assurances and promises, which would land beyond the purview of estoppel. On this view, the latter principle would be limited only to statements of fact, and potentially also to statements as to how the authorities of the host state understand a given state of law (as I argued in Section 2.6.1.1), but not statements as to how the host state intends to proceed legally in the future.[943] I wish to propose a contrary assertion – legitimate expectations will not protect a wide array of statements of fact which are potentially within the ambit of estoppel. This is because legitimate expectations within the meaning analysed in this Chapter are concerned with inducements made by the host state before the making of an investment.[944] Legitimate expectations would therefore not serve to preclude changes of positions

[938] *Pan American Energy*, para 144.
[939] *Aguas del Tunari*, para 188.
[940] *Getma International*, paras 126-128.
[941] *Perenco*, para 466.
[942] *Binder*, para 79.
[943] *Thunderbird Gaming Corporation*, Separate Opinion of Thomas W. Wälde, para 26.
[944] *Sempra*, para 298; *Glamis Gold*, para 799. There are certain limited exceptions to this general rule, particularly where an investment is made in stages or instalments. See: M. Kałduński, *The Protection of Legitimate Expectations…*, see note 422, pp. 178-179. See also: *ICW Europe Investments*, para 549, where the tribunal ascertains

originally adopted after the investment has been set up or during arbitration proceedings. For example, a representation on the part of the host state, made during pre-arbitration negotiations, that a given procedural right shall not be used during arbitration proceedings should they ensue, would not be precluded by legitimate expectations, for at least two reasons: (1) it was made after the investment has been set up; (2) it does not pertain to the making of the investment but rather to the resolution of a dispute between the parties. Another example would be a strict statement of fact, such as a representation as to the reality or interpretation of a past event. Generally, representations to which estoppel could potentially attach do not have to concern the investment or investor at all – as the immediate effect of estoppel is procedural (preclusion, inability to assert an inconsistent position), there are no substantive limits as to the type of representation affected. As for legitimate expectations, the language employed by arbitral tribunals (assurances/promises[945]) is an indication that strict limits apply.

As to whether estoppel is capable of applying to forward-looking promises reference is made to Section 1.7, however, for the purposes of the present discussion, it is appropriate to consider one type of representation that would possibly land the closest to this boundary, i.e. representations of the *Kardassopoulos* and *Fraport (Award)* type – representations to the effect that the status of an investment will not be contested despite non-compliance with domestic law. This reconceptualization would imply a forward-looking obligation, however this species of representation can be recast as follows: the investment is legal despite non-compliance with domestic laws. Host states attempting to question the investment's protected status (as part and parcel of objections to jurisdiction), appear to make both arguments in that they contest the legality of the investment and at the same time assert the investment is illegal. In other words, they break a forward-looking promise to refrain from challenging the legality of the investment and make a statement of fact (understanding of a legal fact) that the investment is illegal.

One certain difference appears to be that estoppel would normally not operate, I submit, in respect of representations directed to, to use the wording of Principle 6 of the GPAUD, the international community as a whole. The cases analysed in this dissertation suggest that for estoppel to arise a representation should be individualized and concretized, made towards

precisely the temporal element of reliance, i.e. when the investor should have relied to successfully ground a legitimate expectations claim. The tribunal inferred no reliance on the facts.

[945] The terms can be used interchangeably. M. Potestà, "Case Comment: *Mr. Franck Charles Arif v. Republic of Moldova*", 15(5-6) Journal of World Investment & Trade 2014, p. 1018. There may be, however, a slight preference in doctrine and case law towards referring to representations made within domestic legislation (particularly stabilization clauses) as assurances or even guarantees. See: M. Hirsch, "Between Fair and Equitable Treatment and Stabilization Clause: Stable Legal Environment and Regulatory Change in International Investment Law", 12(6) Journal of World Investment & Trade 2011, pp. 792-799.

a given representee (or, at a minimum, an ascertainable class of representees).[946] In fact, it could be argued that the individual character of a representation is precisely what serves as a rationale for the potentially wide-reaching effects of estoppel. For estoppel is a device which can be used by host states to carve out an exemption for a given representee, to favour one investor over others by waiving a requirement (or requirements) holding under domestic law. In Chapter IV, I dealt with representations which effectively exempted a given investor from the duty to comply with domestic laws, a situation akin to individualized positive discrimination. It could be potentially destabilizing to the system of foreign investment if we were to assume that such representations could be made publicly and directed to all investors at large. Not only would it reduce domestic investment requirements to a little more than fiction and wishful thinking, but it would also have a demoralizing effect on investors interested in committing in the host state in question. Treaty shopping could become a widespread phenomenon. Inversely, legitimate expectations can be created by virtue of both general and specific representations,[947] which can be inferred, as in a classic estoppel case, from an individualized, concretized representation directed to a given investor or a class of investors, and, under delimited circumstances, from pronouncements directed to the public at large, such as legislation.[948]

Tribunals seized of legitimate expectations claims have set certain requirements towards a representation or conduct. These include, *inter alia*, the requirements of unconditionality, definitiveness and clarity.[949] The representation or conduct must be attributed to the host state, and the corollaries reached with regard to estoppel in this respect could be applied to legitimate expectations by analogy. Evidently, for a representation to give rise to a breach of legitimate expectations it must be deliberate. The promisor must have intended to become bound by its representation.[950] Intention need not be express but can also be implied or imputed.[951]

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[946] See also note 10 *supra*.
[947] Examples of cases where no specific representation was made yet the principle of legitimate expectations was engaged include: *MTD Equity*, *GAMI Investments*, *SD Myers*. For an express statement of principle to this effect, see: *Electrabel*, para 155.
[948] *LG&E Energy*, para 175; *Philip Morris Brands*, paras 423-427; *Antaris*, para 366; M. Kałduński, *The Protection of Legitimate Expectations…*, see note 422, pp. 88-94.
[949] See: M. Kałduński, *The Protection of Legitimate Expectations…*, see note 422, pp. 115-117, and the case law cited therein.
[950] *AWG Group*, para 227. Cf. *Micula*, para 669. See also: M. Kałduński, "Some Remarks on the Protection of Legitimate Expectations in International Investment Law", 25 Comparative Law Review 2019, pp. 223-224. It was noted in Section 1.3.1 that for estoppel to operate no clear consent nor intention to be bound must be established as estoppel is in and of itself a means of imputing intention on the basis of detrimental reliance of the representee. See also note 410.
[951] T. Wongkaew, *Protection of Legitimate Expectations…*, see note 910, p. 142.

6.5.5. Legal effect and consequences of breach

The difference between the legal effects of estoppel and those of legitimate expectations can be understood as secondary and primary, respectively. Estoppel *per se* will normally not generate responsibility on the part of the representor. For example, where estoppel operates to preclude the host state from claiming lack of jurisdiction on account of the investment's ordinary illegality (non-compliance with domestic regulations), no immediate responsibility arises. The claim proceeds to the merits stage and to infer responsibility a separate set of requirements must be fulfilled under the relevant heading of protection (FET, expropriation, prohibition of discrimination, etc.). The closest that estoppel moves to a substantive principle is where a party is held to be estopped from raising a defence to liability. Regard must be had, however, to the fact that the preclusive effect is individualized in the sense that it applies merely to the specific defence "tainted" by estoppel. Of course, on the facts of a particular, rather unique, case, it could transpire that estoppel precludes the host state from raising any defence, thus resulting in liability. It is primarily in this sense that estoppel can exact direct legal consequences as in imposing responsibility in international investment arbitration. The substantive ambit of estoppel goes beyond, however, the mere imposition of responsibility which, as just demonstrated, will be rather rare. For a party's inability to raise an objection or to assert a procedural right in arbitral proceedings could be reconceptualized as a substantive concession.

A breach of legitimate expectations is capable of, under the FET standard, imposing direct international responsibility on the host state, subject to any available defences. As noted above, legitimate expectations is a one-sided principle (as are all investor protection standards) and can impose liability only on the host state.

The difference is also evinced in the methodology a tribunal will apply to investigating breaches of legitimate expectations and potential estoppel situations:

> "In the context of State responsibility, the analysis begins with a breach of international law, and the subsequent inquiry focuses on whether that breach — the internationally wrongful act — can be attributed to the State as a whole. In the context of estoppel, any determination of "wrongdoing" — if that is the correct concept — is the end point of the inquiry. The analysis begins with a review of the acts and statements of the State's various organs and officials, all of which may very well be independently law-

ful. The conclusion of wrongdoing depends on the intricate dynamic, over time, between the State actors and the third party".[952]

Estoppel, by way of its preclusive effects, will therefore often be a procedural device which conduces to the imposition of international responsibility, however estoppel alone cannot ground an inference of the host state's wrongdoing.

6.5.6. Good faith/reasonable reliance. Due diligence

As with estoppel, the *Micula* test conditions the protection afforded by the principle of legitimate expectations upon good faith/reasonable reliance on the part of the claimant investor.[953] The assessment of reasonableness for the purposes of legitimate expectations is objective.[954] A model case in this connection is *Thunderbird Gaming Corporation*, where the investor, in the absence of a contractual commitment or an official, administrative decision, attempted to rely on a legal opinion it received from the Mexican authorities, confirming the legality of a projected gaming investment. Once the investment was set up, the operations were closed by the host state as falling foul of a statutory prohibition on gambling. In a majority decision, the tribunal found that no legitimate expectation could be generated by reference to the legal opinion as it could not have been reasonably relied on by the investor who should have been aware of its legal value, particularly that it was not binding. It was also established in the meantime that the investor provided inaccurate information for the purposes of having the opinion issued, which definitively defeated any possibility of reasonable reliance arising.[955] On a comparable set of facts, in *Nations Energy* the tribunal held that an opinion issued by the Panamanian tax authorities was not binding thereon as it constituted "a simple consulta" and the investor had failed to obtain a formal opinion, a "resolución", which would have been binding.[956] In *Cube Infrastructure Fund*, the tribunal held that the investor's belief that a Spanish statute establishing a preferential special regime for investments in renewable energy

[952] *Duke Energy*, para 243.
[953] Cf. T. Wongkaew, *Protection of Legitimate Expectations…*, see note 910, p. 231, who argues that estoppel does not require proof of reasonable reliance.
[954] A number of theories put forward in the doctrine, all of which propose that objective criteria be used to ascertain the legitimacy of an expectation and reasonableness of resulting reliance, are discussed in: M. Krzykowski, M. Mariański, J. Zięty, "Principle of Reasonable and Legitimate Expectations in International Law as a Premise for Investments in the Energy Sector", International Environmental Agreements: Politics, Law and Economics 2020, online, available at: https://bit.ly/365eK9K (accessed: 24.08.2021). See also: M. Kałduński, *The Protection of Legitimate Expectations…*, see note 422, pp. 127-129; Ł. Kułaga, *Traktowanie sprawiedliwe i słuszne a minimalny standard traktowania w międzynarodowym prawie inwestycyjnym*, Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego 2016, p. 296.
[955] *Thunderbird Gaming Corporation*, paras 145-166.
[956] *Nations Energy*, paras 523-530.

would stay intact despite severe economic and market turbulences was not reasonable. The host state's amendments to the regime, whilst circumscribing it, did not abolish it altogether, which was held to be consistent with what a reasonable expectation of a prudent investor familiar with the renewable energy market should have been. Despite the letter of the legislation, it was held that the economic pressure the regime was enduring must have necessitated that electricity producers were to be forced to sustain losses.[957] Similar conclusions were arrived at in *WA Investments-Europa*, where the investor purported to rely on a letter from the Czech Energy Regulatory Office issued a year before a period of economic crisis, followed by a sweeping reform package ushered in by the Czech government in a bid to curb the resulting economic downturn, determined by the tribunal to be within the host state's reasonable discretion.[958]

It has been demonstrated that in a handful of cases, notably *Churchill Mining (Award)*, arbitral tribunals have attempted, in estoppel claims, to impose upon investors a duty to conduct a measure of due diligence prior to making (and presumably also during) the investment.[959] This is a new requirement and it is uncertain whether future tribunals will follow this reasoning in relation to estoppel. On the other hand, the investor's conduct (and its reasonableness) performs a much more expansive function in the context of protection of legitimate expectations. The following passage from the award in *Duke Energy Electroquil Partners* is instructive:

> "To be protected, the investor's expectations must be legitimate and reasonable at the time when the investor makes the investment. The assessment of the reasonableness or legitimacy must take into account all circumstances, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In addition, such expectations must arise from the conditions that the State offered the investor and the latter must have relied upon them when deciding to invest".[960]

It appears that the threshold of good faith or reasonable reliance in respect of estoppel is lower, or, at a minimum, the extent of reasonableness within this context is yet unexplored. No tribunal seized of an estoppel claim has delved into such circumstances as the economic

[957] *Cube Infrastructure Fund*, paras 330-334.
[958] *WA Investments-Europa*, paras 599-604.
[959] Due diligence is discussed in Section 2.6.3.1 within the context of the requirement that the representee's reliance be reasonable or otherwise in good faith.
[960] *Duke Energy Electroquil Partners*, para 340.

and business stability of the host state[961] or attendant social, political, cultural and historic background which could impact the performance of promises.[962] Kriebaum has commented that the approach showcased by arbitral tribunals evinces that there is a residual measure of flexibility in the interpretation and application of investor protection standards in that account can be taken of the different stages of development across nations.[963]

One common feature shared by both principles appears to be the attention tribunals devote to the investor's good faith by reference to the unclean hands doctrine, however, as noted in Section 4.5.2 *in fine*, the jurisprudence is far from settled on this point. In the context of legitimate expectations claims, regard is had to the investor's criminal or otherwise misleading conduct.[964] In *Plama*, the investor, a Cyprus-based company, along with its owner, a French national, were alleged to have obtained an investment in the host state, Bulgaria, through misrepresentations. The owner had initially approached the host state's authorities on behalf of Norwegian and Swiss companies interested in acquiring a refinery in Bulgaria, however those parties withdrew before the sale was finalized, without Bulgaria's knowledge. The tribunal established that in a good faith belief of Bulgaria, approval of the investment was granted on the assumption that the claimant investor was owned by a consortium of major companies. Consequently, the approval would not have been granted had the host state known about the true identity of the owner and that the Cyprus company "was simply a corporate cover for a private individual with limited financial resources".[965]

6.5.7. Necessity of proving detrimental reliance

The element of detriment has not been expressly articulated nor separately examined in many awards where protection of legitimate expectations was discussed.[966] Notwithstanding, it appears that, since in a typical case an investor is induced, through the host state's statements and conduct, to commit, financially, organizationally and otherwise, to invest, and the legitimate expectations claim appears to only be consummated once the investment is actually made, detriment does perform a role in grounding a legitimate expectations claim. In

[961] For a discussion of such considerations within the context of a legitimate expectations claim, see: *Generation Ukraine*, para 20.37; *Olguin*, para 75; *National Grid*, paras 179-180; *Bayindir*, para 195.
[962] These factors were considered in the following legitimate expectations cases: *Genin*, para 348; *Parkerings*, paras 335-336.
[963] U. Kriebaum, "The Relevance of Economic and Political Conditions for Protection under Investment Treaties", 10(3) The Law & Practice of International Courts and Tribunals 2011, p. 384.
[964] *Azinian*, paras 93-124.
[965] *Plama*, para 133.
[966] See e.g. *MTD Equity*, *ICW Europe Investments*, *Voltaic Network*, *Belenergia*, *Cube Infrastructure Fund*, *OperaFund*.

many cases, contrary to an estoppel claim, where the element is typically prominent and pronounced (at least where the strict test is endorsed), tribunals seized of legitimate expectations claims will often not mention it specifically even though detriment will be a naturally occurring and indispensable factor in a given factual scenario. For it is only after detriment, loss or other damages has ensued that a legitimate expectations claim becomes available. One tribunal has noted expressly that for a legitimate expectations claim to arise the claimant investor must, in reliance upon the host state's inducements or commitments, act in manner that would cause it or the investment in question damages if the host state were to go back on its promises, thus upsetting the investor's expectations.[967] The following dictum from *AWG Group* lends this view further support:

> "[A]n important element of [cases involving breaches of legitimate expectations] has not been sufficiently emphasized: that investors, deriving their expectations from the laws and regulations adopted by the host country, acted in reliance upon those laws and regulations and changed their economic position as a result. Thus it was not the investor's legitimate expectations alone that led tribunals to find a denial of fair and equitable treatment. It was the existence of such expectations created by host country laws, *coupled with the act of investing their capital in reliance on them*, and a subsequent, sudden change in those laws that led to a determination that the host country had not treated the investors fair and equitably must be taken to constitute an important element of the principle".[968]

It is submitted that the element of detriment is shared between the two doctrines. The approach based on the insistence on detrimental reliance within the protection of legitimate expectations standard is typically referred to as the reliance theory. An account of the theory has been proposed recently by Wongkaew who argues, fundamentally, that the overarching purpose of the principle of legitimate expectations is to protect or prevent against detriment that an investor has suffered from its reasonable reliance on the state's promise.[969] The account is focused to large extent on the relational dynamics between the host state and the investor and less on the enforcement of sovereign promises and protection of expectation interests. Other objective ideals typically invoked when discussing protection of legitimate expectations, such as concern for the rule of law, administrative efficiency and protection of public

[967] *Thunderbird Gaming Corporation*, para 147 (emphasis added).
[968] *AWG Group*, para 226 (emphasis added).
[969] T. Wongkaew, *Protection of Legitimate Expectations…*, see note 910, p. 139.

trust, are also of secondary importance. The writer bolsters his argument by making a connection with a number of domestic law principles, including estoppel, but also negligence and the public law of torts.[970] Finally, the two principles share an ambition to strike a fair balance between the host state's right to regulate and the investor's ability to conduct business. Wongkaew argues that the reliance theory, with detrimental reliance at its core, is best suited to live up to those expectations:

> "[A]t the heart of the reformulated principle is the balancing of two interests – the right to regulate, inherent in the fundamental principle of state sovereignty, and the right of the aggrieved investor protected by the moral principle of detrimental reliance. The reformulated principle provides a conceptual framework for balancing the two interests in a fair and equitable manner, which is consistent with the rationale of investment treaties in promoting mutually beneficial relationships".[971]

It appears that in many cases the element of detrimental reliance is taken by an arbitral panel as a given by reference to the facts of a particular case before them. A fitting example is *MTD Equity* where, in a claim brought under the Chile-Malaysia BIT, the investor alleged a breach of its legitimate expectations under the FET standard in relation to the issuance of a construction permit. Following initial inducements and invitations made by senior officials within the Chilean government, including the head of an urban planning state agency (SERVIU), the investor made preliminary expenditures (including external legal advice and banking arrangements) aimed at investigating the suitability of a plot of land south of the city of Santiago for the construction of a planned community. Indications were made that the land in question, listed as dedicated to agricultural use, could be rezoned for commercial purposes. After the investor signed a preliminary contract for the sale of land with a local seller, and committed to the incorporation of a locally registered joint venture company subject to the proviso that the contract shall enter into force after a regulatory approval for rezoning is issued, an application was made with the authorities. In the meantime, the investor incurred additional costs by, *inter alia*, hiring designers and architectural firms to carry out the construction project. The firms advised the investor that the rezoning of the land would have to be initiated by the local municipality where the land was situated and that additional approvals from the Ministry of Housing and Urban Development (MINVU) would be necessary. Subse-

[970] Ibid, p. 140.
[971] Ibid, pp. 140-141.

quently, after a change of government, the initial inducements were retracted and the investor was informed of a reversal in the government's land development policies.[972]

The tribunal, which recited a passage from *Tecmed* concerning the protection of legitimate expectations under FET, did not focus on detrimental reliance (which was patently present on the facts on account of the investor's substantial monetary and organizational involvement), instead underscoring the duty on the part of the host state to act consistently.[973] The tribunal was rather one-sided in its formulation of obligations, burdening the host state with a number of duties related to the requisite standards of treatment. Nonetheless, there are implicit indications in the tribunal's award of a negative assessment of the investor's business decisions, particularly where it appeared to have proceeded with costly investigations of the legal status of the land despite inconsistent statements from the authorities, and paid full price upfront for the land without waiting for final approvals. Notably, the tribunal inferred that the investor had made decisions that needlessly increased their risks in the transaction, and for which they shall bear responsibility, and as a result damages due to the claimant were reduced by 50% under a type of contributory negligence.[974] The case could be taken to imply that the protective net of legitimate expectations is cast wider where detrimental reliance could be wanting, particularly where reliance could be questioned on the grounds of being unreasonable or in bad faith, as it happens to have been the case in *MTD Equity*.

Wongkaew's formulation of the role of detrimental reliance within the framework of legitimate expectations can serve to bolster the enunciation of a convincing rationale for estoppel within international investment law. One of the primary justifications for estoppel proffered in this dissertation is the potential the principle has in reconciling the conflicting (or at least temporarily irreconcilable) interests of investors and host states. Estoppel can, just as legitimate expectations, serve as a regulator of such interests, thus helping to achieve a workable balance which conduces to the maintenance of constructive foreign investment relations. The overarching aim must be to ensure that the general standards of fairness and justice are

[972] *MTD Equity*, paras 39-85.
[973] Ibid, para 114. See also: R. Dolzer, "The Impact of International Investment Treaties on Domestic Administrative Law", 37 New York University Journal of International Law and Politics 2005, pp. 963-964.
[974] Ibid, paras 242-243. As a side note, I submit it could have been difficult for the representations made in *MTD Equity* to pass the standard for clarity and unambiguity required by the strict concept of estoppel. Even before the change of government there were indications from MINVU and a ministerial secretary that the permits would not be granted. On the facts it appears that the investor may have proceeded with its investment in spite of conflicting messages it received from different state agencies, ministries and officials. A plausible interpretation of the facts (many of which were contested) could be that the investor effectively cherry-picked the representations that suited its objectives whilst disregarding indications to the contrary. Notwithstanding, the case is very similar in this respect to *Duke Energy* (in that conflicting statements and decisions were made by different state agencies) where the estoppel claim succeeded.

preserved in dealings between investors and host states. These interactions operate on a number of potentially frictional territories, including the sphere of traditionally private rights (performance of the underlying investment contract, breaches of contract, demands for damages, assignment of contract, rights of third parties, etc.) as well as the rule of law and public law concerns (regulatory stability and latitude accorded to host states, the condition of the environment, human rights abuses, discriminatory treatment, etc.). That problems engendered in the course of creation and conduct of a foreign investment can lead to a myriad of problems straddling those two spheres (alongside other potential issues which are not easily classifiable, such as the choice of a dispute resolution mechanism in the absence of a fork-in-the-road clause in the contract or treaty between arbitration and courts of the host state) is not only testament to the hybrid character of the system at large, but also necessitates that specialist legal instruments be devised and fine-tuned to prevent attempts to abuse one's rights. Legitimate expectations is, in general terms, a more objective standard, although its operation does depend on the making of a representation by the host state. It also comes with the baggage that is brought into the picture by other elements of the FET standard – a pre-set, minimum standard of treatment and protection. Estoppel is markedly more relational in the sense that it polices outward appearances which are detrimentally relied on (in good faith) within the context of an individualized relationship between two or more subjects of international law.

There will be situations where the reliance theory of legitimate expectations will make it become wholly consumed by estoppel. One example is that where an investment arbitration is brought on the basis of an investment treaty incorporating a FET clause. The host state has made a number of representations qualifiable as inducements, by virtue of which promises were made to the investor of attractive regulatory concessions. Suppose the investor was to benefit from tax breaks and deductions and the host state was to make available, under a lease, land for the purposes of setting up an investment in the form of a manufacturing plant at prices below the competitive market level. Further, in response to the investor's concerns regarding the environmental ramifications of the investment, the host state promised to relax those by increasing the permissible levels of pollution and noise emissions, and to delay the timelines of environmental agency inspections. For the purposes of this argument it shall be assumed that the representations effectively waived certain statutory requirements. In effect, therefore, the investor was to benefit from preferential regulatory treatment. The investor initially hesitated but ultimately decided to commit its resources and make its investment in response to and reliance upon the representations made. The inducements were referenced in a letter of intent signed by the parties prior to the conclusion of the state contract. Once the in-

vestment has been set up, the host state purported to charge the full value of tax due according to resident statutes and enforce strict environmental inspections, thus depreciating the value of the investment and hampering its day-to-day operations. The investor brings a claim for, *inter alia*, a breach of the FET standard and, in the alternative, argues the host state to be estopped from reneging on its promises.

It can be conjectured that on both the *AWG Group* or the *MTD Equity* reasoning the outcome should be the same. I am inclined to accept that the tribunal in the latter case approached the investment made *prima facie* as a necessary detriment. It can be reminded that on the facts of *MTD Equity* the actual financial, organizational and, importantly, reputational commitment made by the investor was nothing short of significant. It appears of no consequence (except for the purposes of calculating the damages due) whether detriment is taken to represent the entire value of the investment or the difference between the value of the investment on terms and conditions stipulated in the representation and post the imposition of administrative requirements by the host state in violation of the same.

A finding of estoppel, the requirements of which appear *prima facie* to be made out on the facts, would prevent the host state from retracting its inducements, effectively bringing about the *Duke Energy* outcome. Inference of a breach of legitimate expectations would follow an analogous intellectual exercise in terms of the test to be applied. I intentionally constructed the foregoing scenario in a manner that aligns both concepts and sets aside the divergencies. In short: the claim is raised against the host state, it entails a specific representation in the form of a letter of intent (written statement), it pertains to the making of an investment (to be precise, the pre-investment, inducement stage), and the arbitration proceeding in issue is upon an international investment treaty which incorporates an FET clause.

The argument presented above is instructive and intended to showcase a factual scenario where estoppel and legitimate expectations (FET) claims will overlap. However, slight variations of the facts would render the FET claim unavailable. Suppose the representation was not made as an inducement to make the investment or did not pertain to the investment at all. This showcases that the substantive purview of estoppel is much wider. Further, the host state cannot raise a counterclaim based on legitimate expectations; however, a counterclaim grounded in estoppel is available and the host state could, *inter alia*, raise an estoppel-based objection to jurisdiction or defence to liability. The detrimental reliance element would, however, remain a commonality. It could also be hypothesised that the underlying investment treaty does not contain an FET clause or that an arbitral tribunal seized of a dispute comes to a conclusion that the FET clause before it does not encompass the protection of legitimate ex-

pectations, both of these propositions, are however, hardly realistic in light of contemporary treaty-making practice.

The example contemplated above also shows a potential difference of legal effect of each of the two doctrines and the array of warranted remedies. A finding of estoppel would, I submit, justify an order of restitution or specific performance (cessation) and would not automatically trigger the duty to pay damages, which is the preferred remedy for breaches of treaty-based standards of investment protection. These remedies – restitution and cessation – albeit far from mainstream, have been accepted by a number of arbitral tribunals, particularly where the investor's contractual or other rights being in dispute remain in force at the time an arbitral award is handed down.[975] Further, a tribunal may impose provisional measures to preserve a claimant's access to such remedies. Estoppel would also be concordant with a view, which is shared by an increasing number of investment tribunals, that the relationship between the investor and the host state as well as the viability and profitability (where applicable) of the underlying investment should be maintained.[976]

6.5.8. Private law nature of estoppel

Ostřanský has argued that estoppel, as a private law doctrine, is inadequate as a conceptualization of protection of legitimate expectations within the confines of the FET standard, which involves a relation between at least two unequal parties[977]. Estoppel, the writer opines, cannot, as a private law doctrine derived from contract law, provide answers to questions posed within the context of international investment law:

> "The main reason for the inadequacy of estoppel as a doctrine of public law is that public authorities' activities are based on specific grants of power and are subjected to the requirement of legality. The requirement of legality secures that important public interests embodied in the procedures and powers of the authorities are respected; applying estoppel against public bodies goes against the doctrine of legality, thus ultimately against the public interests enshrined in the legal prescriptions binding upon the authority".[978]

[975] G. Stephens-Chu, "Is it Always All About the Money? The Appropriateness of Non-Pecuniary Remedies in Investment Treaty Arbitration", 30(4) Arbitration International 2014, pp. 675-679.
[976] T. Ishikawa, "Restitution as a 'Second Chance' for Investor-State Relations: Restitution and Monetary Damages as Sequential Options", 3 McGill Journal of Dispute Resolution 2016-2017, p. 168.
[977] See also: T. Wongkaew, *Protection of Legitimate Expectations…*, see note 910, p. 231, who echoes this argument.
[978] J. Ostřanský, "An Exercise in Equivocation: A Critique of Legitimate Expectations…", see note 922, p. 352.

Historically, and within certain confines also contemporarily, estoppel has been successfully invoked against public bodies in some common law jurisdictions,[979] and the concept of legitimate expectations as espoused in common law appears to be much more reliance-based (and thus resembling estoppel) than in civil law systems.[980] But even leaving this point aside, the mere fact that estoppel has found recognition and application, as discussed in this dissertation, in the field of international investment law goes to show that its scope is not limited to quasi-contractual relations between two equal private parties. The quality of international investment law as a hybrid system, which necessarily involves states, must be taken to expand the ambit and implications of international estoppel. The protection afforded in investment treaties to private investors is precisely a form of recognition that they are not on an equal footing with sovereign governments. Further, estoppel has been extensively recognized in public (general) international law, which means it can be invoked against sovereign states.[981]

Regarding the connections between estoppel and legality, it must be reserved upfront that estoppel will operate to effectively circumvent the letter of domestic law only in exceptional circumstances. It follows from the nature of state power that states should be permitted, in strictly delimited cases, to waive, in an individualized manner, the stringent requirements of their domestic law as against a given investor or an ascertainable class of investors. It is one thing to argue that estoppel can provide for exceptions to domestic legality and such ideals as foreseeability, legal stability and certainty, and this point is readily conceded. Rather, it is my argument that the interests represented by the principle of estoppel, i.e. corrective justice, fairness, and the balancing of interests of the host state and the investor, can and do, on the facts of a given case, override the concerns for legality. Ostřanský's argument can equally apply against legitimate expectations, whose status as a public law doctrine is rarely disputed. As confirmed in case law and doctrine alike, both general and specific representations of the host state aimed at inducing foreign investment are capable of overriding the black and white letter of domestic law (such cases were at the centre of analysis in Chapter IV). Granted, the principle appears to impose a heftier obligation on the investor in terms of reasonable reliance

[979] See e.g. T. Nöcker, G. French, "Estoppel: What's the Government's Word Worth? An Analysis of German Law, Common Law Jurisdictions, and of the Practice of International Arbitral Tribunals", 24 International Lawyer 1990, p. 413 et seq.; M. Elliott, "Unlawful Representations, Legitimate Expectations and Estoppel in Public Law", 8(2) Judicial Review 2003, pp. 71-80; R. Berger, "Estoppel Against the Government", 21(4) University of Chicago Law Review 1954, p. 680 et seq.; N. Bamforth, "Legitimate Expectation and Estoppel", 3(4) Judicial Review 1998, pp. 196-204; K.D. Dean, "Equitable Estoppel against the Government – The Missouri Experience: Time to Rethink the Concept", 37 Saint Louis University Law Journal 1992, p. 63 et seq.
[980] M. Kałduński, *The Protection of Legitimate Expectations…*, see note 422, pp. 47-52.
[981] See: L. Johnson, "A Fundamental Shift in Power…", see note 918, pp. 111-116.

as opposed to estoppel, that is the investor must have regard to a wider range of circumstances and perform a higher level of due diligence before being safe in the knowledge that the making of an investment shall be within the ambit of reasonable reliance. The underlying principle, however, that a representation by the host state, which is extraneous as against its domestic law, can operate to override or modify the same, holds equal weight in estoppel and legitimate expectations.

6.6. Chapter summary

Estoppel has been raised in arbitral practice to regulate, both directly and indirectly, the incidence and limits of the substantive rights and obligations of parties to arbitral proceedings. Estoppel claims have been raised as a defence to liability under a BIT, a means of acquisition of substantive rights, both of administrative (implied grant of a concession or permission) and proprietary nature (title to land), and as a precept utilized to preclude a host state from retracting or otherwise unwarrantedly modifying a contractual stability commitment. It has also been invoked, importantly for both theory and practice, within the framework of protection of investor legitimate expectations under the FET standard. In general, only in one case among those analysed in this chapter, *Vestey Group Limited*, an estoppel argument appeared to have been flatly refused. Notably, the claim succeeded in *Duke Energy*. It is arguable that in a number of cases, where nominally the tribunal was confronted with a claim based on legitimate expectations, in fact it applied estoppel or a rule which constitutes a fused distillation of both concepts.[982] There is a specific type of case where the concepts appear to overlap, that is where a host state makes to an investor a specific representation at the pre-investment stage, one which is intended to induce it to make an investment by committing financially and organizationally. Further, it is a precondition that a claim be raised by the investor against the host state in an arbitration instituted on the basis of an investment treaty that incorporates a FET clause. Under such circumstances, for all intents and purposes both estoppel and legitimate expectations claims shall be assimilated. Any variation of those parameters would, it is submitted, typically render at least one of those claims unavailable.

Specifically, estoppel has been relied upon by a host state to preclude an investor from denying statements allegedly made in another proceeding, admissions which had direct bearing upon the defendant's international responsibility. Whilst the estoppel claim failed on that occasion, the tribunal raised no objection in principle to its potential application. In *Pac Rim*

[982] Admittedly, this must remain a tentative hypothesis as express arbitral acknowledgments of this point are extremely rare.

Cayman, the availability of estoppel was confirmed in respect of claims alleging the grant of substantive rights under an administrative concession. The dictum could, in principle, be extrapolated to cover other instances where investors allege that the host state purported to award them a legally recognized right or waive an administrative or regulatory requirement. The limits of this proposition are yet to be delineated as scant arbitral authority on the point exists. What appears certain, however, is that international estoppel does not operate in a manner akin to proprietary estoppel under domestic law. Where domestic regulations do not give rise to the creation of proprietary rights, such as title to land, international estoppel cannot remedy this defect, in accordance with *Vestey Group Limited*.

There are parallels to be drawn between the *Pac Rim Cayman* type of case and cases of one-sided ordinary illegality discussed in Sections 4.2 and 4.5.1. The function played by estoppel when it is raised, in the former scenario, offensively as a claim whose aim is to preclude the host state from denying that a given right was granted, and in the latter, where estoppel is called upon defensively by a claimant investor to defeat the host state's objection to jurisdiction or admissibility based on the alleged illegality of the underlying investment, is similar. In substance, the party claiming (or counterclaiming) estoppel – the investor – alleges in both types of scenario that the host state either impliedly granted a regulatory or administrative concession or another permission, or impliedly waived a domestic requirement constituting a duty to obtain such a permission or concession, effectively granting the underlying right all the same.

Duke Energy is a particularly influential case in the field of estoppel within international investment law, however on many fronts it yields more questions than answers. The host state in that case made a contractual stability commitment which it later purported to renege on by charging an amount of tax that was contrary to the representation made in said contract. The tribunal accepted an estoppel argument aimed at preventing the host state from changing course in this respect. The text of the stability promise was construed purposively and was held to cover not only the *prima facie* letter of the tax laws but also to guarantee consistency in their interpretation and enforcement by state authorities.

The primary difficulty posed by *Duke Energy* for the purposes of this dissertation is that its explanatory potential was written off markedly by the tribunal as it effectively conflated both the strict and broad concepts of estoppel in its reasoning. The initial statement of principle appeared to espouse the strict view, albeit it appears that ultimately the element of detriment was left out of the equation. The tribunal's emphasis on *venire contra factum proprium* treated both as a maxim and a broad principle also reflected, as the tribunal was quick to em-

phasize, in the domestic laws of the host state,[983] orientated the focus towards reliance and how, in the tribunal's opinion, this aspect inter-related with attribution of the representation. In addition, invocations of nebulous terms such as "climate of confidence" were proffered to strengthen the overarching acceptance of the estoppel argument.

The convoluted nature of the dictum in *Duke Energy* notwithstanding, the case can ground a submission that estoppel can perform an ancillary role within the context of a contractual regulatory stability commitment. Whilst it remains the underlying contract that serves as the basis for liability (in the event of a breach), estoppel performs a residual function in that it can preclude the host state from denying the validity and binding character of the contractual promise.

There is a degree of both doctrinal and arbitral support for the proposition that there are some convergencies between estoppel and one prong of the legitimate expectations doctrine – protection of expectations generated by representations (promises, assurances of a forward-looking nature) made by host states to private companies to induce them to make an investment. Specifically, they are said to both be based on the rationale that statements or conduct attributable to a representor can give rise to enforceable rights where such conduct is foreseeably and reasonably relied on to the detriment of the representee or the benefit of the representor. The requirement that reliance be reasonable or otherwise in good faith is another prominent commonality between the two concepts. Further, my analysis showed that both principles embrace the element of detriment (at least when the reliance theory of legitimate expectations is considered), although it is rather infrequently articulated expressly by arbitral tribunals seized of legitimate expectations claims. That estoppel is originally a private law concept does not seem to constitute a material distinction.

The similarities notwithstanding, the purviews of legitimate expectations and estoppel are, save for the specific instance articulated in the first paragraph of this section (and in more detail in Section 6.5.7 *in fine*), different. It could be generalized that estoppel is not supposed to be an "incarnation" of legitimate expectations, but instead a reinforcing mechanism and a tool for the conceptualization of the procedural ramifications of the latter concept. Specifically, estoppel is a more universal concept, a characteristic it owes to and derives from its systemic status as a general principle of law. Estoppel can have preclusive effects in respect of representations both before an investment is made as well as at every stage of the investment once it is set up. Further, estoppel can be raised both by and against host states – contrary to

[983] *Duke Energy*, para 231.

legitimate expectations, claims under which can only be levelled against host states. Consequences of a breach of legitimate expectations and a finding of estoppel differ for both investors and host states.

One aspect in which protection of legitimate expectations appears to reach wider than estoppel is general representations addressed in a non-individualized manner to the international community as a whole. The reported cases discussing estoppel, as well as the guidance offered in the pronouncements of international courts and tribunals seized of general international law claims, seem to point towards an inference that estoppel only applies to concrete representations directed at a specific recipient or an ascertainable class of recipients.

The fundamental difference between the two concepts, however, is structural and systemic. Legitimate expectations is a treaty standard and therefore arbitral tribunals should consider it the first port of call when resolving a case. Where seized of an arbitration initiated under an investment treaty (see Section 2.2.2), a tribunal should look for either an express formulation enshrining the protection or legitimate expectations, or seek to derive the same from an FET clause. In the absence of such an express stipulation protection of legitimate expectations may not be available to an investor. Inversely, for the application of estoppel it is sufficient that the relevant choice of law clause refers to international law as a whole as estoppel is embedded in the system's body of equitable rules.

CONCLUDING REMARKS

Considerations made in the preceding Chapters sought to demonstrate that estoppel can have a pronounced, yet properly delimited, role in international investment law in areas which are not codified in treaty nor derived from custom. The principle can serve as an all-encompassing balancing instrument which fine-tunes the respective rights and obligations of agents, i.e. host states and investors, within the context of arbitrable issues related to jurisdiction, procedure, and substantive protection of investors and investments. Estoppel permeates the regime of international investment law,[984] and although its invocations are radically inconsistent, there is a degree of common acceptance among arbitrators as regards the principle's applicability. Notwithstanding, *de lege lata* the ambit of estoppel within international investment law has limits. Notably, in addition to a refusal in *Vestey Group Limited* to accept the "offensive" use of estoppel (modelling the operation of proprietary estoppel in domestic law as a means to acquire proprietary rights), tribunals have also been wary to place some limits on the application of estoppel to questions of jurisdiction, notably as regards consent to arbitrate (jurisdiction *ratione voluntatis*). This probably stems from the formalistic codification of jurisdictional requirements in Article 25(1) of the ICSID Convention. In contrast, no formal requirement in respect of consent is envisaged in the ICJ Statute, which makes it more susceptible to the operation of estoppel.

In the light of the foregoing, *de lege lata* estoppel is to be classified as a nearly, yet not fully universal, all-encompassing concept within international investment law. Whilst estoppel's potential to override formal requirements envisaged in international treaties appears to be limited, it can operate to grant, modify or deprive of procedural and substantive rights. In Chapter III, it could be observed that whilst estoppel can operate, to an extent, to preclude subjects of international investment law from exercising their treaty-granted rights (in relation

[984] There is a good argument for estoppel to be included within the body of principles of international investment law, particularly concerning the typical individualized, two-sided (or multi-sided yet ascertainable) nature of foreign investment relations, which generates significant potential for the application of contract-law derived principles like estoppel. The concept of "principles of international investment law" is fluid and has been used in cases such as: *Ampal-American (Jurisdiction)*, para 178 (burden of proof); *Occidental (Annulment)*, para 278 (split title and beneficial ownership); *Thunderbird Gaming Corporation*, para 139 (the principle that each party bears its own legal costs and the costs of the arbitration are shared); *Global Telecom Holding*, para 431 (rights related to shares and legitimate expectations connected therewith are protected by investment treaties). In *Cambodia Power*, the tribunal considered the rules of state responsibility as a principle of international investment law, which could signal that the category of "principles of international investment law" also encompasses a number of general principles of law and rules of custom which find application in the resolution of international investment disputes. This could lend credence to the proposition that estoppel should also be included within that category. See: *Cambodia Power*, para 329.

to, *inter alia*, jurisdiction *ratione personae* and *ratione materiae*), it is superseded by considerations of international public policy and rule of law. Further, some tribunals appeared to contradict the letter of treaty in reaching conclusions regarding issue estoppel, particularly when analysing the limits of the concept of privy, however their lines of reasoning could be recast as purposive treaty interpretations. Whilst the *Eskosol* tribunal refused to extend the concept of privy to an 80% shareholder as it did not find a suitable basis for it in the applicable treaty, a much bolder finding was made in *Ampal-American (Liability)* without any reference to treaty, applying issue estoppel to a partial shareholder of a claimant in proceedings conducted before a different arbitral forum (the ICC).[985] In *Hulley Enterprises (Jurisdiction)*, the tribunal expressly rejected an estoppel argument which attempted to preclude the Russian Federation from relying on a right enshrined in a provision of the Energy Charter Treaty. Importantly, however, the tribunal did not object *prima facie* to the applicability of estoppel in such a context as the argument failed for want of fulfilment of the requirement of clarity of representation.

Estoppel's wide availability is testament to the status of international investment law as a hybrid system whose important objective is to "level the playing field" between private parties (investors) and host states – estoppel fulfils those objectives by protecting good faith and preventing instances of abuse of trust in investment dealings. Estoppel will prevail, in the case of a conflict, over domestic law, with the general position captured in *Kardassopoulos* that a state cannot shield itself from international obligations by reference to a breach of its own internal law, however applicability of estoppel in a manner that overrides the letter of a treaty is debatable. Concurrently, questions remain as to whether estoppel can operate *contra* mandatory provisions of other sub-systems of international law.[986]

The conception of estoppel advocated in the dissertation aligns with the statements of principle proffered by the ICJ in *El Salvador v Honduras* and in *Cameroon v Nigeria* as recently reiterated in *Bolivia v Chile*. Despite the minute discrepancies in the detailed formulations of the strict concept (e.g. whether the representation shall be "consistent" and the meaning of such consistency), its core is represented in the formulation accepted in the field of international investment law in *Pope & Talbot*. Section 2.6 enumerates the pillars of the framework.

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[985] See note 782.

[986] Note that claimants in at least two cases have argued that estoppel is capable of overriding mandatory provisions of EU law and binding judgments of the CJEU. See: *ICW Europe Investments*, para 393; *Magyar Farming Company*, para 185.

During the course of the dissertation a number of detailed hypotheses were sought to be verified. What follows is a summary of corollaries reached throughout my argument with a view to proving or disproving the veracity of each hypothesis.

First, it was posited that the requirements of the strict concept, as established in the case law of the International Court of Justice and other courts and tribunals seized of disputes governed by international law, are specific enough to be applied both flexibly and consistently across a wide array of cases encompassing varying factual scenarios whilst achieving a sufficient degree of finality and certainty. Whenever the gap-filling function of estoppel is utilized, the strict view of estoppel should be followed. The reasons are manifold:

- the strict view of estoppel has been repeatedly endorsed in the jurisprudence of the ICJ, the ITLOS and other major international arbitration tribunals;
- the protective edge of the strict concept of estoppel derives its specificity from the detrimental reliance element which necessitates an assessment of interactions between at least two parties (relational element);
- the strict view embraces and embodies the corollary that it is not the objective of estoppel to protect or enforce objectively ascertainable truth, but rather that it performs a controlling and supervisory function over dealings between subjects of international law by preventing instances of abuse of trust;
- *a contrario*, use of the broad concept of estoppel as a gap-filler is liable to engender uncertainty in relations between host states and investors; estoppel's ambition is not to prevent inconsistency of conduct as such – parties should be free to adopt different negotiating positions with a view to striking the best bargain available within the confines of the law and practices permissible in a liberal market economy – but radical course reversals where, in the meantime, there has been a change in the relative positions of the parties caused by detrimental reliance on the part of the representee.

The prevalence of the strict and broad views is *de lege lata* roughly equal, which should make the need to orientate towards the strict view especially pressing. The inconsistency is borne out and compounded by slight preferences within certain, albeit not all, junctures of an arbitral proceeding. As regards objections to jurisdiction and admissibility on the basis of illegality of the underlying investment, most tribunals have, albeit not unanimously, invoked the *Kardassopoulos* test which draws heavily upon the broad view. Issue estoppel *prima facie* embraces its own test, however in some cases (and in this dissertation) attempts have been made to reconceptualize this test within the framework of estoppel proper, but exclusively on the strict view. As regards matters of jurisdiction, admissibility and forum selec-

tion discussed in Chapter III, as well as substantive rights and obligations in Chapter VI, both incarnations have been invoked at comparable frequency. *De lege ferenda* arbitral tribunals shall follow the concept of estoppel crystallized within general public international law, where the strict view has decidedly won. Few convincing doctrinal reasons have been proffered for the divergency between the settled jurisprudence of the major international courts and tribunals and the arbitral case law in international investment arbitration. To no avail are, I submit, any attempts to justify such a state of affairs by reference to the peculiarity of relations between investors and host states. Any argument attaching to the perceived imbalance of bargaining power that must be remedied through investment arbitration is, I submit, flawed because estoppel is precisely one doctrine that is well equipped to fittingly serve this purpose.

It is regrettable that the strict view has been successfully applied only on a handful of occasions. It is not the argument of this thesis that the prevalence of successful invocations of the principle should increase beyond what is warranted by the broad objectives of good faith and justice. The question of desirability of accepting an estoppel claim in a given case must inevitably remain fact-specific. What could be observed is that whilst the strict concept does envisage a number of specific and pointed requirements, there is potential, if a given set of facts warrants it, to experiment with more sweeping interpretations. In particular, the element of detrimental reliance appears susceptible to a purposive construction. For it does not appear, analysing the case law developed so far, that the claimant must prove quantifiable loss in terms of a tangible financial damage. This is explored further in Section 2.6.3.2. The key buffers that would prevent frivolous claims appear to be the clarity requirement as related to the quality of the triggering representation and, on the other hand, the requirement of reasonableness/good faith attached to reliance. These elements are important as they are instrumental in upholding the structural functions of estoppel, that is to prevent instances of detrimental, reasonable reliance. Whilst detriment is an indispensable requirement – where a party moves to change a position that has not been detrimentally relied upon, this should *prima facie* be permitted as agents should generally be allowed to change their opinions on matters of fact and law, and to make different forward-looking promises – its understanding should be sufficiently wide to accommodate all kinds of prejudice that a business can suffer as part of conducting its professional activity. It could be posited that detriment could encompass all decisions which, first, would not have been made but for the representation (condition *sine qua non*) and, second, which had a discernible impact not only on the finances, but also on the strategy, reputation, internal structure, staffing, internal management processes, marketing policies and outputs, or the market standing of the investor. These contingencies could be

particularized further by reference to insights from economic and management theory. The market standing of the investor is probably key, for a decision made in reliance upon a representation may not make an immediate change in the financial condition of a company, it could nonetheless make a difference in its position relative to its competitors by altering the perceptions of reasonable observers of the relevant market. This is, of course, hardly quantifiable, however my proposition could serve as an inspiration for arbitral tribunals wanting to apply a more expansive notion of detriment with a view to inferring the preclusive effects of estoppel for the sake of achieving corrective justice. A broader account of a company's reliance (as manifested by acts or omissions) by reference to the market's reactions could be particularly helpful in respect of claimant investors operating in highly competitive sectors and where there is a strong disproportion between the bargaining power of the host state and the investor. Inversely, a teleological interpretation of detriment, which would result in more frequent successful invocations of estoppel, could help balance the interests of investors and host states especially in those cases where a powerful multinational conglomerate is pitted against a developing country.[987] In this way, accentuation of the different requirements of the strict concept of estoppel would conduce to the fostering of fairness in investment relations, thus creating a "climate of confidence", to use the words of the *Duke Energy* tribunal.

The second hypothesis was that the key objective of estoppel in international investment law is protection of detrimental reliance. The objective of prohibition of inconsistent, unexpected behaviour (changing of position) does not exhaust the actual function of estoppel. Such inconsistencies must be accompanied by detrimental reliance. Estoppel should not be employed merely where there is a sudden change of course – on the contrary, parties are generally entitled to change their minds in dealings related to foreign investment. Where no detrimental reliance is discerned on the facts, there is a question whether such changes should at all be prohibited. Even if so, the concept of implied waiver should come to the rescue, and

[987] This could, at least in part, cater to common allegations levelled against the international investment arbitration regime that it tends to favour the interests of multinational corporations and business conglomerates over those of developing states, many of which are often not strong enough politically and economically to counteract the expansionist policies and demands of such companies. See: P. Nunnenkamp, "Biased Arbitrators and Tribunal Decisions Against Developing Countries: Stylized Facts on Investor-State Dispute Settlement", 29 Journal of International Development 2017, pp. 851-854; T. Schultz, C. Dupont, "Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study", 25(4) European Journal of International Law 2014, pp. 1147-1168; S. Puig, A. Strezhnev, "The David Effect and ISDS", 28(3) European Journal of International Law 2017, pp. 731-761. The intrinsic bias may be rooted, one writer has argued, not only in the attitudes of individual arbitrators but also in the systemic design of international investment arbitration as it is to favour the selection and appointment of decision makers that share similar values and who will naturally gravitate towards certain legal interpretations and outcomes. See: S. Brekoulakis, "Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making", 4(3) Journal of International Dispute Settlement 2013, pp. 553-585, particularly pp. 561-571.

such a party should be held to have waived its right to change course through a streak of congruous conduct. The correct provenance of estoppel, situated conceptually within the strict view, must mean that estoppel's true function is to prevent instances of detrimental reliance. It is in the interest of the international community as a whole, and particularly in the context of vulnerable relations between states and private investors, that parties tread carefully and do not make outward appearances which create a basis for the other party to rely on and make decisions which are often liable to significantly affect its financial, organizational and reputational standing. This cuts both ways – for estoppel does require that detrimental reliance be in good faith or reasonable, which operates as a safety valve keeping the protective scope of the principle in check. It is precisely this understanding of the actual function of estoppel – prevention of instances where a party has reasonably relied on a clear and unambiguous representation in the form of detrimental acts or omissions (or other ascertainable changes of position) – that can help clear doubts as to the position of estoppel within the array of available equitable principles an arbitral tribunal can have resource to with a view to achieving individual fairness and justice in a given case.

Although arbitral tribunals have failed to apply estoppel consistently, under the assumption that it is the strict view that shall dominate the gap-filling function it appears the hypothesis is to be deemed to have been verified positively. To accept that estoppel's primary objective is to protect detrimental reliance of states and investors would help better calibrate the purview of estoppel. It is possible that in practice the principle would fall to be applied less often quantitatively, but instead more consistently and effectively, thus ensuring actual protection of trust in investment relations.

The third hypothesis was that the functions of the broad view of estoppel should in practice, for most intents and purposes, be subsumed under the doctrine of unilateral acts, notably consent, recognition, unilateral state promises, waiver and acquiescence, whilst the strict view shall stand as a fully autonomous doctrine. To take acquiescence as an example, it is true one can interpret it as implied consent (qualified silence) which, once intensive enough to convey approval to the other party, necessarily means that the acquiescing party cannot now change course. Moreover, silence (albeit not "qualified silence" which imports the notion of consent) is accepted, even on the strict view of estoppel, as a permissible variation of representation which can then, if detrimentally relied upon, ground a successful estoppel claim. Importantly, this corollary is also true in international investment law. Nonetheless, it is precisely detrimental reliance which sets apart acquiescence and estoppel or, more directly, it is an element present only on the latter analysis. As acquiescence is an expression of (tacit) con-

sent, it does not allow room for any reaction of the other party in a hypothetical bilateral or multilateral scenario. The nature of acquiescence is such that the qualified silence is necessarily one-sided, unilateral. As regards state promises and estoppel, the differentiating line runs along similar lines and is most visible when one considers the intention to be bound on part of the promisor in a unilateral declaration scenario versus that of a representor hoping to avoid any potential preclusive effects of estoppel. The former subject of international law must evince in its promise the will to be bound, and if that element is present, its promise is binding as soon as it is made. With estoppel, a representation is not *prima facie* binding unless and until it is detrimentally relied upon by its representee(s). In other words, estoppel is a legal instrument which can be used to commit representors to following through precisely where, in the face of changed circumstances, they would be interested in opportunistically changing course. The aforementioned discrepancies notwithstanding, in the absence of a codified set of rules attaching to estoppel or its constitutive requirements, circumspect analogies can be made with the GPAUD to help make authoritative propositions with regard to, *inter alia*, the warranted quality of representations, their formal parameters, and attribution.

What weighs on the broad concept within the gap-filling function could constitute its strength as an interpretative tool.[988] Here, it is desirable that rather than the specialized test of the strict view, generalizations of the primary undertones of estoppel be used, such as prohibition of inconsistency of conduct, fairness and justice in dealings between investors and host states, the need for clarity as regards the expression of manifestations of will, and keeping promises (*acta sunt servanda*). In practice, the interpretation function of the broad view of estoppel will be consumed by references to good faith as it is apparent that tribunals feel more confident referring to the umbrella concept rather than to its concretizations.

The hypothesis has been verified positively by reference to numerous examples from judicial and arbitral practice. With the detrimental reliance element as the differentiating factor between the strict and broad views of estoppel, it is a warranted corollary that the broad view, which as its rationale adopts the prohibition of inconsistent conduct can be reconceptualized, depending on the facts of a particular case, as one of the unilateral acts. This is further confirmed by examples from investment arbitral practice drawn in Section 2.4. It would conduce to more clarity and consistency in the case law for arbitral tribunals to correctly identify instances where the application of a unilateral act is more apposite than recourse to estoppel.

[988] In *Chevron Corporation (2018 Second Partial Award)*, where unilateral acts failed to capture the meaning and objective of the broad view on the facts, the tribunal resorted directly to good faith as an embodiment of *venire contra factum proprium*. Here, it appears good faith performed a gap-filling role.

Where these former concepts are applied consistently, and guidance is taken from the jurisprudence of general international law, they could consume, to a great extent, the purview of the broad concept of estoppel which is especially riddled with inconsistency. Arbitral tribunals should rigorously apply the strict concept of estoppel and more eagerly utilize other, related concepts where currently the nebulous broad view is employed. This would also minimize the role of the broad view of estoppel in performing the gap-filling function, in line with the postulate advanced in the dissertation that this field should be dominated by the strict concept, which in this way shall assume a near-universal character in international investment law.

The fourth hypothesis was that estoppel can assume a powerful role in balancing the relative bargaining powers of states and investors, particularly in connection with objections to jurisdiction and ensuring access to arbitration.

Throughout the dissertation, estoppel has been shown to operate as a corrective justice instrument, one which, by preventing instances of detrimental reliance and abuse of trust, balances the bargaining powers of host states and investors. The most striking examples are gleaned from arbitral practice in cases where estoppel has been raised by claimant investors to preclude host states from advancing jurisdictional objections (reclassified by some tribunals as going to admissibility) on account of the underlying investment's alleged illegality.

Legality of investments is to be assessed through the prism of the host state's domestic law, therefore the type of illegality pleaded by the defendant state refers to either non-compliance by the investor with internal administrative or regulatory requirements, intentional fraud perpetrated by the investor in the process of obtaining the investment, or cases of corruption, i.e. where the investment was procured or otherwise obtained by means of bribing host state public officials. The first category is classified in the dissertation as instances of "ordinary" illegality. This subset, together with cases of fraud, forms the larger category of one-sided illegality because it is given rise to without discernible involvement from the host state (no conduct external to the investor itself attributable to the host state). Cases of corruption, which inherently involve more than one party, represent instances of two-sided illegality. Estoppel has been expressly permitted in *Fraport (Award)* and *Kardassopoulos* to apply to cases of one-sided ordinary illegality. The relevant test is not formulated using terms germane to estoppel, however it bears resemblance to the broad view, as it makes no mention of detrimental reliance, and should be assimilated under that heading. In such ordinary illegality cases estoppel has found some success, most recently in *Karkey Karadeniz*. The *Kardassopoulos* test continues to be invoked by both parties to proceedings and arbitral tribunals alike, thus

remaining a pertinent consideration in cases where the host state lodges a preliminary objection having previously made assurances as to the investment's validity under domestic law or having made outward appearances suggesting either implied consent or waiver of attendant regulatory or administrative requirements.

That estoppel is *de lege lata* used to regulate the relative bargaining positions of the parties through the prism of fairness, evinced by the relatively permissive (albeit not yet uniform) approach to ordinary illegality, is observable, on the other hand, by reference to cases of fraud. This category appears to be off limits for estoppel, at least where either it is the claimant investor itself that was involved in fraudulent manoeuvres or where it failed to properly investigate and verify its local partners in the host state as to whether they are liable to resort to criminal activities in obtaining the investment. In this connection, the tribunal in *Churchill (Annulment)* imposed a duty on investors to conduct due diligence of their local collaborators should they want to absolve themselves of responsibility of any resulting fraud (this aspect could play a role in determining whether the claimant investor could be said to have reasonably relied on any host state assurances given as a result of the former's fraudulent actions). It appears that arbitral refusals to consider estoppel arguments in such cases are concordant with the principle's systemic objectives of furthering individual fairness and justice – an investor directly involved in fraud or one which knowingly engages an ethically dubious local partner to elicit representations or assurances from the host state does not deserve estoppel protection.

De lege ferenda, to further this objective of injecting a measure of balance and fairness into the regulation of balancing powers of subjects of international investment law, it is submitted that arbitral tribunals in two-sided illegality cases of corruption should reconceptualize the applicable test within the strict account of estoppel, principally by taking a more robust account of the detrimental reliance element. The argument advanced herein, which goes against the current arbitral trend, is that estoppel should be applicable in such cases to preclude host states from advancing jurisdictional objections since, in essence, by entering into a state contract and admitting an investment into the country, the host state effectively impliedly consented to treating the investment as valid despite its potential underlying defects (by means of a specific legal fiction). The argument can justify an estoppel claim on two alternative views, that is either (1) the knowledge of corrupt behaviour shall be imputed to the host state; (2) the consent expressed by the host state by means of conclusion of a state contract consumes and overrides any corrupt behaviour that may have preceded the ultimate grant of an investment.

The fifth hypothesis was that a uniform strict concept of estoppel encompassing issue preclusion (current issue estoppel) could conduce towards consistency of outcomes in international investment arbitration.

It is an important component of the argument in favour of the near-universal applicability of estoppel in international investment law to consider the nature and implications of issue estoppel. Application of issue estoppel is predicated upon the fulfilment of two distinct sets of requirements, i.e. the triple identity test imported from the jurisprudence of international courts and tribunals concerning res judicata, and a second group of detailed requirements peculiar to issue estoppel. The triple identity test consists in identity of parties (*persona*), object or claim (*petitum*) and cause of action (*causa petendi*). Further, for issue estoppel to arise and preclude a party from having a given matter reconsidered, it must have been distinctly put in issue in the prior proceedings; the court or tribunal must have actually decided it; and the resolution of the question was necessary to resolving the claims before that court or tribunal. The legal effect of a finding of issue estoppel is the refusal of an arbitral tribunal to consider a given matter in issue, thereby treating it, as a consequence, as decided.

A framework to understand issue estoppel within the strictures of the strict view of estoppel proper is conceivable. In particular, it has been argued that what triggers the operation of the principle is a repeated attempt to have the same issue resolved under the circumstances where, to use the parlance of the strict view of estoppel, the other party to the proceedings could have in good faith relied that, for reasons of systemic coherence of international investment arbitration, a prior determination of the same issue was final and would remain uncontested. This reliance, it could be said, is even stronger than in a classic case of estoppel. Recent case law could be taken to signal a shift towards a relaxation of the triple identity test – the concept of privity of interest (and the related category of privy) has diluted the requirement that parties to proceedings be identical, and dicta in *Ampal-American (Liability)* and *RSM Production* suggest that identity of cause of action could be present even between two sets of proceedings before different autonomous international law fora and, controversially, between domestic arbitration and international arbitration administered by the ICSID. Further in support of my overarching argument in favour of a uniform strict concept of estoppel encompassing issue preclusion, cases such as *Mytilineos Holdings* and *Nova Scotia Power* can be interpreted as authorities for the proposition that issue estoppel could be available where a party deliberately and abusively elects not to raise a given issue or argument originally, only to advance it in the new set of proceedings, where the original silence (qualifiable as a representation) was detrimentally relied upon by the representor's adversary. This would expand

the purview of issue estoppel beyond issues and arguments that were distinctly put in issue and decided in the original proceedings. If these developments are noticed and accepted in future arbitral practice, issue estoppel would inch closer towards the strict concept of estoppel applied in other contexts within international investment law, thus contributing to the expansion and harmonization of the principle.

The sixth hypothesis was that estoppel can have wide application in modifying, creating and denying substantive rights.

Estoppel has been raised, without objection, as a defence to liability, as a means of acquisition of substantive rights of administrative nature, as a tool of enforcing contractual stability commitments and as a reinforcing mechanism of protecting legitimate expectations under the FET standard. The tribunal in *Vestey Group Limited* objected to the operation of estoppel to grant proprietary rights to a party where no such rights could be inferred by reference to relevant domestic laws. Otherwise, the application of estoppel has not been refused and notably, in one important case, *Duke Energy*, an estoppel argument was accepted by the tribunal which held the host state precluded from effectively breaching its contractual stability commitment which was held to extend not only to the letter of the tax regulatory framework, but also to its interpretation. In *Pac Rim Cayman*, estoppel was in principle accepted as a legal device thanks to which investors can claim substantive rights in the form of implied administrative concessions, permissions and consents. As regards the defensive side of estoppel, the dictum in *Duke Energy* gives it rather wide application. For estoppel can serve a subsidiary role in the context of upholding and enforcement of contractual stability commitments – the residual function consists in that it can preclude the host state from denying the validity and binding character of the contractual promise. In this sense estoppel protects substantive rights accorded or promised by host states to investors.

The seventh hypothesis was that estoppel and protection of legitimate expectations under the FET standard are to be distinguished on several grounds as means of affording protection against prejudicial conduct of subjects of international investment law.

The doctrine of legitimate expectations is in many respects wider than estoppel. For it sanctions a much broader category of situations other than instances where a representation is made, one that is subsequently detrimentally relied on. Specifically, the doctrine also protects legitimate expectations generated by virtue of binding instruments such as contracts,[989] and

[989] It is recalled that estoppel was used in *Duke Energy* to effectively enforce a contractual stability commitment. It is the only case I have found where the tribunal resorted in such a context to estoppel and not to legitimate expectations (presumably because this was not a treaty-based arbitration and therefore there was no FET clause

more generally with regard to the stability of the regulatory framework of the host state. On the other hand, however, within the specific type of case where both principles converge, estoppel is a principle capable of finding a more universal application. Estoppel has a broader personal scope and can be invoked both by and against host states. It can attach to forward-looking promises but presumably not to representations made to the international community as a whole within the meaning of Principle 6 of the GPAUD. The range of representations estoppel can affect is, however, much broader in the sense that it also covers all representations not constituting promises or inducements, i.e. statements of fact and of understanding of law. Representations of the latter type are not within the purview of legitimate expectations. A finding of estoppel and a breach of legitimate expectations will in most cases have different legal effects.

Notwithstanding, the principles appear to share a common rationale, at least where protection of legitimate expectations is conceptualized by reference to the reliance theory. Both tests incorporate the requirement of reasonable/good faith reliance upon a representation (albeit it appears the requirement of due diligence is markedly more entrenched and elaborate in legitimate expectations theory whilst it is a relative novelty in estoppel claims, having been first expressly articulated in *Churchill Mining (Award)* and *Churchill Mining (Annulment)*) and, it appears on balance, the necessity of proving detriment as a result of the representee's reliance.

It could be generalized that estoppel is not supposed to be an "incarnation" of legitimate expectations, but instead a reinforcing mechanism and a tool for the conceptualization of the procedural ramifications of the latter concept. Relatively, there is a fundamental systemic difference between the principles in that legitimate expectations is a treaty standard, and therefore arbitral tribunals should consider it the first port of call when resolving a case. Where a tribunal is seized of a treaty-based arbitration, it should look for either an express formulation enshrining the protection or legitimate expectations, or seek to derive the same from an FET clause. Where the applicable law does not include an investment treaty (or an investment contract) incorporating an FET clause, there is a possibility that protection under the legitimate expectations principle will not be available at all (as the status of legitimate

upon which to base a legitimate expectations claim). Understandably, one isolated case is not evidence of stabilized practice, however *Duke Energy* could augur a potential expansion of the purview of estoppel onto previously unchartered territories normally occupied by the principle of protection of legitimate expectations. At any rate, I have argued at several junctures of the dissertation that estoppel can attach to representations irrespective of where the representor intended to be bound thereby (although the most fertile ground for the principle's operation shall be non-binding, informal conduct and statements). *Duke Energy* could be understood as an example of application of estoppel to a factual scenario where the intention to be bound was present.

expectations as a general principle of law remains debatable). In other words, the ability of parties within an investment arbitration to rely upon protection of legitimate expectations depends on its inclusion in relevant instruments forming part of the law applicable to resolving the dispute. A reference to a concrete treaty or contract would normally be necessary. Inversely, for the application of estoppel it is sufficient that the relevant choice of law clause refers to international law as a whole as estoppel as a general principle of law or a general principle of international law is embedded in the system's body of equitable rules.

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