

## ESTOPPEL IN INTERNATIONAL LAW

By

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MORE than thirty years ago it was observed that the doctrine of estoppel<sup>1</sup> did not appear to have received much attention in the sphere of international law.<sup>2</sup> A certain reluctance to invoke estoppel may have been justified at that time, but the marked increase since then in international judicial and arbitral activity has provided substantial grounds for the modern tendency to consider estoppel as one of the "general principles of law recognised by civilised nations."<sup>3</sup> The question whether the juridical basis of the doctrine of estoppel is to be found in customary international law rather than in the "general principles of law" is not free from difficulty; and it is not the purpose of this article to suggest that it can be satisfactorily answered.<sup>4</sup> It would seem that a convincing solution must wait on both a comparative investigation into the operation of the concept in municipal systems of law and a more widespread review of State practice than the present writer has been able to attempt. The scope of the present article is limited to drawing attention to some of the aspects of estoppel which have been noted or suggested by publicists and expressed in State pleadings before international tribunals, in diplomatic correspondence, and particularly in advice tendered to the British Government by the Law Officers of the Crown.

Underlying most formulations of the doctrine of estoppel in international law is the requirement that a State ought to be consistent in its attitude to a given factual or legal situation. Such a demand may be rooted in the continuing need for at least a

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<sup>1</sup> The Anglo-American terminology which has gained wide acceptance is used throughout. "Where the Anglo-American lawyer refers to estoppel, the continental jurist will usually say that the party is 'precluded'" (Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), p. 204). The concept is known to Scots lawyers as "personal bar."

<sup>2</sup> See McNair, "The Legality of the Occupation of the Ruhr," in *British Year Book of International Law*, 5 (1924), pp. 17 *et seq.*, at p. 34.

<sup>3</sup> Thus, the concept of estoppel finds a place in the study by Dr. Bin Cheng entitled *General Principles of Law as applied by International Courts and Tribunals*, at pp. 137 *et seq.*

<sup>4</sup> See, however, below, pp. 470, 478 and 512-513.

modicum of stability and for some measure of predictability in the pattern of State conduct. It may be, and often is, grounded on considerations of good faith. In either event, it is scarcely to be doubted that failure by a State to profess and practise some standard of consistency in its international relations would be viewed unfavourably both by other States and by any international tribunal called upon to adjudicate in a dispute in which such conduct was in issue. One of the authorities which Lord McNair mentioned as throwing some light on the position of estoppel by conduct in international law was the *Behring Sea* arbitration of 1893 between the United States and Great Britain. The Arbitrators expressly found against the United States contention that Great Britain had conceded the Russian claim to exercise exclusive jurisdiction over the fur-seals fisheries in the Behring Sea outside territorial waters; and they were fortified in this conclusion by the fact that the United States, as well as Great Britain, had protested against the Russian Ukase of 1821 in which this claim was asserted. The proceedings, as Lord McNair stated, "demonstrated that some advantage is to be gained by one State, party to a dispute, by convicting the other State of inconsistency with an attitude previously adopted."<sup>5</sup> "This is not estoppel *eo nomine*," Lord McNair commented, "but it shows 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*."<sup>6</sup>

It may, however, be argued that international practice, if not international jurisprudence, has accorded less tentative recognition to the principle of consistency; and one writer has advanced a view of the binding character of unilateral acts and declarations which appears to comprehend the principle underlying estoppel as part of customary international law. "If [a subject of international law] acts contrary to its notified intent," Dr. Schwarzenberger wrote, "it breaks the rule on the binding character of communicated unilateral acts."<sup>7</sup> His remarks on the genesis of this rule are instructive: and it is suggested that the instances from State practice and the official opinions noted in the following pages point for the most part in the same direction. Dr.

<sup>5</sup> *British Year Book of International Law*, 5 (1924), p. 35. See also the views expressed by the Law Officers concerning this dispute, below, pp. 496-497.

<sup>6</sup> *Ibid.*

<sup>7</sup> "The Fundamental Principles of International Law," in *Hague Recueil*, 87 (1955), p. 312. And see Schwarzenberger, *International Law*, Vol. 1 (3rd ed., 1957), Part 1, p. 553: "Provided that a unilateral act is capable of having legal effects, and is intended to have such effects, these must be determined in each individual case by reference to the *jus aequum* rule. The typical minimum effect of unilateral acts is to create an estoppel. It prevents the subject of international law, to which the unilateral act is imputable, from acting contrary to its declared intent."