

# On the Principle of Estoppel in International Disputes—Taking Preah Vihear Temple Case as an Example Introduction

Sheng Luo<sup>1</sup>

<sup>1</sup> China Institute of Boundary and Ocean Studies, Wuhan University

Correspondence: Sheng Luo, China Institute of Boundary and Ocean Studies, Wuhan University.

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## Abstract

The principle of estoppel in public international law is based on the principles of justice, good faith and consistency. It is the product of applying the principle of estoppel in domestic law to the international community by analogy. Under the promotion of the theories of authoritative jurists and international judicial precedents, it has become a general legal principle in international law. This paper will take the Preah Vihear Temple case as an example to illustrate the nature of estoppel from four aspects, namely, the meaning of the statement must be clear and unambiguous; unilateral commitments can also create an estoppel; no objection (lack of protest) or a silence; and the requirement of a reliance.

**Keywords:** estoppel, the preah vihear temple case, public international law, general principles of law

## 1. The Doctrine of Estoppel in the Preah Vihear Temple Case

### *1.1 Overview of the Principle of Estoppel*

Estoppel, also known as the rule of exclusion, is intended to prevent a party from taking a position contrary to its prior statement or conduct, even if that position is not consistent with the facts. Although the principle of estoppel in international law is derived from the rules of estoppel in Anglo-American law, it still fails to develop the rich and detailed system of rules as in Anglo-American law. In international law, any act or expression with legal significance, usually including default and unilateral declaration, may produce the effect of estoppel. Involved in the territorial dispute involves the principle of estoppel, at present, although the estoppel principle in the international judicial practice the use of a lot of, but its development is not optimistic, the international law field has yet to give an accurate definition of estoppel principle, the specific scope of research is in grope. In the Preah Vihear Temple case, the ICJ for the first time made a judgment explicitly based on the doctrine of estoppel.

### *1.2 The Application of Estoppel in Temple of Preah Vihear*

In 1952, a dispute arose between Thailand and Cambodia over sovereignty over the Temple of Preah Vihear, and the dispute was referred to the International Court of Justice. Although the 1904 boundary treaty assigned the area of the Temple of Preah Vihear to Thailand, the 1907 boundary map incorrectly placed the area on the Cambodian side. The ICJ held that the Thai government did not respond in some way to the erroneous map at that time and for many years thereafter, and that Thailand was presumed to have “acquiesced” in the map, based on the jurisprudence that “silence is to be regarded as consent if it is desirable and possible to make a statement”. The map and the boundaries indicated on it are therefore subject to the legal responsibility of estoppel. The ICJ decision established a standard that involves the influence of subsequent acts by not protesting or silence leading to estoppel or acquiescence. This case involves the conflict of sovereignty claims between Thailand (Siam) and Cambodia (the former French protectorate) over the Temple of Preah Vihear. The issue before the court was whether the disputed map and the boundary line indicated on the map were adopted by both parties.

Most scholars agree that in this case estoppel was accepted by the Court and applied implicitly as the main basis of its judgment, not least because three judges in their individual opinions addressed the concept of estoppel as a major point of the judgment (Kaijun PAN, 2017).<sup>1</sup> However, some scholars have criticized the decision of the ICJ. Their reasons are as follows (Yang Yan, 2013).<sup>2</sup> In accordance with the Treaty of 1904, Thailand has always believed that the Temple of Preah Vihear is situated in territory under the sovereignty of Thailand, and were unaware the error. As for the territorial sovereignty confirmed by legal treaties, Thailand does not need to take action to inform other countries, and the territory will not become the territory of other countries because of its inaction. Moreover, Thailand did not explicitly claim sovereignty over the temple before it found that the map was wrong, which does not mean that it has given up its territorial sovereignty, nor does it mean that it tacitly agrees that the Temple belongs to Cambodia. Just as no country in the world has the need to declare or otherwise show sovereignty over a territory that it believes is not disputed. On the contrary, if a country gives up its sovereignty over a certain area, it should give up its sovereignty through a clear and unambiguous statement. Therefore, it cannot be regarded as tacit agreement just because Thailand has not claimed sovereignty before. At least, it cannot be regarded as clear and unambiguous. In fact, in this case, in relation to territorial sovereignty, states normally protest certain types of acts, like issuing a formal diplomatic note, to say that protest is “called for” by the circumstances. Besides, if there are expressly clear representation to Preah Vihear, this case would not apply to the doctrine of estoppel.

## 2. The Status of Estoppel in International Law

The doctrine of estoppel, is a term which first originated in common law system of England but the principle underlying estoppel is familiar to many systems of municipal law (Weeramantry & J. Rg., 1996).<sup>3</sup> Indeed, it is probably true to say that, in its translation from the municipal to the international sphere, and in its subsequent utilization by international lawyers, the concept of estoppel has been broadened so substantially that the analogy with the estoppel of municipal systems may be positively misleading (Macgibbon, I. C., 1958).<sup>4</sup>

Estoppel is based on the right of a party to act in reliance on its own conduct that prevents it from asserting rights against another party, when the promising party cannot renege. In short, it means that the promise cannot be reversed. This concept is not often used in civil law countries, but in civil law countries the principle of “good faith” is a concept similar to the principle of estoppel, which requires citizens to be honest and trustworthy in civil and commercial activities, and to pursue their own interests lawfully without endangering the public interest or the interests of others. It is inevitable that the principle of estoppel enters the field of international law, because the pursuit of justice and the maintenance of order are still inseparable from the interaction between countries. However, there is no authoritative definition of estoppel in international law.

There are several opinions about whether estoppel belongs to a customary international law or to a general principle of international law. 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 (I.C. MacGibbon, 1958).<sup>5</sup> Moreover, Dr. Schwarzenberger, pointed that “if [a subject of international law acts contrary to its notified intent, it breaks the rule on the binding character of communicated unilateral acts.” He summed up: “No doubt, in the formative stage of this rule, the obnoxiousness of self-contradictory behavior and *venire contra factum proprium* assisted in creating the *opinio juris sive necessitatis* which marks the borderline between international comity and international customary law (Schwarzenberger, G, 1955).”<sup>6</sup>

On the contrary, a considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency (Crawford, James, 2019).<sup>7</sup> In the various enumerations of general principles of law applicable to international legal relations there has generally been a somewhat indiscriminate cataloguing of principles as different in both methodological and substantive importance as, for example, “equity,” “estoppel,” “*pacta sunt servanda*” (Wolfgang Friedmann, 1963).<sup>8</sup> Estoppel is a general principle of international law, before a tribunal the principle largely defined may operate to resolve ambiguities and as a principle of equity and justice (Cf Cheng, 1987).<sup>9</sup> Chinese scholar, Haopei Li, supported that the principle of estoppel as a general principle of law is a source of treaty law that cannot be taken lightly (Haopei Li, 2003).<sup>10</sup>

Estoppel is a very significant principle of international law related to the issue of territorial acquisition. Strictly speaking, it is not certain whether estoppel belongs to international customary law or to a general principle of international law, but international practice shows that the principle has been supported and confirmed by important international judicial bodies such as the International Court of Justice (Zhu Wenqi, 2009).<sup>11</sup> It has been argued that the principle of estoppel was applied as a general principle of law in Preah Vihear Temple Case, and that the general thinking of the ICJ was correct, despite the varying degrees of problems in the analysis of the form and details of the application of estoppel. Even though there was no agreement on estoppel between Thailand and Cambodia, this principle still served as the law applied by the Court in deciding this case and served to fill the gap between international treaties and international custom.

The principle of estoppel constitutes a general principle of law, which is generally applicable to both the major countries of the law system in the world and the international community. It is because the principle of estoppel reflects the legal value of fairness and justice, is the basic truth or principle of law, and can provide the basic or original comprehensive principle for other rules. It is for this reason that the doctrine of estoppel can establish the rules of conduct of states, fill the loopholes in international law, explain the rules of international law, and balance the conflicts of interest between the parties to a dispute.

### 3. The Essentials of Estoppel

In the sphere of international law, two divergent schools of thought exist as to what conditions give rise to the doctrine of estoppel (R. Bermhardt, 1984).<sup>12</sup> The strict or restrictive view of the doctrine requires the following elements: (i) words or conduct; (ii) made by X to Y; (iii) which induces Y to act or abstain in reliance on those words or that conduct; (iv) to the benefit of X or the detriment of Y. It is also required that the words or conduct be clear and unambiguous, authorized, voluntary, and so to fact, not law (Bowett, D. W., 1957).<sup>13</sup> Its use must in consequence be subject to certain limitations. The real field of operation, therefore, of the rule of preclusion or estoppel, *stricto sensu*, in the present context, is 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 (I.C. J. Reports, 1962).<sup>14</sup>

In contrast, there exists a wider view of the rule which demands in general terms that a State maintain a position consistent with that which it has adopted in the same circumstances on previous occasions. A State which, by its conduct, representation or silence, has adopted a position manifestly contrary to the right claimed by it before an international tribunal, is precluded from asserting that right — *venire contra factum proprium non valet* (it is not permissible to go against one's own act). Estoppel in its broad form also bears a close resemblance to the principle that a State cannot blow hot and cold — *allegans contraria non audiendus est* (he who alleges things contrary to each other is not to be heard) (MacGibbon, 1958; G. Schwarzenberger, 1957; H. Lauterpacht, 1958).<sup>15</sup> In fact, since the rather wanton application of estoppel in *Temple of Preah Vihear*, the International Court of Justice has not accepted an estoppel claim and has consistently suggested that its notion of this theory is generally consistent with Anglo-American estoppel by representation (Brown, Christopher, 1996).<sup>16</sup>

Estoppel may be invoked where (a) a State has made clear and consistent representations, by word, conduct, or silence; (b) such representations were made through an agent authorized to speak for the State with respect to the matter in question; (c) the State invoking estoppel was induced by such representations to act to its detriment, to suffer a prejudice, or to convey a benefit upon the representing State; and (d) such reliance was legitimate, as the representation was one on which that State was entitled to rely (PCA, 2015).<sup>17</sup> In this paper, the essential of estoppel will be elaborated from four aspects, namely, the meaning of the statement must be clear and unambiguous; unilateral commitments can also create an estoppel; no objection (lack of protest) or a silence; and the requirement of a reliance.

#### 3.1 The Meaning of the Statement Must Be Clear and Unambiguous

First of all, the principle of estoppel requires a State to be honest and trustworthy. It cannot make a statement contrary to its previous statement. Therefore, to judge whether a State is honest and trustworthy, it must find out whether it has publicly made a clear and consistent expression of its intention to another state or the international community. For only when a State makes an unambiguous statement can other states understand the true meaning of its expression of will and thus have reasonable confidence in its words and deeds.

In the *Case Concerning the Arbitral Award Made by the King of Spain* on December 23, 1906, in which Nicaragua challenged the validity of an award regarding the determination of a boundary between Nicaragua and Honduras, the Court found that Nicaragua had “by express declaration and by conduct,” (I.C. J. Reports, 1960)<sup>18</sup> including the Foreign Minister's report on the award to the National Legislative Assembly of Nicaragua, recognized the award as valid. Having failed to raise any questions about the award for almost five and one-half years, Nicaragua was not permitted “to go back upon that recognition” and to challenge the award.

The attitude must be clear and unequivocal, as PCIJ pointed out in the *Serbian Loans* case, of 12 July 1929:

[W]hen the requirements of the principle of estoppel to establish a loss of right are considered, it is quite clear that no sufficient basis has been shown for applying the principle in this case. There has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied (P.C.I.J., Series A, 1929).<sup>19</sup>

#### 3.2 Unilateral Commitments Can Also Create an Estoppel

A unilateral statement is an important factor in the formation of an estoppel. It is generally accepted that the form of a unilateral statement will not affect their validity or legal validity. The ICJ mentioned the unimportant

formality of a unilateral statement in the *Preah Vihear Temple case* related to unilateral behavior of the party involved.

In the *Nuclear Tests case*, a case in which the model of unilateral commitments constituted estoppel, the Court, while clarifying that the French 1974 “unilateral acts creative of legal obligations” (I.C. J. Reports, 1974)<sup>20</sup>, clarified the conditions to be met for the model of unilateral commitments. First, the promise of a unilateral commitment must be made publicly; second, the party making the promise must have the intention to be bound, so that the promise is binding even if it was not made through international negotiations.

### 3.3 No Objection (Lack of Protest) or a Silence

A state may express its intention by express means, such as speech and behavior, or implicitly by silent means. The so-called express behavior refers to the ideographers express the internal meaning of the relevant country to the outside clearly, such as recognition. The implied act of expression refers to the fact that the state does not make an explicit act of expression, but it can be inferred according to the legal provisions or relevant rules. As provided in article 45B of the Vienna Convention on the Law of Treaties, the principle of estoppel can be applied to a State party to a treaty only if its past actions objectively make it necessary for it to be deemed to have acquiesces in the validity of the treaty.

In the *Case Concerning the Land, Island and Maritime Frontier Dispute* between El Salvador and Honduras, the Court found tacit consent on the part of Honduras to El Salvador’s sovereignty over a contested island because Honduras failed to protest public acts demonstrating El Salvador’s claim to sovereignty. The Court also determined that a protest by Honduras made in 1991 was too late to affect the “presumption of acquiescence” (I.C. J. Reports, 1992)<sup>21</sup> created by Honduras’ long silence.

The question is that, whether a mere fact of silence gives rise to an estoppel? Judge Alfaro hold the view that silence and lack of protest are so fundamental that they decide by themselves alone the matter in the dispute and thus this constitutes “a presumption *juris et de jure* in virtue of which a State is held to have abandoned its right” to oppose an adverse claim by another State (I.C. J. Reports, 1962).<sup>22</sup> However, Judge Spender argued that silence must be viewed in the context of the circumstances in which it was maintained; the presumption of consent derived from silence may be rebutted by a clear indication of the contrary intention. Silence is thus considered as having evidentiary value only (I.C. J. Reports, 1962).<sup>23</sup>

### 3.4 The Requirement of a Reliance

The main purpose of estoppel application is to protect the trust interest of the relative state. In order to maintain fairness and justice, a party that has made a clear and effective expression of its will must abide by its position and prohibit it from going back on its word, so as to prevent the relative State from suffering losses due to reliance on that expression. Despite the issue raised by Judge Alfaro that international estoppel might not require reliance, Fitzmaurice, the other Judge argued that “the party invoking the rule must have “relied upon” the statements or conduct of the other party, either to its own detriment or to the other’s advantage”. In the *Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks And South Ledge* between Malaysia and Singapore, Singapore invokes estoppel in an attempt to show that Malaysia has relinquished sovereignty over Pedra Branca/Pulau Batu Puteh (I.C. J. Reports, 2008).<sup>24</sup> The Court points out that a party relying on an estoppel must show, among other things, that it has taken distinct acts in reliance on the other party’s statement (North Sea Continental Shelf, Judgment, I.C.J. Reports, 1969). The Court observes that Singapore did not point to any such acts. To the contrary, it acknowledges in its Reply that, after receiving the letter, it had no reason to change its behavior; the actions after 1953 to which it refers were a continuation and development of the actions it had taken over the previous century. While some of the conduct in the 1970s, which the Court next reviews, has a different character, Singapore does not contend that those actions were taken in reliance on the Johor response given in its letter of 1953 (I.C. J. Reports, 2008).<sup>25</sup>

The Court accordingly need not consider whether other requirements of estoppel are met. It can be analyzed that, the Court’s implicit logic is that by claiming a violation of estoppel, the State B should prove that it acted differently because it relied in good faith on the statement of State A, and that the state B changed its position, causing the state A to suffer damages as a result of the act of reliance. As can be seen, the Court in that case applied a very strict standard of proof to the principle of estoppel.

In this case, however, the detriment of the reliance does not necessarily require that the state B take different measures or actions than it did in the past. The result that the state A making the declaration to its advantage or the state B relying on it suffers bad consequent is not predicated on a change of position by state B. Thailand was estoppel from the temple for a long time, and then the Thai government violated that acquiescence by taking force. Cambodia did not act inconsistently with its previous actions during this process, and it always asserted its sovereignty over the temple, losing physical control of the temple because of the Thai occupation. The Court still supported on the Cambodian side.

#### 4. Conclusion

The principle of estoppel in public international law is based on the principle of justice, good faith and consistency. Although the principle of estoppel originated from domestic law, it has become a general principle of law in international law under the promotion of the theories of authoritative jurists and international judicial precedents. In short, international judicial practice continues to demonstrate the growing role of estoppel in the resolution of state disputes, particularly territorial disputes and maritime delimitation disputes. The principle of estoppel serves as a mechanism that eventually validates given circumstances which otherwise would have permitted the nullification of the legal act in question (V́ctor Rodŕguez Cedeño, n.d.).<sup>26</sup> According to the principle of estoppel, a state cannot arbitrarily change its previous consistent position. However, as Sinclair said, “the court has shown wisdom and restraint” in the application of the principles of estoppel and it will “continue to exercise considerable caution in admitting too decisive a role for either of these concepts in the final determination of inter-state disputes” (Sinclair, Sir Ian, 1996)<sup>27</sup>.

The principle of estoppel is given some weight in the decisions of international judicial organs, which not only has a complementary role in the problems arising from the conclusion of treaties, but also in the settlement of international disputes and the establishment of a system of good faith between states. Estoppel can also play a positive role in regulating the behavior of states, such as unilateral declarations, unilateral acts and informal agreements concerning the diplomacy of states.

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- <sup>15</sup> MacGibbon, loc. cit. n. 2, pp. 469,512. See also G. Schwarzenberger, *International Law*, vol. I, 3rd edn. (1957) pp. 483,610; H. Lauterpacht, *The Development of International Law by the International Court*. (1958), pp. 168-172; Guggenheim, op. cit. n. 6; and the Separate Opinion of Vice-President Alfaro in the Temple Case, supra, n. 8.
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