Arbitrators, and parties to arbitration, have been willing for certain disputes to be resolved by reference to principles which can be characterized as having an anational, or transnational, character. As was discussed in the Preliminary Report (common law countries) (considered at the International Law Association's 64th Conference)¹, this point, if nothing else, is uncontroversial. Nor, as this Committee's Chairman, Professor Gaillard, observes in his present introductory paper, is recourse to such transnational principles a particularly rare event. The Committee's approach in its continuing study of transnational law has been to step back from the highly contentious issues that arise from any theoretical consideration of transnational law, or lex mercatoria, as a discrete body of law or principles², and to examine, in a pragmatic way, the application of individual, identifiable principles at least as a phenomenon of international commercial arbitration, which it undoubtedly is.

The particular principle with which this report is concerned is that of l’interdiction de se contredire au détriment d’autrui, and the notions underlying this formulation which find similar expression in the concepts of non concedit venire contra factum proprium and estoppel. (The latter term is used throughout this report simply for brevity). There are practical questions to be addressed. Is recourse to a transnational principle of estoppel a feature of only certain contracts or types of commercial dispute? What motivates arbitrators, and parties, to look outside individual municipal legal systems? From what materials do they construct the transnational principle? In reflecting on these questions it may be possible to form a clearer view as to whether recourse to transnational principles generally reflects a need on the part of the international business community for solutions which cannot be obtained by the application of specific national laws and whether the particular principle considered here does provide such a solution.

I. ESTOPPEL - THE ELEMENTS

At the heart of estoppel is the notion that one party to a dispute should not be permitted to take a position, including by asserting legal rights, in circumstances where (i) were he to do so, that party would be acting in a manner inconsistent with a position he had previously taken and (ii) it would be unjust to the other party for him to do so³. As the following sections of this report will indicate, the seeds of estoppel are sown throughout customary public international law, both with regard to relations between States⁴ and relations between States and private parties⁵, as well as in the laws of a number of national legal systems.

In Germany the principle may be seen in the judicial application of the general obligation of performance in good faith contained in Article 242 of the German Civil Code⁶. This principle is expressed as a specific plea of non concedit venire contra factum proprium of which there are two constituents: some assertion of rights by one party inconsistent with his previous conduct and a balancing between the conflicting interests of both parties to determine which of the two deserves protection. Reliance which may have been placed by the one party on the other's conduct is frequently a factor to be
taken into account in conducting this balancing exercise. This apparently monistic principle has wide application in German jurisprudence, in cases as different as inheritance law, company law and domestic arbitration.\(^7\) It seems that non concedit venire contra factum proprium has no direct parallel in French law, but that in practice the French law doctrine of apparence may operate in certain cases in similar ways to modify the operation of strict legal rights.\(^8\)

As noted above, the German principle has as its starting point the general concept of "performance in good faith". Good faith recurs as a source term of estoppel in the area of public international law.\(^9\) It is reflected specifically in Articles 150(2) and 148(2) of the Egyptian Civil Code, the latter providing that:

"A contract must be performed in accordance with its content and in compliance with the requirements of good faith. A contract binds the contracting party not only as regards its expressed conditions, but also as regards everything which, according to law, usage and equity is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract."

There is then estoppel as developed in the various common law jurisdictions. Of the comparative law sources relevant to general principles of estoppel in international commercial arbitration some may regard it as potentially the most influential. Recourse to the common law systems by arbitrators seeking support for a transnational rule of estoppel is not, however, without hazard. Taking English law

as a particular example, the basic elements of the concept of estoppel suggested at the beginning of this section of the report do reflect the broad theme running throughout the English jurisprudence. But that jurisprudence is an old one and is highly developed. Estoppel, which plays a significant role across the whole spectrum of civil law and procedure in England neither arises from, nor presents, a single coherent doctrine. Despite periodic moves towards harmonization,\(^10\) the English law on estoppel is best described as a group of principles which share certain general characteristics but which differ from each other in respect of a number of material features. Indeed, there is no accepted classification or agreement as to terminology.

To illustrate the diversity of the principle, just in the area of potential relevance to international commercial arbitrators, one needs to distinguish between "estoppel by representation" (which is often treated as including a sub-category of "estoppel by conduct") and "estoppel by convention" - these first three notions being sometimes linked together under the generic heading "estoppel in pais" - and a different category, with a quite distinct juridical lineage, "promissory estoppel". There are significant differences both in the constituents of each principle and in their effect. Compare, for example, promissory estoppel (constituents - (a) a representation by a party that he will not enforce his strict legal rights against another party, (b) an intention on his part that the representation should be relied on, (c) actual reliance by the other party and (d) the renegoting on the promise being "inequitable") with estoppel by representation (constituents - (a) a representation by one party, by words or conduct, of a fact or state of affairs, (b) with knowledge that it is untrue or with the intention that it should be acted on, (c) action by the other party on the basis of that representation (d) which is to that other party's detriment). Not only does estoppel by representation operate solely where there is a representation of existing fact, as opposed to a promise or statement as to future intention, but also promissory estoppel does not necessarily require any detrimental reliance - on the contrary, the party relying on the promise may even have derived a benefit from it. For example by being permitted to tender periodic payments of sums less than those contractually due. Detriment is, however, a prerequisite of estoppel by representation. Moreover, the effect of promissory estoppel is not to extinguish the prior legal rights of the party subject to the estoppel, but simply to suspend them, unlike estoppel by representation which usually has a permanent effect. Estoppel by convention (constituents - (a) an agreed assumption between parties to a transaction that a state of affairs is true (or a mistake in that regard by one party acquiesced in by the other) and (b) circumstances which would make it unjust for the parties, or either of them, to go back on the assumption) is different from both promissory estoppel and estoppel by representation, not least because it requires neither a representation nor a promise of any sort.

Nor do the various common law jurisdictions agree as to the legal effect of estoppel. For example, the principle in the United States which corresponds to that of promissory estoppel in English law can give rise to a free-standing cause of action for the person who asserts the estoppel. So too in Australia. In England, promissory estoppel has a purely defensive character and simply protects the promisee from being sued on the original obligation.
The nature of estoppel in common law systems (and specifically under English law) has been considered here in some detail to highlight two points. First, it illustrates the range of factual circumstances in which estoppel may be brought into play in international commercial arbitrations and suggests that arbitrators in searching for, and developing, detailed working concepts of estoppel, may need to think in terms of different, albeit related, principles designed for different sorts of cases. Second, and more ominously, the complexities of estoppel in English law highlight the dangers of the comparative method of formulating substantive transnational principles. Any arbitrator who sought to support some specific principle of estoppel by reference to a supposed "rule of estoppel under English law" could find himself in no better a position than was the majority of the tribunal in the case of Klöckner v. Cameroon, whose identification as a "basic principle of French civil law" of a general duty of full disclosure between close contractual partners was found to be unsupportable - and with the same unwelcome consequences for his award.\(^\text{18}\)

## II. THE INTERNATIONAL COMMERCIAL ARBITRATION CASES

A detailed survey of international commercial arbitration awards is beyond the scope of this report but there are several reported awards of significance in which estoppel has played a part and which merit consideration.\(^\text{19}\)

One of the most substantial treatments of estoppel is to be found in the award on jurisdiction by the First Tribunal in Amco Asia Corporation and others v. The Republic of Indonesia and another, an ICSID arbitration.\(^\text{20}\) The substantive dispute arose from the termination of a hotel lease and management agreement originally entered into between Amco Asia and P.T. Wisma, an Indonesian company apparently under the ultimate control of Indonesian Government interests. The facts surrounding the termination included a direct intervention at the hotel by the Indonesian army and police. This event was ultimately determinative of the jurisdiction issue - the Tribunal holding that this was, in effect, a case of expropriation by the Indonesian Government in respect of which it was competent. However, one of the alternative jurisdictional challenges raised by the respondents was that the Tribunal had no jurisdiction to consider claims relating to the termination of the lease and management agreement on the basis that this agreement was between private parties, \textit{i.e.}, Amco Asia and its successors and P.T. Wisma. Anticipating a response from the claimants that P.T. Wisma was no more than an emanation, or alter ego, of the Indonesian State, the respondents contended that the claimants should be "estopped" from raising this argument. The ground for this estoppel was that Amco Asia had acted, in related proceedings before the Indonesian courts and in connection with the I.C.C. arbitration clause in the lease and management agreement, in a manner which was alleged to be inconsistent with the pursuit of the alter ego argument.

The Tribunal's findings on the estoppel arguments are no more than dicta. However, its observations are noteworthy both for the firmness with which they support a transnational rule of estoppel and for their eclecticism. Noting that estoppel was a common law concept, the Tribunal also characterized it as an example of the doctrine of good faith which is present in all legal systems, including national laws and public international law. It took up the statement of Judge Alfaro in the Temple Vihear case that, in public international relations, "one State should not be permitted to rely on its own inconsistency to the detriment of another State".\(^\text{21}\) The Tribunal expressed the view that the same general principle was equally applicable to international commercial relations involving private parties. Two key grounds for an estoppel were identified - inconsistency of conduct and benefit or detriment to the respective parties. The Tribunal regarded the principle thus formulated as also to be found in the "essence of the concept of common law estoppel" - a concept the Tribunal felt able to identify from a review of one or two authorities and commentaries on the English law of estoppel by representation. The Tribunal wisely (bearing in mind the discussion of certain classes of estoppel in English law in the previous section of this report) added the qualification that the theory of estoppel, properly so called and as it had been developed in the Anglo-American legal systems, was unique to those systems and could not in all its details be adopted as any sort of universal rule. Applying its concept of estoppel to the issue before it, the Tribunal's final and quite specific conclusion was that, since there was neither prejudice to the Indonesian Government nor benefit to Amco Asia arising from the Amco Asia's previous conduct, there was no bad faith on the part of Amco Asia and therefore no reason for deeming them to be estopped from advancing certain arguments.

The Tribunal appears to have entertained no difficulty in identifying and applying a transnational principle in that case. There had been no agreement between the parties as to any applicable law. In these circumstances, the Tribunal seems to have considered (and subsequently held formally in its award on the merits of November 1984) that, pursuant to Article...
Page: 132

The way the Tribunal characterised estoppel (as a transnational principle) certainly captures the broad spirit of "the estoppels" in English law. However, not every English lawyer would agree that estoppel by representation accords quite the same importance to the benefit obtained by the party making the representation (as opposed to the detriment to the representee) as it was given in the Tribunal's formulation. Moreover, an English lawyer analysing the allegations on which the Indonesian Government's claim of estoppel was based would probably regard as more relevant than estoppel by representation, two further, and specialised, English estoppel principles - "estoppel by record" and that arising from the line of estoppel cases suggesting that, where a person has made a choice between two inconsistent courses of conduct and has taken the benefit of one those courses, he may not switch to the other\(^22\). Again, the risks of the comparative method of identifying transnational principles emerge.

The treatment of estoppel in the Amco case can be contrasted with that in the case of Framatome and others v The Atomic Energy Organisation of Iran\(^{23}\). The Framatome case resembled the Amco case in that it also involved a foreign private party contracting with an entity under host State control. However, this case was an I.C.C., rather than an ICSID, matter and the relevant contract was, by agreement, governed by a national law, namely Iranian law. The Tribunal's approach to estoppel in this case concentrated on issues of public international law, rather than comparative law.

In the Framatome case the Tribunal's competence was again in issue. The respondent contended that its entire contract with the claimant and/or the arbitration clause contained in that contract was invalid on a number of grounds, including the ground that the contract had been concluded without the proper authority or formalities required by Iranian law. This argument was made against the background of the main contract having been partially performed by both parties for several months.

The Tribunal found in favour of the respondent's contention that the contract was tainted by the irregularities. However, the Tribunal went on to consider whether the respondent was "entitled to assert" these irregularities. The Tribunal came to the conclusion that it was not. The view was taken that the responsibility for the irregularities lay entirely with the respondent and the Iranian Government. The Tribunal found it unnecessary to examine whether the applicable Iranian law should be "adjusted in international contractual relations" to take account of the position of the foreign contractor. It appears to have exercised an inherent jurisdiction to refuse to hear assertions which would necessarily entail the respondent taking advantage of its own irregularities and violations of Iranian law. The Tribunal specifically held that the State organisation's actions were such as to "forbid it to repudiate or to attribute to somebody else the consequences of its faults. . . and by which it cannot profit at the expense of the claimants". And in support of this finding the Tribunal invoked "the general principles of law, and particularly that of good faith, applicable in international relations, both inter-State and between private persons". At this point, the Tribunal appeared to be equating the respondent State organisation with the Iranian State itself and justifying its recourse to this estoppel-style argument by reference to a rule of public international law (developed later in the award in the context of the separate challenge to the arbitration clause) that a State cannot resile from its obligations, including commercial obligations to private parties, "by an act of its own will\(^{24}\). The Tribunal went on to hold that because of the part-performance the main contract had also been "ratified" in the sense that the respondent was precluded from contesting its validity.

The Tribunal's reliance on inherent powers of procedure and public international law in the Framatome case may be compared with another, earlier, I.C.C. case where estoppel was also considered. In Dalmia Dairy Industries v National Bank of Pakistan\(^{25}\) the sole arbitrator rejected the respondent's challenge to the continuation of the arbitration on the basis of concurrent court proceedings which the respondent had started after the commencement of the arbitration. He found the respondent to be estopped from pursuing this argument on the basis of the respondent's previous inconsistent conduct and delay with regard to the litigation. The arbitrator was of the view that there was "a general principle of law, both international and municipal that [here quoting an old English authority] a man shall not be allowed to blow hot and cold - to affirm at one time and to deny at another". The status of this broadly-phrased principle of estoppel, and the basis for its application in the award, is unclear. It should perhaps be viewed in the context of finding made later in this award that the "law" governing the arbitration proceedings was the I.C.C. Rules (then the 1955 Rules), to the exclusion of any national laws, of the parties or otherwise.

Page: 133
This line of reasoning is reflected in another, more recent I.C.C. award in I.C.C. case No. 4667 of 1984. In this case, the Tribunal decided that an Italian company was bound by a contract signed by its commercial director, even though this was done outside the scope of his customary authority. This was because the other, non-Italian contracting party had been led to believe - and, so the Tribunal held, was entitled to maintain - that the commercial director had the necessary powers by reason of the company's chief executive attending, and reviewing the relevant contractual papers with the commercial director at a meeting at the end of which the arbitration clause had been signed. The Tribunal saw this as an example of the requirement recognised "in the majority of legal systems" that contracts should be performed in good faith. Moreover, Article 13(5) of the I.C.C. 1975 Rules required arbitrators to take into account "relevant trade usages" - the Tribunal saw the creation of a binding agreement in circumstances such as these as being also a matter of such usage.

Two cases heard by the Iran-US Claims Tribunal which touched briefly on general principles of estoppel are also instructive. The Tribunal's mandate to look, where appropriate, for principles which lie outside national laws is clearly set out in the Algiers Accords, Article (V). In the case of DIC of Delaware, Inc and another v Tehran Redevelopment Corp. there was a dispute over the existence of an oral contract. The respondent argued that under Iranian law - the applicable law agreed by the parties - a contract exceeding a certain value had to be in writing and could not be proved by oral testimony alone. In reply, the claimants produced evidence that there had been part-performance of the contract on their part. In finding in favour of the claimants, the Tribunal not only held that there was a general principle "of commercial and international law" which permitted the existence of an enforceable oral contract to be proved through evidence of part-performance, but it also suggested strongly that, in any event, the conduct of the respondent (apparently having regard to the respondent's favourable attitude during pre-contractual negotiations and its acceptance of substantial part-performance) should estop it from asserting the non-existence of the contract.

In a rather different case, Woodward-Clyde Consultants v Atomic Energy Organisation of Iran and another, there were produced in evidence two genuine, but totally contradictory, documents created by the Iranian Social Security authorities, one supporting the claimant's case and the other the respondent's case. The respondents were the Iranian Government and one of its entities. The Social Security authorities were also an entity of the State. Accordingly, the Tribunal applied "the general rule of evidence according to which the inconsistent acts of a party must be construed against him" and found in favour of the claimant on the basis of this evidence.

Finally in this review, there is the decision of the Ad Hoc Tribunal in Benteler v Belgium. Here the principal issue concerned the question which was also at stake in the Framatome case, and which was touched on above in the discussion of that case, namely the invocation by a State of its own laws to contest the validity of its own consent to commercial arbitration with a foreign private party. The Tribunal in Benteler, in support of its finding in favour of the validity of the arbitration agreement as a matter of interpretation of the Geneva Convention of 1961, spoke of there being a wider rule that a State should not use its own laws to evade its commercial obligations. This rule was described "a principle more and more generally accepted in international arbitration law". The Tribunal suggested that there were several ways of formulating this principle in "the common law of arbitration". These included an argument based on the requirements of international ordre public or, as a variation of this theme, estoppel "when the circumstances of the case are such that the State would go contra factum proprium in raising it".

III. CONCLUSION

The most significant cases where estoppel has been considered in international commercial disputes have involved States and State enterprises. (Perhaps the vestigial memory of unrestricted state immunity still tempts governments to "blow hot and cold" with their commercial commitments). In these cases, estoppel appears to play an ancillary role in support of wider public international law principles, such as those invoked in the Framatome and Benteler cases. Specifically, estoppel has been used creatively in commercial arbitrations between State and non-State parties. The future development of transnational principles of estoppel may lie in cases of this sort and these principles may have a correspondingly special character. One might add, in anticipation of such development, that the use of estoppel in the resolution of commercial disputes between a State and a private party sits uneasily with notions held in certain domestic jurisdictions, notably the United States, that there may be no "estoppel against the State".

Page 135
In all the cases that have been briefly reviewed in this report the arbitral tribunal has had - or at least appears to have regarded itself as having - some sort of mandate for applying an estoppel principle which was not derived from an applicable national law. This mandate has been found in customary public international law and in the choice of arbitral rules. Article 42 of the ICSID Convention has been relied on. So too, although perhaps less convincingly, have been the I.C.C. Rules.

The broad impression is created that commercial arbitrators have had recourse to a transnational principle of estoppel because applicable national laws have either been inadequate to produce the obviously "fair solution" that the arbitrator was striving to achieve, or have been the very cause of the problem - as in the Framatome case.

Whether estoppel is a concept which is capable of being elaborated into a substantive and detailed rule or body of rules must be open to question. It appears rather to be a technique for applying, in a focused way, the wider notion of good faith in international commercial contracts. In doing so, the concept of estoppel emphasises the consistency in dealing which creates confidence in international commerce - one of the shared and legitimate expectations of the international commercial community.

2 The practical and political implications, let alone the theoretical objections, continue to generate debate. See M. Blessing "Globalization (and Harmonization?) of Arbitration" (1992) 9 J.Int. Arb. 79.
3 For other general formulations see D.W. Bowett "Estoppel before International Tribunals and its Relation to Acquiescence" 33 B.Y.I.L. at 176 and Judge Basdevant in his "Dictionnaire de la terminologie du droit international": "... a peremptory objection which prevents a party to a litigation from taking a position which contradicts ... that which earlier acknowledged expressly or tacitly".
4 The Eastern Greenland case (1933) P.C.I.J. Series A/B No. 53; Ops. of Judge Alfaro and Judge Fitzmaurice in the Temple Vihear case ICJ Rep 1862 at 6 et seq.) and 63. See also amongst the leading commentaries Bowett op. cit. and Bin Cheng "General Principles of Law as Applied by International Tribunals" (1954) 143 et seq.
6 "The obligor is required to effect performance in conformity with the good faith required by trade customs ..." Art. 242, German Civil Code.
8 See E. Gaillard "L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international" Rev. Arb. 1985 241 at 247-249 and generally. The author also reviews the principle of non concedit venire contra factum proprium in Swiss law at 249-250.
9 See the Schufeld case (U.S. v Guatemala, 1930) 2 Rep. Int. Arb. Awards 1081 and also Bin Cheng, commenting on this case, who observes: "The principle [of estoppel] is yet another instance of the protection which the law accords to the faith and confidence that a party may reasonably place in another, which ... constitutes one of the most important aspects of the principle of good faith", op. cit. 143-144.
11 See Hughes v Metropolitan Railway (1877) 2 App. Cas. 439 and BP Exploration (Lybia) v Hunt No. 2 [1979] 1 WLR 783 at 812.
13 As were the facts in the leading case of Central London Property Trust Ltd. v High Trees House Ltd. [1947] KB 130. See also The Post Chaser [1981] 2 Lloyd's Rep. 695 at 701.
14 See The Amalgamated Investment and Property Co Ltd case at note 9 supra.
15 See Restatement, Contracts Art. 90 and Restatement, 2d, Contracts Art. 90.
17 Coombe v Coombe [1951] 2 KB 215 at 220.
19 See the comment of Craig, Park and Paulsson "International Chamber of Commerce Arbitration" 2nd edit. (1990) at 629 on the relative lack of attention paid to estoppel by the leading commentators.
21 See note 3 above.
24 As to this "rule" and its operation in international commercial arbitrations see K-H. Böckstiegel "The Legal Rules Applicable in International Commercial Arbitration Involving States or State-controlled Enterprises" in "60 Years of I.C.C. Arbitration - A Look to the Future" (1984) 117, 138-141 and 164-169 and also Schwebel op. cit.
27 The Tribunal is required to decide "all cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable".
29 Award in Case No. 67 of 2 September 1983, Iran-US Claims Tribunal Reports Vol. 3 (1983) 239 at 248 and see E. Gaillard op. cit. at 244-45 and Annexe II.
30 Award of 18 November 1983, extract published in English in J. Int. Arb. 184 and see note 23 supra.
32 For Lex Mercatoria in the modest sense of individual principles justified "as matter of the reasonable and legitimate expectations" of the commercial community see Craig, Park and Paulsson, op. cit. 613-620.

Referring Principles:

I.1.2 - Prohibition of inconsistent behavior