Law and Business Review of the Americas

Volume 20 | Number 2 Article 5

2014

Equity in MERCOSUR: The Use of Estoppel in a Customs Union Created for and by Countries of the Civil System of Law

Jessica M. Guevara

EQUITY IN MERCOSUR: THE USE OF ESTOPPEL IN A CUSTOMS UNION CREATED FOR AND BY COUNTRIES OF THE CIVIL SYSTEM OF LAW

Jessica M. Guevara, Esq.†*

I. INTRODUCTION

THE Statute of the International Court of Justice gives us the typical sources of international law.[1] And among them, the Court recognizes the applicability of general principles of law[2] and equity, if the parties so agree.[3] In common law, one of those principles of law is estoppel.[4] Estoppel permeated the international law system through the use of the general principles of law to solve international conflicts.[5] Among the MERCOSUR sources, general principles of international law are recognized to be applicable.[6] But the use of estoppel in the MERCOSUR system has been limited,[7] and the Permanent Review Tribunal narrowed its application, so it can only be used as a measure of last resort.[8]

---

* Jessica M. Guevara has a Juris Doctorate with a concentration in international law studies from SUNY Buffalo Law School. She is a foreign attorney and graduate of Universidad Católica Andres Bello in Caracas, Venezuela. In Caracas, she dedicated her practice to civil litigation. Currently, she focuses her studies in Alternative Resolution of Conflicts and its impact in the international arena.

† To my parents, who made me who I am, and to my husband, thank you for your infinite support. A mis padres, que hicieron de mi la persona que soy, y a mi esposo, gracias por tu apoyo incondicional.

1. Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. No. 6, art. 38, *available at*, http://www.icj-cij.org/publications/en/acts-and-documents-no-6.pdf.
2. *Id.* art. 38(1).
3. *Id.* art. 38(2) (referring to equity in Latin as *ex aequo et bono*).
4. *See* Vernon Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 24–25 (1994).
5. *See* Anastasious Gourgourinis, *Equity in International Law Revisited (with Special Reference to the Fragmentation of International Law)*, 103 AM. SOC'Y INT'L L. PROC. 79, 80 (2009).
6. *See* Olivos Protocol for the Settlement of Disputes in MERCOSUR art. 34.1, Arg.-Braz.-Para.-Uru., Feb. 18, 2002, 42 I.L.M. 2 (2003) [hereinafter Olivos Protocol].
7. *See infra* pt. V. Only two ad hoc tribunal decisions have decided the dispute considering the principle of estoppel, and the PRT has reviewed the principle just once.
8. Prohibición de Importación de Neumáticos Remoldeados Procedentes del Uruguay [Remolded Tires from Uruguay Import Ban], Arbitral Award No. 01/2005, Uruguay v. Argentina ¶ 21 (Dec. 20, 2005), Tribunal Permanente de Revision [Permanent Review Tribunal] (MERCOSUR).

MERCOSUR is a customs union established in 1991.[9] In 2002, MERCOSUR created the Permanent Review Tribunal (PTR)[10] in the Olivos Protocol to provide assurance of the correct interpretation and application of the MERCOSUR law.[11] This new organ has been able to perform its purpose through appellate decisions,[12] Advisory Opinions (AP),[13] and other important functions.[14]

The Permanent Review Tribunal reviewed the issue of estoppel when the complaining party in Arbitral Award No. 01/2005[15] raised the issue before the tribunal. It is interesting to see this argument being raised for the second time within the MERCOSUR system[16] and the reaction of the court when confronted with it because all the countries conforming MERCOSUR are countries using the Roman or Civil System of Law.[17]

This paper argues that the decision of the Permanent Review Tribunal in the *Uruguay v. Argentina* case, concerning the prohibition on import of retreaded tires,[18] was consistent with MERCOSUR system of law because the countries integrating MERCOSUR are countries that use the Civil System of law. In that case, the court held that the principle of estoppel is extraneous to the MERCOSUR system of law because it is a principle originated in the Common law. Additionally, the court held that the principle of estoppel could only be used as a measure of last resort.[19]

The purpose of this paper is to identify the rule about estoppel in the MERCOSUR system in the light of the Permanent Review Tribunal decision and clarify when the principle of estoppel can be adequately argued in front an Ad Hoc Tribunal or the Permanent Review Tribunal when the

9. *See* Michael Cornell Dypsky, *An Examination of Investor-State Dispute Resolution under the MERCOSUR and NAFTA Regimes*, 8 L. & BUS. REV. AM. 217, 220 (2002).
10. Olivos Protocol, *supra* note 6, art. 18.
11. *Id.* at pmbl.
12. Impedimentos a la Libre Circulación Derivado de los Cortens en Territorio Argentino de Vias de Acceso a los Puentes Internacionales Gral San Martín y Gral Artigas, Argentina v. Uruguay, Award No. 02/2006 (Jul. 6, 2006), Permanent Review Tribunal (MERCOSUR); Arbitral Award No. 01/2005, *supra* note 8.
13. Opinião Consultiva n. 01/2009 [Advisory Opinion No. 01/2009], (Dec. 1, 2010) (PRT 2009), *available at* http://www.mercosur.int/innovaportal/file/OPINION_CONSULTIVA_01-09.pdf?contentid=441&version=1&filename=OPINION_CONSULTIVA_01-09.pdf; Opinião Consultiva n. 01/2008 [Advisory Opinion No. 01/2008] (PRT 2008), *available at* http://www.mercosur.int/show?contentid=441; Opinião Consultiva n. 01/2007 [Advisory Opinion No. 01/2007] (PRT 2007), *available at:* http://www.mercosur.int/innovaportal/file/PrimeraConsultiva_PT.pdf?contentid=441&version=1&filename=PrimeraConsultiva_PT.pdf.
14. Olivos Protocol, *supra* note 6, art. 23 (the PRT as only instance for dispute resolution), art. 28 (Motion for Clarification), art. 24 (Exceptional Cases).
15. Arbitral Award No. 01/2005, *supra* note 8, ¶ 21.
16. *See infra* pt. V.
17. *See* Craig R. Giesze, *Helms-Burton in Light of the Common Law and Civil Law Legal Traditions: Is Legal Analysis Alone Sufficient to Settle Controversies Arising Under International Law on the Eve of the Second Summit of the Americas?*, 32 INT'L LAW. 51 (1998).
18. *Infra* pts. IV and V.
19. *Infra* pt. V.

tribunals are deciding controversies under the new Olivos Protocol dispute resolution.[20]

This document is organized in five parts. Part II introduces the MERCOSUR system including the changes after the Olivos Protocol. Part III introduces the main characteristics and differences between the Common Law System of Law and the Roman or Civil System of Law. Part IV discusses the relevant case in the new regime created by the Olivos Protocol that raised and solved the use of estoppel in the MERCOSUR system, which is *Uruguay v. Argentina*, on the issue concerning the importation of Uruguayan retreaded tires to Argentina. Part V discusses the doctrine of Estoppel. Specifically, it discusses the principle of Estoppel generally, the application of the principle in international law courts and tribunals, and the rule of estoppel in MERCOSUR after the Olivos Protocol.

II. MERCOSUR

MERCOSUR or Common Market of the South[21] is a customs union[22] established by Brazil, Argentina, Uruguay, and Paraguay in 1991.[23] However, Paraguay was politically suspended from the block[24] right before Venezuela joined the system in 2006.[25] Bolivia joined the block in 2012,[26] and it used to be an associate member of the block along with Chile, Colombia, Ecuador, and Peru.[27]

MERCOSUR established not only a free trade area for goods and services, but also a channel for coordination of economic policies among the member states.[28] This customs union resulted from a history of political and economic struggle in the area. After hyperinflation, dictatorships, and border disputes, the region enrolled itself in an economic coopera-

20. Olivos Protocol, *supra* note 6, at ch. I.
21. Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay, and the Eastern Republic of Uruguay art. 1, Mar. 26, 1991, 30 I.L.M. 1044 [hereinafter Treaty of Asunción], *available at* http://www.worldtradelaw.net/fta/agreements/mercosurfta.pdf.
22. *See* Dypski, *supra* note 9, at 220.
23. Asunción Treaty, *supra* note 21.
24. Ljiljana Biukovic, *Dispute Resolution Mechanisms and Regional Trade Agreements: South American and Caribbean Modalities*, 14 U.C. DAVIS J. INT'L L. & POL'Y 255, 267–69 (2007); *Paraguay Set Against Venezuela Pact Role*, UPI.COM (5:59 PM March 27, 2013), http://www.upi.com/Top_News/Special/2013/03/27/Paraguay-set-against-Venezuela-pact-role/UPI-37831364421547/.
25. Nikolaos Lavranos & Nicolas Vielliard, *Competing Jurisdictions Between MERCOSUR and WTO*, 7 LAW & PRAC. INT'L CTS. & TRIBUNALS 205, 209 (2008).
26. *Bolivia Signs Mercosur Incorporation Protocol and Becomes Sixth Member*, MERCOPRESS (Dec. 8, 2012, 4:07 AM), http://en.mercopress.com/2012/12/08/bolivia-signs-mercosur-incorporation-protocol-and-becomes-sixth-member.
27. Lavranos & Vielliard, *supra* note 25, at 209; Stephen Powell & Ludmila Mendoca, *Symposium: The Human Element: The Impact of Regional Trade Agreements on the Human Rights and the Rule of Law: Managing the Rule of Law in the Americas: An Empirical Portrait of the Effects of 15 Years of WTO, MERCOSUL, and NAFTA Dispute Resolution on Civil Society in Latin America*, 42 U. MIAMI INTER-AM. L. REV. 197, 227 (2011).
28. Asunción Treaty, *supra* note 21, art. 1.

tion era that resulted in the Program for Integration and Economic Cooperation (PICE).[29] The PICE is a 1986 trade agreement between Argentina and Brazil aiming at the creation of a common market, which later precipitated the creation of MERCOSUR.[30]

At the beginning, MERCOSUR was not institutionally strong because the member states "refrained from creating supranational institutions to guide the process."[31] However, the Ouro Preto Procotol gave some institutional and structural depth that the system needed because, among other reasons, it gave MERCOSUR international legal personality.[32]

MERCOSUR has a wide range of institutions. The Asuncion Treaty created the heart of the political organization of the system, which is the Council for the Common Market and the Group of the Common Market.[33] The Council for the Common Market is the political organ of the system, which is in charge of the decision-making process in order to secure the objectives established by the union.[34] The Council is integrated by the various External Affairs and Economy Ministers of the member states.[35] The Group of the Common Market is the executive organ, which is coordinated by the Ministers of Foreign Affairs of each member state.[36]

In 1994, MERCOSUR expanded its institutions by adding the MERCOSUR Trade Commission, the Joint Parliamentary Commission, the Economic-Social Consultative Forum, and the MERCOSUR Administrative Secretariat.[37] The MERCOSUR Trade Commission, along with the Council for the Common Market and the Group of the Common Market, is one of the "organs with decision-making authority."[38] The MERCOSUR Trade Commission is the organ in charge of assisting the Group of the Common Market in the application of the trade policies agreed to by the member states.[39]

The Joint Parliament Commission represents the parliament of each member state, and its members are appointed by the national parliament of each member state.[40] This organ "has an important advisory function with respect to the harmonization of legislation."[41]

The Socio-economic Consultative Forum represents the economic and

29. *See* Dypski, *supra* note 9, at 220.
30. *Id.*
31. *Id.* at 220–21.
32. *Id.* at 221.
33. Asunción Treaty, *supra* note 21, art. 9.
34. *Id.* art. 10.
35. *Id.* art. 11.
36. *Id.* art. 13.
37. Additional Protocol to the Treaty of Asuncion on the Institutional Structure of MERCOSUR art. 34, Arg.-Braz.-Para.-Uru., Dec. 17, 1994, 34 I.L.M. 1244, 1258 (1995) [hereinafter Ouro Preto Protocol].
38. Dypski, *supra* note 9, at 222.
39. Ouro Preto Protocol, *supra* note 37, art. 16.
40. *Id.* arts. 22, 24.
41. John Vervaele, *Mercosur and Regional Integration in South America*, 54 INT'L & COMP. L.Q. 387, 392 (2005).

social sectors of each member state.[42] It has a consultative function and can provide recommendations to the Common Market Group.[43] Finally, the MERCOSUR Administrative Secretariat, which is headquartered in Montevideo,[44] is the organ of support of the system. It "organizes meetings and handles documentation."[45] "Its powers, however, are rather weak . . . and purely supporting. [It] has no executive power . . . [and] cannot, therefore, be compared to the European Commission in the EC Treaty or EU Treaty."[46]

The idea of a MERCOSUR dispute resolution system was introduced in the Asuncion Treaty,[47] but it was not until the Brasilia Protocol was signed that a dispute resolution system was created.[48] However, the provisions in the Olivos Protocol, which was agreed on 2003 and became effective in 2004, superseded the Brasilia Protocol's provisions.[49] The dispute resolution system distinguishes between disputes among member states, and disputes between particulars and member states.[50] And one of the most distinguishable characteristics of the Olivos Protocol is the creation of the Permanent Review Tribunal.[51]

The Permanent Review Tribunal can clarify the decision of an Ad Hoc Tribunal, and it also has appellate jurisdiction over the decisions of Ad Hoc tribunals.[52] Additionally, this organ serves as "a unique instance of dispute settlement (by common agreement of the parties involved in the dispute), as a unique instance of urgent and exceptional cases, and as a consultative body."[53] However,

> The creation of a judicial body in MERCOSUR is a controversial issue that has been widely discussed by specialized commentators on MERCOSUR law. In this regard, some commentators have emphasized the need for a permanent court of justice in MERCOSUR guaranteeing the enforcement and uniform interpretation of community law. Another part of MERCOSUR legal scholarship proposes to introduce different changes in the institutional arrangements to address the enforcement problems MERCOSUR faces and to ensure a uniform application, without going beyond the present intergovernmental machinery.[54]

This controversy occurs because "[t]he MERCOSUR has been designed to reflect its member states' desire to achieve economic integra-

42. Ouro Preto Protocol, *supra* note 37, art. 28.
43. *Id.* art. 29.
44. *Id.* art. 31.
45. Vervaele, *supra* note 41, at 392.
46. *Id.*
47. Asuncion Treaty, *supra* note 21, art. 3.
48. Biukovic, *supra* note 24, at 271.
49. *Id.*
50. *See* Olivos Protocol, *supra* note 6, at ch. I, XI.
51. Lavranos & Vielliard, *supra* note 25, at 212.
52. Belen Olmos Giupponi, *International Law and Sources in MERCOSUR: An Analysis of a 20-year Relationship*, 25 LEIDEN J. OF INT'L L. 707, 714 (2012).
53. *Id.* at 715.
54. *Id.* at 716.

tion through political cooperation rather than institutionalism."[55] MERCOSUR is not a supranational organization, but "an intergovernmental organization with community objectives."[56] Each country brings to the system their own perceptions of economy, social policy, and law, "because [the MERCOSUR institutions's] members are in fact the representatives of the governments of the four member states."[57] Therefore, MERCOSUR is only a means to coordinate the objectives of the system outlined in the Asuncion Treaty.[58] This idea is reinforced by the fact that "MERCOSUR institutions have surprisingly little power over member states because they can only reach decisions by consensus and the enforcement of those decisions is at the absolute discretion of the member states."[59]

III. COMMON LAW V. CIVIL SYSTEM

Although the Common Law and the Civil System (also known as Roman System) come from a common tree, the Roman Law,[60] both have evolved to have their own characteristics.

As Tetley defines them:

> Civil law may be defined as that legal tradition which has its origin in Roman law, as codified in the Corpus Juris Civilis of Justinian, and as subsequently developed in Continental Europe and around the world. Civil law eventually divided into two streams: the codified Roman law (as seen in the French Civil Code of 1804 and its progeny and imitators-Continental Europe, Quebec, and Louisiana being examples); and uncodified Roman law (as seen in Scotland and South Africa). Civil law is highly systematized and structured and relies on declarations of broad, general principles, often ignoring the details. Common law is the legal tradition, which evolved in England from the eleventh century onwards. Its principles appear for the most part in reported judgments, usually of the higher courts, in relation to specific fact situations arising in disputes, which courts have adjudicated. The common law is usually much more detailed in its prescriptions than the civil law. Common law is the foundation of private law, not only for England, Wales and Ireland, but also in forty-nine U.S. states, nine Canadian provinces and in most countries, which first received that law as colonies of the British Empire and which, in

55. Cherie O' Neil Taylor, *Dispute Resolution as a Catalyst for Economic Integration and an Agent for Deepening Integration: NAFTA and MERCOSUR?*, 17 NW. J. INT'L L. & BUS. 850, 867–68.

56. Vervaele, *supra* note 41, at 392; *see also* Taylor, *supra* note 55, at 868; Nadia de Araujo, *Dispute Resolution in Mercosul: The Protocol of las Lenas and the Case law of the Brazilian Supreme Court*, 32 U. MIAMI INTER-AM. L. REV. 25, 31 (2001).

57. Biukovic, *supra* note 24, at 271.

58. Asunción Treaty, *supra* note 21, art. 1.

59. Biukovic, *supra* note 24, at 270–71; Powell & Mendoca, *supra* note 27, at 242–43.

60. HENRY M. HERMAN, THE LAW OF ESTOPPEL 7 (1871).

many cases, have preserved it as independent States of the British Commonwealth.[61]

Then, the most remarkable and distinctive characteristic of both systems is the source of law. In the Civil System, judges abide mostly to codified sources.[62] However, the judges in Common Law decide their cases based on a case law system.[63] Prof. Tetley justifies this difference in that "civil law adopts Montesquieu's theory of separation of powers, whereby the function of the legislator is to legislate, and the function of the courts is to apply the law. Common law, on the other hand, finds in judge-made precedent the core of its law."[64]

The Roman or Civil System expanded to many countries of Europe after Napoleon occupied the various territories.[65] Among those countries were Spain and Portugal, which were the conduits to transport the Civil System to the Americas.[66]

Although the Common Law is known to apply positive non-legislative rules, "the common law is not limited to published judicial precedent, but more broadly, is the system of rules and declarations of principles from which our judicial ideas and legal definitions are derived and which are continually expanding."[67]

The style by which a judge resolves controversies in both systems is different. In Common law systems, the judge bases his or her analysis on the facts of the cases; he or she looks for similar fact patterns to determine the law applicable to the case, and when there are not cases similar to the one at hand, he or she creates new rules to resolve the new issue.[68] On the other hand, the judge on the Civil System "focuses rather on legal principles. He or she traces their history, identifies their function, determines their domain of application, and explains their effects in terms of rights and obligations."[69] In the Civil System, the cases already decided provide a source for induction of the scope of application of the principles of law involved.[70]

Another difference between the two systems is the process of interpretation of the law. According to Tetley,

In civil law jurisdictions, the first step in interpreting an ambiguous law, according to Mazeaud, is to discover the intention of the legisla-

61. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 683–84 (2000).
62. *See id.* at 701; Vernon Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TULANE L. REV. 7, 13 (1994).
63. *See* CHOW SCHOENBAUM, INTERNATIONAL BUSINESS TRANSACTIONS PROBLEM, CASES, AND MATERIALS 455 (Aspen Publishers, 2d ed. 2010); *see also* Tetley, note 61, at 701.
64. Tetley, *supra* note 61, at 701.
65. *Id.* at 687–88.
66. *See id.*; *see also* SCHOENBAUM, *supra* note 63, at 446.
67. JOSEPH J. BASSANO, IND. LAW ENCYC. COMMON LAW § 1 (1961).
68. Tetley, *supra* note 61, at 701.
69. *Id.* at 702.
70. *Id.*

> tor by examining the legislation as whole, including the "travaux preparatoires," as well as the provisions more immediately surrounding the obscure text. In common law jurisdictions, by comparison, statutes are to be objectively construed according to certain rules standing by themselves, such as that an enactment must be read as a whole, and that special provisions will control general provisions, so as to meet the subjects' reasonable understandings and expectations.[71]

The principles of equity also distinguish the Civil and Common Law Systems. In the Civil System, the principles of equity "aid, supplement, or correct the civil law,"[72] but are not a formal source of law.[73] In the early common law system, "equity softened or abated the rigor of the common law with the Conscience of the Chancellor."[74] Nowadays, equity in common law "serve[s] the function of altering the course of the common law system where it results, in spite of long and steady development, are plainly unreasonable, unjust, or offensive."[75]

IV. URUGUAY, ARGENTINA, AND RETREADED TIRES

In 1997, the Eastern Republic of Uruguay started exporting retreaded tires to the Republic of Argentina.[76] During those years, the value of the exports of Uruguayan retreaded tires exported from Uruguay to Argentina was approximately $1,477,827.[77] However, those operations occurred during only part of each year: in 1998, Uruguay exported the tires only over a period of eight months; in 1999 only for nine months; in 2000 eleven months; in 2001 three months; and in 2002, only four months.[78]

Retreaded tires are a product obtained from a used tire, which was duly inspected and in good shape; the used tire's external appearance is reconstructed into a new tire.[79] These tires can be as reliable as a new tire, but may not last as long.[80] The problem with these tires is that in some South American countries, the technology necessary to dispose of the tires does not exist or is prohibitively expensive to implement.[81]

Argentina enacted administrative laws that prohibit the importation of used tires into to the country. Additionally, in 2002, Argentina enacted a

---

71. *Id.* at 704–05.
72. Palmer, *supra* note 62, at 8 (quoting Roman jurist Papinian).
73. *Id.* at 31.
74. *Id.* at 8.
75. Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV 369, 370 (1996); *see also* Palmer, *supra* note 62, at 19.
76. Laudo 10/2005 (Uruguay v. Argentina) Prohibicion de Importacion de Neumaticos Remoldeados, ¶ 15 (Tribunal Arbitral) (Oct. 10, 2005), *available at* http://www.sice.oas.org/dispute/mercosur/laudo%20neumaticos_005_s.pdf [hereinafter Retreaded Tires II].
77. *Id.* ¶ 104.
78. *Id.*
79. *Id.* ¶ 72.
80. *Id.* ¶ 73–74.
81. *Id.* ¶ 48.

law that also prohibits the importation of retreaded tires.[82]

In 2004, during the LVI Common Market Ordinary Meeting, Uruguay initiated the mechanism of dispute resolution established in the MERCOSUR Law.[83] Argentina was notified, and both parties had diplomatic discussions looking to resolve the impasse. However, an amicable resolution was not reached, and the Ad Hoc Arbitral Tribunal was established.[84]

A. Ad Hoc Tribunal Arbitral Award

On February 18, 2005, the Ad Hoc Arbitral Tribunal was created,[85] and each party had a chance to present its allegations.[86] Uruguay contended that the 2002 Argentinean law violated the MERCOSUR law because it completely prohibited the flow of goods among the countries' borders.[87] Uruguay argued that a violation to the Montevideo Treaty[88] did not occur in the case because retreaded tires were safe. Uruguay stated that the retreaded tires did not pose any threat to safety on the highways or to the environment.[89] Furthermore, Uruguay argued that the Argentinean prohibition violated some provisions of the Asuncion Treaty,[90] the Annex I of the Asuncion Treaty, some decisions of the Council of the Common Market,[91] the *pacta sunt servanda* principle, and the principle of Estoppel.

On the other hand, Argentina argued that the limitation imposed by the 2002 law, although impeding the unrestricted flow of retreaded tires through the Uruguayan-Argentinean border, was an exception to free trade as established in the Montevideo Treaty.[92]

On October 25, 2005, the tribunal decided that the Argentinean law prohibiting the importation of Uruguayan retreaded tires was compatible with the MERCOSUR law.[93] The tribunal disposed the estoppel argument based on reasons discussed below.[94] The tribunal upheld the law because the protection of the environment is one of the objectives of MERCOSUR, and article 50(d) of the Montevideo Treaty allowed Ar-

82. *Id.* ¶ 14, 42.
83. *Id.* ¶ 11; *see* Olivos Protocol, *supra* note 6, art. 4–7.
84. Retreaded Tires II, *supra* note 76, ¶ 13; *see* Olivos Protocol, *supra* note 6, art. 9–14.
85. Retreaded Tires II, *supra* note 76, ¶ 1.
86. *Id.* ¶¶ 6–10.
87. *Id.* ¶¶ 14–15; *see* Asuncion Treaty, *supra* note 21, art. 1.
88. Treaty Establishing a Latin American Free Trade Area and Instituting the Latin American Free Trade Association, Arg.-Bol.-Braz.-Colom.-Chile-Ecuador-Mex.-Para.-Peru-Uru.-Venez., Feb. 18, 1960, 2 M.I.G.O. 1575, *available at* http://www.sice.oas.org/trade/montev_tr/Montev1.asp [hereinafter Montevideo Treaty].
89. Retreaded Tires II, *supra* note 76, ¶ 16.
90. Treaty of Asunción, *supra* note 21, arts. 1, 5.
91. Council of the Common Market Decision 22/00, MERCOSUR (July 30, 2000); Council of the Common Market Decision 57/00, MERCOSUR (June 30, 2001); Retreaded Tires II, *supra* note 76, ¶¶ 62, 63.
92. Montevideo Treaty, *supra* note 88, art. 50(d).
93. Retreaded Tires II, *supra* note 76, ¶ 1.
94. *Infra* pt. V.

gentina to prohibit the import of tires if they posed a risk to the environment.[95]

B. Decision of the Permanent Review Tribunal

Uruguay, unsatisfied with the decision of the Ad Hoc Tribunal, submitted the controversy to the Permanent Review Tribunal (PRT).[96] Exercising its review powers,[97] the PRT overruled the decision of the Ad Hoc Tribunal,[98] sustaining that the Argentinean law was not compatible with the MERCOSUR regime.[99] The reason for overruling the decision was that the Ad Hoc Tribunal committed substantial mistakes of law.[100] One of those mistakes was that the Ad Hoc Tribunal did not create a standard of law as to when and how to apply the exceptions to free trade based on the Montevideo Treaty article 50.[101] The tribunal also shifted the burden of proof in cases where it was uncertain that damage to the environment would result, although no express law existed as to that requirement.[102]

V. ESTOPPEL

A. Generalities

The origins of the word estoppel are not clear.[103] Some authors say that the word derives from the word *estop*, which is a synonym of *stop*.[104] Others trace its origins to the French word *estoupe*.[105] However, all agree that estoppel is a rule of equity[106] that prevents a person from denying an already accepted state of affairs.[107] Indeed, "the name of 'estoppel' . . . was given 'because a man's own act or acceptance stoppeth . . . his mouth to allege or plead the truth.'"[108] Then, the principle "restrains a party from testifying or speaking as to the truth or falsity of those events."[109]

Although the principle of estoppel had its origins in "the earliest days

95. Retreaded Tires II, *supra* note 76, ¶ 99.
96. Olivos Protocol, *supra* note 6, art. 17.
97. *Id.* arts. 17, 22.
98. Laudo No 1/2005 contra el Laudo arbitral del Tribunal Arbitral *ad hoc* en la controversia 'PROHIBICIÓN DE IMPORTACIÓN DE NEUMATICOS REMOLDEADOS PROCEDENTES DEL URUGUAY', Dec. 20, 2005, ¶ 26 (Del Tribunal Permanente de Revisión).
99. *Id.* ¶ 26.2.
100. *Id.* ¶ 25.
101. *Id.* ¶ 10.
102. *Id.* ¶ 20.
103. *See* Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 371 (1996); *see also* HERMAN, *supra* note 60.
104. Brown, *supra* note 103, at 371.
105. HERMAN, *supra* note 60; *see also* ELIZABETH COOKE, THE MODERN LAW OF ESTOPPEL 7 (2000).
106. *See* Brown, *supra* note 103, at 370.
107. *Id.* at 371.
108. MELVILLE M. BIGELLOW, A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 4 (Little, Brown, and Co., 4th ed. 1886) (citing Lord Coke).
109. Brown, *supra* note 103, at 371.

of the Roman Law,"[110] it evolved to be an equity doctrine applied in the common law system.[111] In the United States, the doctrine of estoppel has evolved to be used in various areas of law, like contracts law and property law.[112]

According to Brown, "[t]here are four primary rubrics under which numerous forms of estoppel can be placed: estoppel by representation, estoppel by record, estoppel by deed, and the various forms of estoppel by silence."[113]

Estoppel *in pais*, which means "in the country" or "in the land," is a type of estoppel from medieval common law[114] and was the root of estoppel by representation.[115] It was used to prove acts that occurred in the presence of witnesses.[116] In medieval times, "[l]ivery (of seisin), entry, acceptance of rent, partition, and the acceptance of an estate" created estoppel *in pais*.[117] When this doctrine is successfully applied, "the estopped party cannot resile from representation derived from his or her notorious act."[118] "Estoppel by acceptance of rent . . . occurred where the landlord accepted rent from a tenant who held over after the expiration of a lease by deed."[119] This form of estoppel, by acceptance of rent, still remains.[120]

Then, estoppel by representation arises:

> [w]here one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.[121]

What is important in estoppel by representation is that the representor has knowledge of "the information that would render the representation false"[122] and the representee detrimentally relies on the false representa-

110. HERMAN, *supra* note 60, at 7
111. Palmer, *supra* note 62, at 24–25; *see also* COOKE, *supra* note 105, at 19.
112. *See* Brown, *supra* note 103, at 370.
113. *Id.* at 372.
114. *Id.*
115. Adam Ship, *The Primacy of Expectancy in Estoppel Remedies: An Historical and Empirical Analysis*, 46 ALBERTA L. REV. 77, 85 (2008).
116. Brown, *supra* note 103, at 372.
117. BIGELLOW, *supra* note 108, at 445.
118. Ship, *supra* note 115, at 84.
119. BIGELLOW, *supra* note 108, at 446.
120. *Id.*
121. Brown, *supra* note 103, at 372.
122. Ship, *supra* note 115, at 86.

tion.[123] Although "its application can have significant effects on the substantive aspects of a claim . . . estoppel by representation in Anglo-American law is a rule of procedure and cannot serve as the basis of a claim."[124]

Estoppel by record, also known as *res judicata*, "refers to the testimony of a witness which over time became written."[125] It originated from the German notion that the "king's seal attached to a document rendered its contents incontestable,"[126] and it evolved to the notion that tribunal decisions are final and the parties cannot contractually modify them.[127] This type of estoppel belongs to the procedural world, and it is based on the interest of the commonwealth to end litigation and on the principle that no one shall be punished twice in regards to the same event.[128]

Estoppel by deed, also called estoppel by matter in writing,[129] is the type of estoppel in "which a person may be estopped from acting inconsistently with a deed to which he was a party . . . or if the deed's execution was based on a false premise, a party may be estopped from invoking the falsity."[130]

Estoppel by silence is a set of categories of estoppel, which are acquiescence and laches.[131] "Acquiescence applies when a party remains silent while another party mistakenly violates the first party's rights and the first party's willful silence encourages the latter party unwittingly to continue the violation."[132] Laches, instead, "aims to prevent a party from bringing claims after a long delay."[133]

B. Estoppel in International Law

The doctrine of estoppel in international law "is little more than a maxim exhorting the parties to act consistently."[134] But "the basic proposition that parties should act consistently is so broad [and] . . . [t]he possible means of implementing such a proposition are so numerous that one must look to more specific municipal law analogies."[135] It is also important to mention that the doctrine of estoppel has not become a customary rule of international law:

---

123. *Id.* at 90.
124. Brown, *supra* note 103, at 374.
125. *Id.*; *see also* Cooke, *supra* note 105.
126. Ship, *supra* note 115, at 83.
127. *Id.*
128. Brown, *supra* note 103, at 375–76 (referring to the principles of *interest reipulicae ut sit finis litium* and *nemo debet bis vexari pro una et eadem causa*).
129. Bigellow, *supra* note 108, at 320.
130. Ship, *supra* note 115, at 83 (alteration in original).
131. Brown, *supra* note 103, at 377.
132. *Id.*
133. *Id.* at 377–78; *see also* Stanev v. Bulgaria, App. No. 36760/06, Eur. Ct. H.R. ¶ 194 (2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108690; Savez Crkava v. Croatia, App. No. 7798/08, Eur. Ct. H.R. ¶ 122 (2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-102173.
134. Brown, *supra* note 103, at 384.
135. *Id.*

> [I]t is equally difficult to maintain that international custom is the foundation of estoppel in international law. According to Brownlie, there are four elements which must be satisfied for a practice or custom to become law under Article 38(1)(b): 1) duration, 2) consistency of practice, 3) generality of practice and 4) opinio juris et necessitatis. Even if the first and third elements exist, the other two elements present problems. First, although certain jurists recognize a consistent and well-established practice with regard to estoppel, arbitral decisions and cases before international courts dealing with estoppel have failed to arrive at clear and workable definition of the rule. Second, in applying the element of opinio juris et necessitatis, the subjective element of customary law, one can properly ask how any certainty or conviction can exist with regard to a principle as ill-defined as international estoppel.[136]

Then, for Brown, a possible explanation for the acceptance of estoppel in the international plane is that the doctrine is a powerful "juridical wild card allowing one who plays it in international law to make it represent any legal notion he desires."[137] In international law, "equity has been faced with skepticism for vagueness and lack of predictability, while 'stand-alone' general principles of law have lapsed into a considerable degree of obscurity regarding their origin, practical utility, and *modus operandi*, overtly disadvantaged to treaty and custom."[138]

In the international plane, two notions of estoppel have evolved. First, a narrower one, which "adheres somewhat to the strictures of the Anglo-American estoppel by representation."[139] Second, a broader one that is related to common law estoppel, but "is less strictly defined and has a broader scope of application."[140]

The doctrine of estoppel arrived to the international arena through arbitrations that involved "English and American parties."[141] However, its use expanded to the Permanent Court of International Justice, the International Court of Justice,[142] and even to cases in the European Union.[143] Additionally, the Central American Court of Justice, the judicial body of the Organization of Central American Estates, "has recognized the full applicability of the principle of Estoppel in the context of the Central American integration process."[144]

---

136. *Id.* Therefore, it is only sustained by article 38.1(c) of the Statue of the I.C.J.
137. *Id.*
138. Gourgourinis, *supra* note 5, at 80–81.
139. Brown, *supra* note 103, at 396; *see also* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, ¶ 42 (July 20, 2010); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, 2008 I.C.J. 12, ¶ 228 (May 23, 2008).
140. Brown, *supra* note 103, at 396.
141. *Id.*
142. *Id.* at 388, 390.
143. *See* Retreaded Tires II, *supra* note 76, ¶ 84–85.
144. Belén Olmos Giupponi, *International Economic Law (IEL) and Sources of Law in MERCOSUR: An Analysis of a Fifteen-Year Relationship* (Int'l Studies Ass'n,

As an example of the use of estoppel in international law, more specifically in arbitration, Professor Brown points out to three cases: the Corvaia arbitration, the Tinoco case, and the Shufeldt case.[145]

The Corvaia arbitration involved an Italian citizen who had severed all his ties to Italy. Italy asserted that it could state a claim in his behalf. However, the arbitrator rejected Italy's position and said that Italy was estopped from asserting the claim on behalf of the person. The arbitrator was American, and he applied estoppel as understood domestically: as detrimental reliance, which professor Brown calls *stricto sensu estoppel*.[146]

In *Tinoco*, Great Britain initiated a suit against Costa Rica. The issue was the payment of debt entered by the previous government that arrived to power after a military coup. When the new government took control, it rejected its obligations to a Britannic Bank, and Great Britain sued. Costa Rica alleged estoppel arguing that Great Britain never recognized the past government. The tribunal rejected the estoppel defense applying the definition of estoppel stated in Corvaia.[147]

In *Shufeldt*, the United States sued Guatemala concerning the issue of a concession. The concession was given by Guatemala to an American diplomat; however, the Guatemalan parliament did not approve the transaction. The tribunal based its decision on the existence of a previous obligation, but it recognized the use of estoppel in international law.[148]

The principle of estoppel has also permeated some international trade disputes. For example, in *Bananas I*,[149] one of the issues claimed was the applicability of estoppel to the dispute. The panel report at that time said, "[T]he mere fact that the EEC had notified these restrictions to the CONTRACTING PARTIES, and that such measures had not been acted upon until now had not changed the obligations under the General Agreement."[150] This issue was revisited in *Bananas III*,[151] and it was said that *Bananas I* was distinguishable from the *Bananas III* in which it "was not one of 'a mere' notification of a restriction to otherwise passive parties: a schedule was negotiated during an official Round and expressly accepted by the CONTRACTING PARTIES by their ratification and the 'estoppel' principle was simple not an issue here."[152]

Working Paper, 2011), at 14, *available at* http://citation.allacademic.com/meta/p499714_index.html.

145. Brown, *supra* note 103, at 386–88.
146. *Id.* at 386–87; *see* Rep. of Int'l Arbitral Awards: Corvaia Case (of a general nature), vol. X at 609 (1903), http://legal.un.org/riaa/cases/vol_X/609-635.pdf.
147. Brown, *supra* note 104, at 387; *see* Aguilar-Armory & Royal Bank of Can. claims (Gr. Brit. v. Costa Rica), 1 R.I.A.A. 371, 382-84 (1923).
148. Brown, *supra* note 104, at 387–88.
149. Report of the Panel, *EEC-Member States' Import Regimes for Bananas*, DS32/R (June 3, 1993) at 29 (unadopted) [hereinafter *Bananas I*], *available at* http://www.worldtradelaw.net/reports/gattpanels/eecbananas.pdf.
150. *Id.* at 79.
151. Panel Report, *European Communities–Regime for Importation, Sale, and Distribution of Bananas*, ¶ 4.100, WT/DS27/R/GTM, WT/DS27/R/HND (May 22, 1997).
152. *Id.* (citing *Bananas I*, at 80)

The principle of estoppel has been used since the creation of the Permanent Court of Justice and the International Court of Justice. As an example of them, Professor Brown points out the *Serbian Loans* case and the *Cases Concerning the Legal Status of Eastern Greenland*.[153]

In *Serbian Loans*,[154]

> [t]he Permanent Court of [. . .] Justice . . . examined the question of estoppel for the first time. . . . The case involved certain loan contracts concluded between Serbian and French financers. The Serb-Croat-Slovene government alleged that, although . . . the loans required [payment] in gold . . . the lenders previously accepted payment in currency and had thereby forfeited the right to demand that subsequent payment be made in gold.[155]

The Court in this case concluded that the principle of estoppel was not applicable because the French government was trying to solve the dispute through diplomatic means, and it caused an understandable delay.[156] Additionally, the Court said that the requirements of estoppel had not been met because "[t]here has been no clear and unequivocal representation by the bondholders upon which the debtor State was entitled to rely and has relied."[157]

The *Case Concerning the Status of Greenland*,[158] involved the desire of Denmark for other states to recognize its sovereignty over "certain parts of Eastern Greenland."[159] In 1919, Norway indicated that it "would not challenge Denmark's sovereignty claims over Eastern Greenland."[160] Both countries alleged estoppel. The Court stated that Denmark was not estopped from alleging sovereignty over the Eastern Greenland because it had claimed sovereignty over the territory several times.[161] However, "the court rejected Norway's claim without explanation."[162]

The principle of estoppel continued to be used by states in the International Court of Justice. Indeed, "[e]stoppel is a well-accepted doctrine in matters before the International Court of Justice."[163] The court visited the principle in *Fisheries* and *Nottebohm*, but "[t]he most comprehensive examination of the estoppel doctrine made by the International Court of

153. Brown, *supra* note 103, at 388–89.
154. Payment of Various Serbian Loans Issued in France (France v. Kingdom of the Serbs, Croats and Slovenes), Judgment, 1929 P.C.I.J. (ser. A) No. 20 (July 12) [hereinafter Serbian Loans], *available at* http://www.worldcourts.com/pcij/eng/decisions/1929.07.12_payment1.htm.
155. Brown, *supra* note 103, at 388.
156. Serbian Loans, *supra* note 154, ¶ 80.
157. *Id.*
158. Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53 (Sept. 5) [hereinafter Greenland case], *available at* http://www.worldcourts.com/pcij/eng/decisions/1933.04.05_greenland.htm.
159. Brown, *supra* note 103, at 388–89.
160. *Id.* at 389.
161. Greenland case, *supra* note 158, ¶ 158.
162. Brown, *supra* note 103, at 389.
163. *Id.* at 390.

Justice was in *Temple of Preah Vihear*."[164]

The *Fisheries*[165] involved the validity of the borders or lines delimitating the Norwegian Fisheries zone.[166] The allegations of the parties "made no specific reference to estoppel. Nonetheless, it is often cited as an example of estoppel in international law."[167] The court held that the United Kingdom had accepted "certain seas adjacent to Norway as part of Norway's territorial waters."[168] Then, although the court did not talk about estoppel expressly, it decided the case based on the principle's basic notions.

In *Nottebohm*,[169] Liechtenstein expressly argued estoppel saying "that Guatemala formerly recognized the naturalization [of Mr. Nottebohm] which it now challenges and cannot therefore be heard to put forward a contention which is inconsistent with its former attitude."[170] In this case, Liechtenstein was suing Guatemala on behalf of Mr. Nottebohm.[171] However, the court said that there "is nothing [in the file] to show that before the institution of the proceedings Guatemala had recognized Liechtenstein's title to exercise protection in favor of Nottebohm and that it is thus precluded from denying such a title."[172] The court rejected Liechtenstein's position.[173]

The *Temple of Preah Vihear*[174] concerned the rights on the temple, which was located on the borders of Cambodia and Thailand.[175] "The dispute focused on a series of earlier events which occurred when France, as a protectorate, had controlled Indochina."[176] France and Thailand agreed on a temporary border, and the agreement placed the temple on the Cambodian side.[177] Thailand alleged that the maps, which reflected the agreement, were not valid because "the maps received from Paris were only seen by minor officials who had no expertise in cartography, and would know nothing about the Temple of Preah Vihear."[178] The court held that Thailand could not rely on that argument because the country, at its own risk, relied on the work of "minor officials." Additionally, when the facts demonstrated that high-ranking officers, like the

164. *Id.* at 390, 392.
165. Fisheries Case (United Kingdom v. Norway), 1951 I.C.J. 116, No. 5 (Dec. 18, 1951), *available at* http://www.icj-cij.org/docket/files/5/1809.pdf.
166. *Id.* at 118–19.
167. Brown, *supra* note 103, at 390.
168. *Id.*
169. Nottebohm (Liech. v. Guat.), Judgment, 1955 I.C.J. 4, No. 18 (Apr. 6) [hereinafter Nottebohm case], *available at* http://www.icj-cij.org/docket/files/18/2674.pdf.
170. *Id.* at 17.
171. Brown, *supra* note 103, at 390.
172. Nottebohm Case, *supra* note 169, at 19.
173. Brown, *supra* note 103, at 391.
174. Temple of Preah Vihear (Cambodia v. Thai.), 1962 I.C.J. 6, No. 45 (Jun. 15, 1962) [hereinafter Temple of Preah Vihear], *available at* http://www.icj-cij.org/docket/files/45/4871.pdf.
175. *Id.* at 15.
176. Brown, *supra* note 103, at 392.
177. *Id.*
178. Temple of Preah Vihear, *supra* note 174, at 25.

Foreign Minister, saw the maps,[179] the court rejected Thailand's position.

The principle of estoppel arrived to the MERCOSUR for the first time in 2002.[180] This case was resolved under the Brasilia Protocol just days before the Olivos Protocol was signed.[181] This controversy involved a Brazilian law prohibiting the importation to Brazil of retreaded tires.[182] Uruguay alleged, *inter alia*, the principle of estoppel.[183] The court defined estoppel in a restrictive way, saying that estoppel is the obligation of a state to respect a determined course of conduct that would have a secondary effect in another state, and injury would result to the other relying state if the state changed its conduct.[184] The court held that the Brazilian law was incompatible with MERCOSUR law because it was contrary to a decision of the Council of the Common Market[185] and also violated principles of international law concerning estoppel.[186] "In sum, the case before the MERCOSUR ad hoc Arbitral Tribunal was a purely interpretative and procedural nature. It was not a case where Brazil conceded its legislation was flawed, but defensive—it was simply a matter of analysis and interpretation as to the scope of [the Brazilian law]."[187]

C. Estoppel in MERCOSUR after the Olivos Protocol

1. Ad Hoc Arbitral Tribunal Award of 2005

One of the arguments that Uruguay made in the case was the application of estoppel to the facts.[188] Analyzing this principle, the court said that estoppel had been applied in the international sphere as a means to provide stability, certainty, and continuity to the international obligations.[189] Additionally, the court defined estoppel as:

> [A] principle that forbids a complaining state to claim for its benefit the fulfillment of a right or the exercise of a lawful power, if such claim is contrary to a conduct previously accepted by the state . . . and it is incompatible with the legitimate expectative created in the legal patrimony of a state, or states, which in good faith and reasonably, has trusted the truthfulness of the previous conduct and has accommodated their interests to conform that new state of affairs

179. *Id.*
180. *See* Laudo N 1/2002 (Uruguay v. Brazil) Prohibicion de Importacion de Neumaticos Remoldeados, Jan. 9, 2002, ¶ (Tribunal Arbitral), [hereinafter Retreated Tires I]
181. The decision is dated Jan. 9, 2002, and the Olivos Protocol was signed on Feb. 18, 2002.
182. Retreated Tires I, *supra* note 180.
183. *Id.*
184. *Id.* ([E]l estoppel . . . el carácter obligatorio de las declaraciones de un Estado que le obligan a respetar una conducta determinada, tiene como base actos secundarios de un tercer Estado y consecuencias perjudiciales que resultarían de un cambio de actitud del Estado que creó la expectativa en el otro Estado).
185. CMC Decision 22/00 (July 30, 2000).
186. Retreaded Tires I, *supra* note 180.
187. Lavranos, *supra* note 25, at 215.
188. Retreaded Tires II, *supra* note 76, ¶ 82.
189. *Id.*

created.[190]

Furthermore, the court ruled that, at a minimum, estoppel must have at least three elements: (1) a situation created by a State, as primary conduct; (2) followed by the conduct of another State, secondary conduct; and (3) the impossibility of the State that created the situation to behave contrary to the primary conduct.[191]

The court held that the principle of estoppel was not applicable to the case because estoppel is not an absolute principle,[192] and also that estoppel in this case would depend on the existence of a commercial flow or practice sufficient to generate the anticipation that an international obligation international was formed.[193] Therefore, until October 2002,[194] estoppel in MERCOSUR applied only when there was reliance by one state on the precedent conduct of another state and if the case involved the flow of goods across borders,[195] the flow had to be enough to create reliance.

2. *Decision of the Permanent Review Tribunal*

As stated above,[196] Uruguay disagreed with the arbitral award decided in favor of Argentina and appealed to the Permanent Review Tribunal. This was the first time that the review organization had the opportunity to evaluate an ad hoc decision.[197] Thus, the court decided to be very explicit in explaining the nature of its review power stating that the court can decide not only issues of law, but issues of fact.[198] It stated the issue to be "the interpretation and application of the free trade principle and its exceptions in article 50 of Montevideo Convention, and its application to the [present] case."[199]

Then, the court went further to specify that the issue was the applicability of the exception in article 50 of the Montevideo Convention to

190. *Id.* ¶ 83 ("Mediante ese principio se impide que un Estado reclame para si la observacia de un derecho de que es titular o el ejercicio de una facultad admitida por el Derecho, sit al pretension resulta contraria al contenido de ese derecho o al ejercicio de las facultades que lo integran o que el Derecho reconoce e incompatible con las legitimas expectativas originadas en el patrimonio juridico del Estado, los Estados que, de Buena fe y de forma reasonable, han confiado en la veracidad de la conducta primaria y han acomodado sus intereses de conformidad con el Nuevo estado de las cosas asi creado.")

191. *Id.* ¶ 85.

192. *Id.* ¶ 87, 103 (pointing out that the principle of estoppel might be suspended in reason of another principle, in this case, the principle of protection of life and health of people and animals regulated in art. 50(d) of the Montevideo Treaty).

193. *Id.* ¶ 103.

194. Including the Uruguay v. Brazil decision of the same year, but decided under the Brasilia Protocol.

195. Retreated Tires II, *supra* note 76, ¶ 103.

196. *See* Olivos Protocol, *supra* note 96.

197. The PRT was created in February 2002 through the Olivos Protocol, and before it there were only ad hoc tribunal decisions, wither under the new Olivos Protocol process or the former Brasilia Protocol.

198. Arbitral Award No. 01/2005, *supra* note 98, ¶¶ 1–3.

199. *Id.* ¶ 3.

MERCOSUR law and not to general international law.[200] With this perspective, the court recognized that estoppel, as "a concept of Anglo-Saxon origin,"[201] has been used in international law; however, because "it is a non-originating . . . right outside the integration concept . . . [it] should only be applicable to dispute settlement processes of integration as a [measure of] last resort."[202] Indeed, the court ruled that although the principles of international law are mentioned as part of the sources of MERCOSUR,[203] "[their] application should always be alone subsidiary . . . and only when they are applicable to the case [in review]."[204]

Analyzing the Ad Hoc Tribunal decision, the court concluded that the elements of estoppel enunciated by the Ad Hoc tribunal were correct.[205] The court also agreed with the Ad Hoc Tribunal that "estoppel has not [an] absolute character,"[206] but it disagreed with the decision of the Ad Hoc tribunal to add a fourth requirement to estoppel.[207] The reason is that the fourth requirement is not consistent with an integration scheme "in [the MERCOSUR case] with countries with diametrically different markets and economies in size and development."[208]

Therefore, the rule in the MERCOSUR system is that estoppel can only be applied in MERCOSUR cases as a supplementary principle and only when applicable to the case in review. Also, there must exist a situation created by a State (primary conduct), followed by the conduct of another State (secondary conduct), and the impossibility of the State that created the situation to behave contrary to the primary conduct.[209]

VI. CONCLUSION

MERCOSUR was created as an intergovernmental organization rather than a supranational organization.[210] Consequently, the main organs of the MERCOSUR are integrated by the Ministers of Foreign Affairs of each country, the parliament is constituted of members appointed by each member state's parliament, and the MERCOSUR Secretariat has only supportive power in lieu of executive power. The ideas and values of each member state are reflected in the conduct of MERCOSUR.

The member states of MERCOSUR—Argentina, Brazil, Uruguay, Paraguay, Venezuela, and Bolivia—are states that employ civil (or Roman) legal systems. The civil legal system has principles of equity that are only used as means to supplement the law, but never as a formal source of law.

---

200. *Id.* ¶ 9.
201. *Id.* ¶ 21.
202. *Id.* ¶ 21 (referring to MERCOSUR as the integration process).
203. Olivos Protocol, *supra* note 6, art. 34.1.
204. Arbitral Award No. 01/2005, *supra* note 98, ¶ 9.
205. *Id.* ¶ 22.
206. *Id.*
207. *Id.* ¶ 22 (arguing that the existence of permanent trade flow is not necessary).
208. *Id.*
209. *Id.*
210. *See* Vervaele, *supra* note 41; Taylor, *supra* note 55; de Araujo *supra* note 56.

Estoppel is a principle, created under the primitive Roman law, which has become a principle of equity used in common law systems. Estoppel is the principle of law that basically prohibits a person from denying a fact already accepted as true.

Estoppel has been widely used in various decisions involving international law, but MERCOSUR has rejected its application to MERCOSUR law, unless there is no other option. Estoppel only applies to MERCOSUR law as a measure of last resort when a state has detrimentally relied on the conduct of another state.

Therefore, the decision of the Permanent Review Tribunal in *Uruguay v. Argentina* concerning retreaded tires is consistent with the MERCOSUR system. The reason is that estoppel is an equity principle used in common law systems and MERCOSUR is an intergovernmental organization composed of countries using civil law. Estoppel is therefore a principle extraneous to MERCOSUR law.

Case Note & Comment