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Estoppel: What's the Government's Word Worth? An Analysis of German Law, Common Law Jurisdictions, and of the Practice of International Arbitral Tribunals[†]

A major priority for any company contemplating foreign investment is the establishment of contacts, be they direct or indirect, with the relevant foreign authorities. Without the necessary information and approvals most ventures would be doomed from the outset. In this context companies are all too frequently confronted with the question whether and/or to what extent foreign authorities are bound by promises or statements made to an investor. This uncertainty can be of enormous significance when, for example, a company is promised a building subsidy, a tax concession, or a permit to purchase real estate.¹

A possible scenario would be as follows: The firm INVEST intends to buy a piece of land in order to set up a luxury retirement village with extensive leisure facilities. INVEST applies to the relevant local authority for the necessary permits for the area, which lies partly in a residential area and partly in a nature reserve. Upon being asked by INVEST's agent whether a permit for the intended purchase would be granted, the officer responsible replies that there would be

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[†]The Editorial Reviewer for this article was Susan F. Harris.

1. See, e.g., *Hampshire Mfg. Corp. v. United States*, 667 F. Supp. 874 (Ct. Int'l Trade 1987), where the United States Customs Service had promised to value particular imported goods on the basis of the "export value" instead of on the basis of the "American selling price."

"no problems" in this regard. The firm wishes to finance the purchase by selling several blocks in another district, but the intended swap fails. After negotiations the officer responsible signs a permit allowing INVEST to sell the blocks in question. Despite the previous oral assurance, the responsible authorities subsequently issue a written refusal of the purchase application, thereby frustrating INVEST's aims.²

I. Federal Republic of Germany

In German law the question of whether the authorities are bound by such assurances depends on the legal form in which the assurances were made. If, for example, the assurance is made as a preliminary decision in the form of an administrative act benefitting the applicant, then the possibility of a withdrawal or revocation is determined by sections 48 and 49 of the Federal Administrative Procedure Act (*Verwaltungsverfahrensgesetz* or VwVfG)³ as well as the corresponding state regulations. First, it is necessary to determine whether or not the administrative act was in conformity with the law. In the case of a beneficial and legitimate administrative act the principle of irrevocability applies, although an absolute bar to revocation is not created. The authorities may only revoke a beneficial and legitimate prospective administrative act under the narrow conditions of section 49 paragraph 2 of the VwVfG. In such a case they are obliged to compensate the affected person for the damages incurred by his reliance on the continued effect of the administrative act, to the extent that his reliance is worthy of protection (section 49 paragraph 5 of the VwVfG).

If the beneficial administrative act is of an illegal nature the principle of protection of reliance applies. In the case of material or monetary activities or transactions arising from an illegal administrative act, this principle means that the administrative act may not be revoked insofar as the beneficiary has relied on the administrative act continuing to be effective and his reliance is worthy of protection when balanced against the public interest in revocation (section 48 paragraph 2 subparagraph 1 of the VwVfG). In the case of benefits that are neither monetary nor material in nature arising from an illegal administrative act, the appropriate remedy is financial compensation. In these circumstances the administrative act may be freely revoked as long as compensation is paid for damages arising from reliance (section 48 paragraph 3 subparagraph 1 of the VwVfG).

During the investment process the question of administrative acts (or their absence) frequently does not arise until late in the proceedings. Nonetheless, the

2. These facts are based on a decision of the German Federal Administrative Court, 1 Entscheidungen des Bundesverwaltungsgericht [BVerwGE] 254 (1955).

3. The *Verwaltungsverfahrensgesetz* [VwVfG] is a codification of the rules of procedure in administrative actions. Although there exist both federal and state Administrative Procedure Acts, most of their regulations are identical, since all Acts are based on a uniform draft.

person involved has an obvious and immediate interest in gaining a binding promise from the authorities concerning their future actions. Such an interest is particularly understandable when the authorities have discretionary powers with regard to the contemplated administrative action. Even in cases where the authorities have no discretion, however, it may be advantageous to obtain a binding statement, particularly if the state of the law is unclear or disputed.

For just such circumstances case law and doctrinal writers⁴ have developed the institution of the "administrative promise" or *öffentlich-rechtliche Zusage*.⁵ The West German legislature has defined one aspect of the "administrative promise," the so-called "assurance" or *Zusicherung*, in section 38 of the Administrative Procedure Act. The *Zusicherung* is a promise given by the responsible authority to carry out or refrain from carrying out a particular administrative act at some future point in time. It is, however, only effective when given in writing, and is thus not applicable to the circumstances under investigation here.

Apart from the *Zusicherung* under section 38 of the Administrative Procedure Act, there exists the "general" administrative promise or *allgemeine öffentlich-rechtliche Zusage*. This becomes significant whenever an authority promises to make a decision, to carry out some kind of administrative act, to conclude a public contract, or to act in a private legal capacity such as in the sale or purchase of real estate.⁶ The prerequisites for the effectiveness of the assurance (*Zusicherung*) are not applicable to the promise (*Zusage*).⁷

An effective *Zusicherung* presupposes that the administration enters into an official obligation towards the promises and wishes to be bound by the obligation.⁸ This is the crucial difference between entering into a promise and merely providing information. In the latter case the authorities have no desire to bind themselves, but are rather simply providing information concerning factual or legal circumstances. The authorities can only be legally bound with regard to the promisee if they have unambiguously expressed their willingness to do so. It is not sufficient for the authorities to state, for example, that a permit would be issued shortly.⁹ It is also necessary that the matter concerning which the promise is made lies within the power of the administration and that the promise is made by an officer who, by virtue of his position within the administration is authorized to make such declarations. In addition, the promise must not

4. The work of doctrinal writers occupies a more fundamental and integral place in the hierarchy of the Romano-Germanic legal system when compared with the Common Law system; see R. DAVID & J. BRIERLEY, *MAJOR LEGAL SYSTEMS IN THE WORLD TODAY* 147-54 (3d ed. 1985).

5. See W. FIEDLER, *FUNKTION UND BEDEUTUNG ÖFFENTLICH-RECHTLICHER ZUSAGEN IM VERWALTUNGSRECHT* (1977).

6. For an overview of these various circumstances, see K. OBERMAYER, *KOMMENTAR ZUM VERWALTUNGSVERFAHRENSGESETZ* § 38 Randnuer [RdNr.] 14 (Neuwied 1983).

7. This remains the dominant opinion in case law and commentaries; see P. STELKENS, H. BONK & U. LEONHARDT, *VERWALTUNGSVERFAHRENSGESETZ* 38 RdNr.2 (2d ed. 1983).

8. BVerwG, 1966 *Zeitschrift für Beamtenrecht* 377; 1976 *Deutsches Verwaltungsblatt* 339.

9. 74 BVerwGE 15, 17 (1987).

contravene any *Rechtssatz* or "legal rule."¹⁰ If a promise is illegal due to a breach of a regulation then, according to the cases and the greater part of the literature, the general principles for the revocation of illegal beneficial administrative acts are not applicable. Instead the promise is to be seen as nonbinding. Only in narrowly defined and exceptional circumstances may the promise be binding due to the need to protect the promisee's reliance.¹¹

This short overview of West German law concerning oral promises made by public authorities shows that considerable uncertainty exists. The criteria expounded by the Federal Administrative Court are hardly suited to allowing an unequivocal prognosis as to whether an authority's promise is binding or not.

II. The Common Law Jurisdictions

The divergent historical development of the law in England and on the Continent shows that there exists in the Common Law jurisdictions, in contrast to the Continental legal orders, no discrete legal category known as public law.¹² The question as to whether an authority is bound by a promise or assurance has been traditionally characterized as being one of private law.

A private individual will be held to a promise or to an assurance if the said promise or assurance was made to another person with the intention that it be binding and the other person has acted in reliance thereupon.¹³ Such issues primarily come under the rubric of estoppel. Three general forms of estoppel may be distinguished: "by record," "by deed," and "by representation." In the present case the last form, "by representation," applies. It may occur:

where one person (the representor) has made a representation to another person (the representee) in words or by acts and 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

10. *Id.* For a brief description of the significance of the "legal rule" (*Rechtssatz* or *règle de droit*) in the Romano-Germanic legal system, see R. DAVID & J. BRIERLEY, *supra* note 4, at 94, 335.

11. BVerwG, 1966 Deutsches Verwaltungsblatt 857. For an opposing view, see W. FIEDLER, *supra* note 5, at 80.

12. See R. DAVID & J. BRIERLEY, *supra* note 4, at 81–85. Indeed it was for a long time denied that there existed in England any such thing as "administrative law." This was primarily the result of the theories of the prominent English jurist A. V. Dicey. Only in the last few decades of this century has a relatively coherent body of administrative law developed in the common law jurisdictions, primarily through the decisions of the higher courts. Australia would appear to have gone further in this regard, as comprehensive federal legislation (known as the "new administrative law") has in many areas replaced or augmented judge-made law. A particularly significant development was the creation of the Australian Administrative Appeals Tribunal, which in many respects may be compared to the West German Bundesverwaltungsgericht or the French Conseil d'État. See S. HOTOP, *PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW* chs. I, X (6th ed. 1985).

13. *Robertson v. Minister of Pensions* [1948] All E.R. 767, 770.

variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.¹⁴

This principal of private law, however, cannot simply be transplanted into the public sphere. Originally the public administration was in general allocated a privileged position:

Although the courts have developed a doctrine of equitable estoppel, under which one who makes a representation to another who reasonably relies on it to his detriment is estopped to deny the truth of the representation or to gain by taking a position inconsistent with the representation, the court built up a large body of law that the doctrine of equitable estoppel does not apply to the government.¹⁵

Many judgments illustrate these precepts by statements such as: "The King is not bound by estoppels, though he can take advantage of them."¹⁶ On the other hand, a series of decisions also exist in which the doctrine of estoppel was expressly applied against the public administration.

The starting point for determining the applicability of the doctrine of estoppel against the Crown is the question of how the relevant statutory bases define rights and obligations. One group of statutes determines directly how rights and obligations arise without the administration being able to exert any influence on them ("the statute speaks for itself"). Another group of norms grants the administration the power to determine individually the rights and obligations ("the statute defines rights in terms of determination").

A. FIRST GROUP OF CASES: "THE STATUTE SPEAKS FOR ITSELF"

In this first group there can be no application of the doctrine of estoppel, since the legal relationships are independent of official acts:

No estoppel can arise out of the acts of an official who enjoys no authoritative power of decision in relation to the rights and obligations in question. Why should this be so? The answer is the supremacy of legislation. *Ex hypothesi*, legal relations arising from legislation are independent of official action. Consequently, nothing can be made to hinge on the conduct of officials without disturbing the legal consequences called for by the statute.¹⁷

This principle was applied in *Millet v. The Queen*.¹⁸ In this case the husband of the plaintiff concluded an insurance contract with the Crown under the Veterans' Insurance Act. The relevant conditions of performance contained a stipulation by which the policy would become invalid if the insurance payments were made late. The husband made two late payments which were nonetheless

14. G.S. BOWER & A. TURNER, *THE LAW RELATING TO ESTOPPEL BY REPRESENTATION* 4 (2d ed. 1966).

15. K.C. DAVIS, *ADMINISTRATIVE LAW* 343 (3d ed. 1972).

16. *The King v. Royal Bank of Canada*, [1920] 50 D.L.R. 293, 304 (Manitoba Ct. App.).

17. McDonald, *Contradictory Government Action: Estoppel of Statutory Authorities*, 17 OSGOODE HALL L.J. 160, 161 (1979).

18. [1954] Ex. C.R. 562 (Can.).

accepted by the responsible officers. The last payment before his death was also late. The Crown relied on this delay and declared the contract of insurance invalid.

The Exchequer Court decided that the acceptance of the delayed payments by the Crown did not prevent it from insisting on strict compliance with the conditions of performance. The Crown could thus rely on these conditions in declaring the policy invalid. The court reasoned that "where a particular obligation or duty is imposed by statute or by regulations validly made thereunder and embodied in a contract no estoppel should be allowed to give relief from the said obligation."¹⁹ The primary basis for the strict application of the statutory regulations is that these norms would otherwise be treated as if they had never entered into force.²⁰ This reasoning is reflected in a range of decisions:

[Estoppel] cannot, therefore, avail in such a case to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law.²¹

B. SECOND GROUP OF CASES: "THE STATUTE DEFINES RIGHTS IN TERMS OF DETERMINATION"

A different set of circumstances arises when the public administration exercises a certain degree of competence in making decisions. McDonald characterizes this group of cases in the following terms: "In such a case, [the government official] is not in the same position as a private person. His decisions are not extraneous to the statutory rights and obligations that are to be implemented."²²

When considering decisions of a discretionary nature the administration cannot be bound to exercise its discretion one way or the other, nor can it be bound to refrain from making any decision at all. If, however, the administration does make a decision, it is then bound by it. These principles have found recognition in many judgments in various common law jurisdictions.²³ The following cases are illustrative of the breadth of application of the principles.

In *Jaillard v. City of Montreal*²⁴ the responsible head of the police station had initially given his approval in principle to a construction application. He

19. *Id.* at 572 (Fournier, J.).

20. McDonald, *supra* note 17, at 162; *see also* *The Mun. Council of the United Counties of Peterborough & Victoria v. The Grand Trunk Ry. Co.*, 18 U.C.Q.B. 220, 224 (1859).

21. *Maritime Elec. Co. v. General Dairies, Ltd.*, [1937] A.C. 610, 620 (P.C. 1935) (Can.) (Lord Maugham). In this case the plaintiff, an energy utility in Fredericton, New Brunswick, had mistakenly undercharged the defendant. The Privy Council overturned the decision of the Supreme Court of Canada and determined that there was no estoppel, as § 16 of the Public Utilities Act of New Brunswick provided that all "public utility companies" were to charge the set rates, no more and no less.

22. McDonald, *supra* note 17, at 162.

23. For a detailed discussion, *see* McDonald, *supra* note 17, at 167.

24. [1934] 72 C.S. 112 (Quebec Superior Court).

subsequently refused the application, however, due to the opposition of a parish priest. The Cour Supérieure de Montréal ordered the city to grant the approval sought on the grounds that the administration was obliged to decide according to its own discretion, not that of others. The court reasoned as follows:

[I]f the authority to exercise that discretion is delegated to an officer of the city, . . . , that discretion should be exercised by that officer and not by another. . . . The refusal of the officer to grant the permit was not the exercise of his judgment or his discretion, but the discretion or judgment of another, who had no authority whatever to interfere in or control the matter.²⁵

In *R. v. Dominion of Canada Postage Stamp Vending Co.*²⁶ the Postmaster General had, in the exercise of his authority, distributed licenses for the sale of postage stamps. These licenses were in the form of contracts which, inter alia, foresaw that such licenses would be irrevocable. The Supreme Court of Canada held the irrevocability clause to be inadmissible for the following reasons:

A Minister cannot, by agreement, deprive himself of a power which is committed to him to be exercised from time to time as occasion may require in the public interest, or validly covenant to refrain from the use of that power when it may be requisite, or expedient in his discretion, upon grounds of public policy, to execute it . . .²⁷

Although this principle is basically unquestioned, there have been some cases in which the administration had limited its own room for maneuvering and was subsequently bound thereby.²⁸

In one case, *Re Multi-Malls Inc. & Minister of Transportation*,²⁹ a local council had submitted to the Minister for approval a draft plan, in accordance with the relevant regulations. Section 15(1) of the Planning Act allowed for the Minister to refer the draft plan as a whole or in part back to the local council and that he should do this upon request of a person affected. After receiving the draft plan, the Minister gave an assurance that he would refer a certain part of the draft plan, for which alterations had been requested, back to the local council. In spite of this promise, the Minister approved the plan as a whole, without having referred back the part in question for reconsideration.

The Ontario Court of Appeal cited the judgment of the English Court of Appeal in the *Liverpool* case³⁰ and decided that the approval by the Minister was without effect:

In my view, on this basis, it was implicit in the assurances given by the Ministry that the plan would not be approved without the requested modifications unless there was a reference to the Board. The appellants relied on the assurances [given by the Ministry]

25. *Id.* at 114 (Greenshields, C.J.).

26. [1930] 4 D.L.R.241 (Can.).

27. *Id.* at 244 (Lamont, J.).

28. For a detailed discussion, see McDonald, *supra* note 17, at 175.

29. [1977] 73 D.L.R.(3d) 18 (Ontario C.A.).

30. *Re, Liverpool Taxi Owners' Association*, [1972] 2 All E.R. 589 (C.A.).

to their detriment, as they themselves could and would have requested the Minister to refer the matter. The Liverpool decision . . . imposed on the Minister, in accordance with natural justice if not by estoppel, the duty not to give approval to the unmodified official plan without referring the matter to the Municipal Board for a public hearing, in accordance with his statutory duty and the assurances given.³¹

The Court of Appeal came to a similar conclusion in *H.T.V. Ltd. v. Price Comm'n*,³² in which Lord Denning held the Commission to be bound by its prior systematic and uniform interpretation of statutory regulations.

This principle was further developed by way of the decision of the Ontario High Court in *Re Smith & Municipality of Vanier*.³³ In this case the applicant had made an application for a license to run a public hall. His application was rejected. The initial decision was justified by the Municipal Council on the basis of unsatisfactory safety precautions and the lack of evidence of adequate insurance. The applicant eliminated these defects and informed the municipality accordingly. The municipality then passed a resolution not to approve the public hall "in the public interest." Without expressly relying on the doctrine of estoppel the municipality was directed to reconsider the application:

Would not a reasonable man be entitled to assume from the posture of the Municipal Council on return of the first motion that approval would be forthcoming if he remedied the deficiencies? In the present case the applicant ordered his affairs accordingly. Then, after completing the deficiencies with the financial consequences which that entailed he finds that the Council refused to issue the license. Under such circumstances I believe a Court is entitled to look beyond the resolution to refuse the license. I am of opinion that there was a want of good faith in law and accordingly an order of mandamus may issue.³⁴

McDonald summarizes the principles inherent in this group of cases thus:

A public authority cannot be estopped from exercising its powers. But once the authority has decided that a particular exercise of power is appropriate, it must act accordingly, at least where there has been reliance on that decision. . . . But the principle is taken one step further in cases such as *Re Smith and Municipality of Vanier*. When the authority by its conduct leads the individual to believe that a decision has been made, it is to be treated as having made the decision. And having made it, the authority must act accordingly.³⁵

C. ULTRA VIRES CASES

In the cases illustrated above the doctrine of estoppel was only recognized when the information had been given by an officer who was responsible for the distribution of such information or for the performance of the relevant administrative action, or when the substance of the information duly given by a

31. [1976] 73 D.L.R. (3d) 18, 34-35 (Lacourrière, J.A.).

32. [1976] I.C.R. 170 (C.A. 1975).

33. [1973] 30 D.L.R.(3d) 386 (Ontario High Ct.).

34. *Id.* at 392 (Pennell, J.).

35. McDonald, *supra* note 17, at 180-81.

responsible authority lay within the competence of that authority.³⁶ This limitation of the doctrine of estoppel was to some degree tacitly assumed, but was also in certain circumstances expressly mentioned. For example, one court noted that "The Liverpool decision . . . imposed on the Minister, in accordance with natural justice if not by estoppel, the duty not to give approval to the unmodified official plan without referring the matter to the Municipal Board for a public hearing, *in accordance with his statutory duty* and the assurances given."³⁷ On the other hand, some newer cases presuppose a certain binding of the administration even in cases where either the informant was not the responsible person or the information given was *ultra vires*.

1. *England*

The initial judgment in England in this direction was that of the King's Bench Division in *Robertson v. Minister of Pensions*.³⁸ In this case the plaintiff was injured during his army service. A medical examination found him to be no longer fit for service. He then applied to the War Office for a pension. Without informing the Minister of Pensions, the War Office replied that his incapacity to work was attributable to his army service. In reliance upon this reply the petitioner undertook no further steps to obtain an independent medical opinion or to assure the storage of the X-ray exposures, which subsequently went missing. The King's Bench Division had to decide whether the Minister of Pensions was bound by the War Office's reply. Lord Denning came to the conclusion that the Minister of Pensions was bound by the War Office's reply for the following reasons:

The case fell within the principle that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it was given, then, once it is acted upon, he is bound by it. . . . The next question is whether the assurance is binding on the Crown. The Crown cannot escape by saying that estoppels do not bind the Crown, for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, i.e., the doctrine that the Crown cannot bind itself so as to fetter its future executive action.³⁹

In this case, the information was given to the plaintiff by the wrong authority, but was substantively correct, and the plaintiff was not in a position to recognize that the War Office was the responsible authority. "That was, on the face of it, an authoritative decision intended to be binding and intended to be acted on. Even if Colonel Robertson had studied the Royal Warrant in every detail, there

36. *Jaillard v. City of Montreal*, [1934] 72 C.S. 112; *Cité de Montréal v. Hôpital Voghel Inc.*, [1962] B.R. 497; *Ville de Montréal v. The New Cheetah Club "69" Ltd.*, [1973] C.A. 375 (Q.B.); *Dame St-Pierre v. Ville de Villeneuve*, [1969] C.S. 544; *The Queen v. B.V.D. Co.*, [1952] Ex.C.R. 191.

37. *Re Multi-Malls Inc. & Minister of Transp.*, [1976] 73 D.L.R.(3d) 18, 34-35 (Ontario C.A.) (Lacourière, J.A.) (emphasis added).

38. [1948] 2 All E.R. 767 (K.B.).

39. *Id.* at 770.

would have been nothing to lead him to suppose that the decision was not authoritative."⁴⁰

This decision was criticized in a series of judgments, particularly in the decision of the House of Lords.⁴¹ Nonetheless in *Lever Finance Ltd. v. Westminster Corp.*⁴² Lord Denning reiterated and expanded upon his reasoning in *Robertson*. In this case the responsible construction authority had approved a plan of Lever Finance for building a housing complex. After the commencement of construction the company modified the plan and sent the authority a copy of the new plan. In the course of a telephone conversation, without having the original in front of him, the responsible planning officer incorrectly informed the architect, "quite clearly . . . the alterations were not material, and that therefore he had no objection and no further consent was required."⁴³ Relying on this information Lever Finance proceeded with construction. Upon detecting the error the authority refused to approve the new application.

After referring to earlier precedents, Lord Denning departed from them by declaring: "Those statements must now be taken with considerable reserve."⁴⁴ He referred to the reasoning in his previous decisions on this subject, stating:

[I]f an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be. . . . So here it has been the practice of the local authority, and of many others, to allow their planning officers to tell applicants whether a variation is material or not. Are they now to be allowed to say that that practice was all wrong? I do not think so. It was a matter within the ostensible authority of the planning officer; and, being acted on, it is binding on the council.⁴⁵

Whereas Lord Denning made it clear in *Robertson* that the reply of the War Office reflected the actual legal situation, he emphasized in *Lever* that the "planning officer made a mistake." The position was thus precisely the opposite of that prevailing in *Robertson*. In the one case an unauthorized body gave information which was objectively and legally correct and in the other the officer responsible gave information beyond his own competence. This decision means that it must be assumed that an authority may even be bound in ultra vires cases, provided either an unauthorized officer gives information which is legally correct or an authorized officer exceeds his sphere of competence.

This expansion of the grounds upon which an administration may be bound by its own decisions has also found favor in literature on the topic:

40. *Id.* at 769.

41. *Howell v. Falmouth Boat Constr. Co.*, [1951] A.C. 837; *Southend-on-Sea Corp. v. Hodgson (Wickford) Ltd.*, [1962] 1 Q.B. 416; *Wells v. Minister of Hous. & Local Gov't*, [1967] 1 W.L.R. 1000 (C.A.).

42. [1970] 3 All E.R. 496.

43. *Id.* at 498.

44. *Id.* at 500.

45. *Id.* at 500, 501.

Ainsi, l'Administration publique est liée par une information lorsque son contenu est conforme à la législation applicable et que le préposé qui l'a donnée était autorisé à le faire. Certains juges, plus innovateurs, ont pourtant décidé, soit en «forçant» la notion de l'intra vires, soit en se fondant sur la doctrine de l'ostensible authority, que l'Administration était liée même si, au sens strict, il y avait excès de juridiction.⁴⁶

Another source states:

Despite trenchant criticism from the House of Lords, Lord Denning has persisted in his view that individuals who deal with public officials should not be prejudiced by relying on the representations made by officials with apparent authority whom they reasonably, though erroneously, believe to be acting within their legal powers.⁴⁷

The expansion of the doctrine of estoppel as expressed in *Lever* has recently again been limited. In *Western Fish Products v. Penwith Dist. Council*⁴⁸ the English Court of Appeal held:

In any event, an estoppel could not be raised to prevent a statutory body exercising its statutory discretion or performing its statutory duty, and therefore, even if the council's officers while acting in the apparent scope of their authority had purported to determine the plaintiffs' planning application in advance, that was not binding on the council because it alone had power under the 1971 Act to determine the applications.⁴⁹

The doctrine of estoppel is thus applicable in two types of cases. First, if an authority delegates responsibility for a decision that is within its sphere of competence to one of its officers, it is bound by his decision.⁵⁰ Second, an authority cannot rely on a procedural requirement not being fulfilled if it has decided not to insist on such fulfillment.⁵¹

This limitation of the doctrine of estoppel in construction law is explicable in terms of the purpose of these regulations. Justice requires that not only the interests of the builder but also those of the potentially affected neighbors be taken into account.

But then comes the difficulty, and the real danger of injustice. To permit the estoppel no doubt avoided an injustice to the plaintiffs. But it also may fairly be regarded as having caused an injustice to one or more members of the public, the owners of adjacent houses who would be adversely affected by this wrong and careless decision of the planning officer that the modifications were not material. Yet they were not, and it would seem could not, be heard. How, in their absence, could the court balance the respective injustices according as the court did or did not hold that there was an estoppel in favour of the plaintiffs? What "equity" is there in holding, if such be the effect of the decision, that the potential injustice to a third party, as a result of the granting of the estoppel is irrelevant?⁵²

46. Pelletier, *Les conséquences juridiques des informations erronées fournies par les préposés de l'Administration publique*, 23 LES CAHIERS DE DROIT [C. DE D.] 356 (1982).

47. Evans, *Delegation and Estoppel in Administrative Law*, 1971 MODERN L. REV. 335, 340.

48. [1981] 2 All E.R. 204.

49. *Id.* at 205.

50. *Id.* at 219.

51. *Id.* at 221.

52. *Id.* (Megaw, L.J.).

This judgment in particular shows clearly that the limitation of the doctrine of estoppel in construction law is primarily directed at preventing injustice to neighbors. This limitation does, however, appear to be applicable to areas outside that of building and construction. In *Rootkin v. Kent County Council*⁵³ the Court of Appeal referred to the earlier decisions in determining that a public authority cannot bind itself to exercise its discretionary powers in a particular manner.

2. Canada

There exist a number of Canadian decisions which have not incorporated the recent English judgments and continue to proceed from the assumption that administrators cannot be bound with respect to acts which are *ultra vires*.⁵⁴ Even this principle, however, is not without controversy. In *Silver's Garage Ltd. v. Bridgewater* the Supreme Court for the first time expressed some doubts on this issue:

After having read a great many of the authorities, I am satisfied that where a municipal corporation has entered into a contract by resolution of its council, the absence of the formality of a by-law or an agreement under seal is *not necessarily fatal* to the claim of the other contracting party if he has performed his part of the contract and the corporation has accepted the benefit of it.⁵⁵

In the same way there have been some cases in which the relevant authority was held to be bound by its acts in spite of a breach of statutory regulations:

The material before me indicates that a practice [which was deficient under the zoning by-law] has developed and has been followed by builders and by the city of breaking a building permit into three stages: excavation, foundation and superstructure erection. I do not think it appropriate for the city to now resist mandamus by saying to the applicants . . . you should have done something that was not the agreed and accepted mode of procedure which was adopted and followed by the city and by builders.⁵⁶

These cases suggest that the Canadian courts are disposed to concur with the more recent English decisions to the extent that estoppel becomes a possibility when merely procedural regulations have been breached. On the other hand there appear to have been no Canadian cases where *Lever* has been applied. In this context, two cases which deal with the doctrine of estoppel in the context of citizenship and immigration law are of particular interest.

In *Gill v. The Queen*⁵⁷ two Indian citizens were only allowed to enter Canada after having committed themselves to depart Canada on a certain day and after

53. [1981] 1 W.L.R. 1186.

54. *Re Ormerod and Township of Ancaster*, [1972] 21 D.L.R.(3d) 541 (Ontario High Ct.); *Re David Gallo Bldg. Co. & City of Toronto*, [1974] 38 D.L.R. 536 (Ontario High Ct.). Neither case, however, referred directly to the doctrine of estoppel.

55. [1971] 17 D.L.R.(3d) 1, 9 (Can.) (Ritchie, J.) (emphasis added).

56. *Re George Herczeg Ltd. & City of Toronto*, [1973] 26 D.L.R.(3d) 165, 168 (Galligan, J.); see also *Chater v. City of Dartmouth*, [1975] 62 D.L.R.(3d) 122 (Nova Scotia 1st Div.).

57. [1978] 88 D.L.R.(3d) 341 (Can.).

the plaintiff had deposited a certain amount of money as a guarantee that they would in fact leave. Before the expiration date they applied to be accepted as landed immigrants. Their application went to appeal and was not finally rejected until after the specified date. The responsible immigration officer then decided that the deposit had been forfeited under section 63 of the Immigration Act.⁵⁸ The plaintiff, however, maintained that the officers responsible had given an assurance that the deposit would not be forfeited as long as the immigration case was still pending.

The Federal Court rejected the concept of the Crown being bound by the doctrine of estoppel, without elaborating on precedents dealing with this issue. Cattanaach, J., stated:

In my opinion the evidence does not establish that such representations were made but even assuming that they were made and the visitors were induced thereby to act to their detriment that amounts to an invocation of the doctrine of estoppel and the doctrine of estoppel does not lie against the Crown. It is not open to the plaintiff to set up an estoppel to prevent the operation of the statute nor can representations made by department officers preclude the operation of the statute.⁵⁹

This decision of the Federal Court, taken literally, is diametrically opposed to the Canadian and English precedents. As stated above, the Crown cannot be prevented from exercising its discretionary powers where they exist. It is, however, bound by any such exercise. Section 63 of the Immigration Act did not provide for any compulsory forfeiture of the deposit. A decision in this respect lay rather within the discretion of the responsible immigration officer. The immigration officer had exercised this discretion by giving an assurance that the deposit would not be forfeited as long as the immigration case was pending, and according to the existing precedents he was bound by this decision. McDonald expressed a similar view:

I do not see how the operation of the statute would have been defeated since the statute did not require forfeiture; it authorized the immigration officer to make an order of forfeiture, and in exercise of that authority the immigration officer had decided that forfeiture was not appropriate in particular circumstances.⁶⁰

The *Gill* decision thus appears not to have revolved around the applicability of the doctrine of estoppel. The Federal Court appears rather to have relied to a not inconsiderable degree on the conviction that the immigration officer had made no such assurance:

In my opinion *the evidence does not establish that such representations were made but even assuming that they were made* and the visitors were induced thereby to act to their detriment that amounts to an invocation of the doctrine of estoppel and the doctrine of estoppel does not lie against the Crown.⁶¹

58. Immigration Act, CAN. REV. STAT. ch. 1-2 (1970).

59. [1978] 88 D.L.R.(3d) at 345.

60. McDonald, *supra* note 17, at 168 n.39.

61. [1978] 88 D.L.R.(3d) at 345 (emphasis added).

This interpretation is also supported by the fact that the Federal Court did not in any way address the precedents on estoppel. In addition, the Federal Court did not recognize the plaintiff as the legal claimant:

Inasmuch as the deposits were forfeited, there was no debt owing to the aliens which could be assigned to the plaintiff. In any event, a Crown debt is not assignable accept [sic] under the provisions of section 80 of the *Financial Administration Act*, R.S.Canada 1970, c. F-10, or any other Act of Parliament, and there was no such assignment. The powers of attorney did not amount to equitable assignments but were merely directions to pay to the plaintiff any moneys owing to the aliens. They created no right of action in the plaintiff against the Crown even if the moneys had become payable to the aliens.⁶²

It may thus be argued that the comments on the doctrine of estoppel in this case should only be seen as obiter dicta.

With the decision of the Federal Court decision in *In re Citizenship Act and in re Holvenstot*⁶³ the Canadian courts seem, on the other hand, to have accepted to some extent Lord Denning's approach in *Lever*. In *Holvenstot* the appellant had made an application for naturalization. This application was rejected by the authorities on the grounds that the appellant had been charged under section 6 of the Narcotic Control Act.⁶⁴ The trial had, however, been stayed under section 508(1) of the Criminal Code.⁶⁵ According to section 508(2) of the Criminal Code the trial could be reactivated at any time within one year of the stay of proceedings. A stay as such would in no way hinder a possible continuation of proceedings. The Court concluded that:

[I]t seems clear that because of subsection 508(2) [Criminal Code], no constraint on the Crown's future action on the charge arose because of the stay alone. For the statutory period mentioned there, the Crown is expressly permitted to continue proceedings on a stayed charge. Furthermore, it has been held that apart entirely from subsection 508(2) proceedings on a stayed charge may be continued without any need to proceed by way of fresh prosecution for the same offense: *See Regina v. McLeod* (1970) 74 W.W.R. 319 (B.C. Supreme Court).⁶⁶

For this reason the appellant was, in the opinion of the responsible authorities, still "a person charged with an indictable offense." Accordingly the granting of Canadian citizenship was impossible due to section 20(1)(b) of the Citizenship Act.⁶⁷ Subsequent to the rejection of application for naturalization the appellant's attorney received a letter from the relevant authorities, containing inter alia the following statement: "I am writing further to your letter of April 9, 1981, regarding Ms. Holvenstot. This is to advise you that the Crown does not intend

62. *Id.* at 342.

63. [1982] 2 F.C. 279 (1981) (Vancouver 1st Div.).

64. Narcotic Control Act, CAN. REV. STAT. ch. N-1 (1970).

65. Criminal Code, CAN. REV. STAT. ch. C-34 (1970).

66. [1982] 2 F.C. at 280.

67. Citizenship Act, Can. Stat. ch. 108 (1974-75-76).

to take further proceedings against Ms. Holvenstot on the charge of cultivating marihuana. Trusting this is the information you require . . .'⁶⁸

The Federal Court was thus faced with the issue of whether the Crown was prevented from continuing proceedings against the appellant by virtue of the above letter. An affirmative answer would mean that section 20(1)(b) of the Citizenship Act would no longer stand in the way of the appellant's naturalization, as she would no longer be a "person charged with an indictable offense." Verchere, D.J., referred to the English precedents:

It has been said, and I accept it as correct, that an estoppel can bind the Crown: see *Robertson v. Minister of Pensions* [1949] 1 K.B. 227. There Denning, J., as he then was, held that a letter . . . fell within the principle "that if a man gives a promise or assurance which he intends to be binding on him, and to be acted on by the person to whom it was given, then, once it is acted upon, he is bound by it" [at page 231], and accordingly found in favour of the appellant.⁶⁹

Verchere, D.J., applied these criteria to the case at hand and came to the conclusion that the Crown was indeed estopped from continuing proceedings under the Narcotic Control Act:⁷⁰

It seems to me reasonably certain from the date of the letter, the contents of it and the prompt use to which the appellant put it that that use was in fact intended. That is to say, it seems reasonably certain that it was written and given to make it appear that the charge which had prohibited a grant of citizenship to the appellant need no longer be taken into account. The prosecutor apparently considered that if the Crown should obtain evidence in support of the charge which it was said was then lacking, it would be open to it to proceed by way of fresh prosecution. Hence, it would seem no term was expressed (nor can one be implied) that the Crown was free to revoke its decision at its pleasure and that being so, it seems to me that further proceedings on the charge must be estopped and that, just as the doctrine of executive necessity was held inapplicable in the *Robertson* case, it is equally inapplicable here.⁷¹

Prior to this decision the precedents were relatively clear. If the statute itself determined the rights and obligations in question (first group of cases: "the statute speaks for itself"), then the administration was not bound by estoppel. The doctrine of estoppel was only applicable where the rights and obligations had been more clearly determined by an administrative act (second group of cases: "the statute defines the rights in terms of determination").

The *Holvenstot* decision, however, augurs a change of course in the judgments. It would appear on the face of it that *Holvenstot* is only relevant to the second group of cases. This is because the Crown had discretionary powers under section 508(2) of the Criminal Code to reactivate within one year proceedings stayed under section 508(1) of the Code. In this regard the decision certainly fits into the second category of cases in which estoppel is considered to be a possibility.

68. [1982] 2 F.C. at 281.

69. [1982] 2 F.C. at 281.

70. Narcotic Control Act, CAN. REV. STAT. ch. N-1 (1970).

71. [1982] 2 F.C. at 281.

Holvenstot, however, is also of significance for the first category of cases, as the statute did not expressly empower the Crown to truncate the period of one year envisaged in section 508(2) of the Criminal Code. If one thus acknowledges the possibility of estoppel, then the Crown clearly has the power to shorten the period set by the statute. To this extent the decision belongs to the first group of cases. The *Holvenstot* case may thus be seen as having acknowledged the applicability of the doctrine of estoppel for the first group of cases ("the statute speaks for itself").

The altered approach of the Canadian Courts has been reflected in several subsequent decisions.⁷² In *Mentuk v. The Queen*, McNair, J., held as follows:

In my view, the doctrine of promissory estoppel must be perceived as playing an important supplementary part in reinforcing the leading roles of expectation and reliance. If there is one prong of the defendant's case that should be blunted and diverted by the shield of estoppel it is the insistence on strict legal rights in the context of the plaintiff being regarded as a mere supplicant and the spoken word as evincing nothing more than an intention to negotiate toward a possible settlement. Expectation and reliance, buttressed by estoppel, all come down to the same thing: the defendant gave promises or assurances to the plaintiff on which the latter could reasonably be expected to rely and did in fact rely to his detriment and it would be unjust and inequitable in the circumstances to allow the defendant to afterwards go back on those promises and assurances.⁷³

In *Optical Recording Corp. v. Canada*⁷⁴ the applicant, a Canadian corporation, acted in accordance with a notice of assessment of the Minister of National Revenue. The departmental policy was, however, beyond the contemplation of subsection 195(2) of the Income Tax Act. As the Minister had no lawful authority to thwart the application of subsection 195(2) of the Act, the extralegal policy was illegal. Despite his assurances to the contrary, the Minister subsequently issued requirements to pay and garnishing orders. The Federal Court held that the Minister was estopped from benefitting from the garnishments so obtained:

The respondents [The Queen and the Minister of National Revenue], by illegal abuse of authority and false inducements, are clearly estopped from taking any benefit from their sudden garnishments of the applicant's accounts. They are justly estopped even in public law and even although the benefit taken is not for personal gain but for the public purse. The principle of estoppel here is closely akin to that other long and hardy fibre in the web of our law, *ex turpi causa non oritur actio*. The Minister cannot be permitted to put a taxpayer to prejudicial disadvantage by invocation of illegal administrative means of the Minister's own invention, which unlawfully induced the taxpayer into a highly vulnerable position.⁷⁵

72. See the cases cited below, as well as *Aetna Casualty du Canada Compagnie d'Assurance v. Canada*, F.C. 7.5.1987, T-2155-83 (1987). See also the decision in *The Queen v. Canadian Air Traffic Control Ass'n*, [1984] 1 F.C. 1081, which emphasized the need for a clear and unambiguous promise by words or by conduct as a prerequisite for estoppel.

73. [1986] 3 F.C. 249.

74. [1987] 1 F.C. 339.

75. [1987] 1 F.C. at 361.

A similar position was taken by Hugessen, J., in *Granger v. Employment and Immigration Commission*:

The commission's position is, then, quite simple. It frankly admits that its first interpretation was wrong. It does not dispute the fact it gave this interpretation to the applicant and others, and that the applicant acted on the basis of such information. As this information was incorrect, the acts which the applicant thought were to his advantage were really to his detriment. If he had obtained correct information at the proper time, he could have made a different and a more advantageous choice. However, it has not only the power but the duty to apply the text of the statute in all its rigour to the applicant's case: *dura lex, sed lex*—so much the worse for him!

In my view, this attitude is not acceptable. There may have been a time when the courts could close their eyes to reality and say that, however unfair the results might be, Parliament intended that the statute should always be applied. The individual relied at his peril on the interpretation of the legislation given by the authorities.⁷⁶

In this case, however, the majority of the Federal Court dismissed the applicant's action on the grounds that the Crown was not bound by the Department's representations if the latter were contrary to clear and peremptory provisions of law. It is thus clear that the law continues to be in a state of flux in determining the extent to which the doctrine of estoppel may be applied against the government.

3. *United States*

The key U.S. cases in this area of the doctrine of estoppel are *Federal Crop Ins. Corp. v. Merrill*,⁷⁷ *Moser v. United States*,⁷⁸ and *Schweiker v. Hansen*.⁷⁹

In *Merrill* the respondents applied for a crop insurance policy from the Federal Crop Insurance Corporation (FCIC), and disclosed that the wheat to be insured had already been sown. The County Committee, as the responsible organ of the FCIC, informed the respondents that the wheat had been insured. The first insurance payment was then made. Following this, the respondents sent a written application to the office of the FCIC in Denver, where it was accepted. Subsequently, the wheat was virtually totally ruined by drought. The FCIC was empowered to insure the wheat in question, but had determined, "as a matter of policy," not to insure it. The FCIC had published a notice to this effect in the Federal Register. Neither the respondents nor the County Committee were aware of the notice.

The United States Supreme Court⁸⁰ overturned the ruling of the Idaho Supreme Court,⁸¹ which had applied the doctrine of estoppel in the respondents' favor. The reasoning of the United States Supreme Court was as follows:

76. [1986] 3 F.C. 70, 81.

77. 332 U.S. 380 (1947).

78. 341 U.S. 41 (1951).

79. 450 U.S. 785 (1981).

80. Albeit with a majority of only 5:4.

81. "[The plaintiffs] purchased the insurance in question in good faith and thereafter suffered a loss. The [Corporation] through its agent had knowledge of the material facts. It is now estopped

The case no doubt presents phases of hardship. We take for granted that, on the basis of what they were told by the Corporation's local agent, the respondents reasonably believed that their entire crop was covered by petitioner's insurance. And so we assume that recovery could be had against a private insurance company. But the insurance company is not a private insurance company. It is too late in the day to urge that the Government is just another private litigant, for purposes of charging it with liability, whenever it takes over a business theretofore conducted by private enterprise or engages in competition with private ventures.⁸²

The decision of the United States Supreme Court in *Moser v. United States*,⁸³ made only four years later, provides a clear contrast to *Merrill*. Moser, a Swiss national, had applied to be exempted from military service during the Second World War due to his status as a "neutral alien." This application was made on the advice of the Swiss Legation, which had informed him that he would not thereby lose the right to become an American citizen. This information was incorrect, but it was not possible to ascertain whether the State Department had misinformed the Swiss Legation.

The Supreme Court determined that the legal position was clear and reasoned that "as a matter of law, the statute imposed a valid condition on the claim of a neutral alien for exemption; petitioner had a choice of exemption and no citizenship, or no exemption and citizenship."⁸⁴ Without expressly mentioning the doctrine of estoppel, the Supreme Court⁸⁵ held the State Department to be bound by the information given by the Swiss Legation:

The express waiver of citizenship had been deleted. Petitioner had sought information and guidance from the highest authority to which he could turn, and was advised to sign Revised Form 301. He was led to believe that he would not thereby lose his rights to citizenship. If he had known otherwise he would not have claimed exemption. In justifiable reliance on this advice he signed the papers sent to him by the Legation. . . .

We do not overlook the fact that the Revised Form 301 contained a footnote reference to the statutory provision [any person who makes such application—for exemption from military service as a neutral alien—shall thereafter be debarred from becoming a citizen of the United States], and that the Legation wrote petitioner "you will not waive your right to apply for American citizenship papers." The footnote might have given pause to a trained lawyer. A lawyer might have speculated on the possible innuendoes in the use of the phrase "right to apply," as opposed to "right to obtain." But these are minor distractions in a total setting which understandably lulled this petitioner into misconception of the legal consequences of applying for exemption."⁸⁶

The Court in *Davis* outlined the significance and consequences of this decision:

from denying the validity of the insurance contract," *Merrill v. FCIC*, 67 Idaho 196, 200, 174 P.2d 834, 836 (1946).

82. 332 U.S. 380, 383 (1980) (Frankfurter, J.).

83. 341 U.S. 41 (1951).

84. 341 U.S. 41, 46 (1951) (Minton, J.).

85. The decision was unanimous.

86. 341 U.S. 41, 46 (1951) (Minton, J.).

Among the many interesting propositions of law that lurk in the *Moser* opinion, two are especially fascinating: (1) the Swiss Legation by writing a letter to a Swiss citizen changed the effect of a statute enacted by Congress. The statute gave Moser a choice between citizenship and military exemption, but not both; the letter gave him both, and the unanimous court followed the letter rather than the statute. (2) Moser was not presumed to know law; he was not presumed to know even the statutory law that was set forth in clear and understandable terms on the application blank he signed.⁸⁷

The third key case, *Schweiker v. Hansen*,⁸⁸ once again restricted the applicability of the doctrine of estoppel in certain areas. In this case, a representative of the Social Security Administration had interviewed the respondent and informed her incorrectly that she was not entitled to any "mother's insurance benefits." The respondent therefore did not attempt to submit a written application for the benefits. One year later, she learned that this information was incorrect. She then applied for and was awarded the benefits. However, the Social Security Administration refused to pay the amount in question for the previous year.

Both the District Court for the District of Vermont and the Court of Appeals for the Second Circuit had decided in favor of the respondent. The United States Supreme Court overturned these decisions⁸⁹ and held:

This Court has never decided what type of conduct by a Government employee will estop the Government from insisting upon compliance with valid regulations governing the distribution of welfare benefits. In two cases involving denial of citizenship, the Court has declined to decide whether even "affirmative misconduct" would estop the Government from denying citizenship, for in neither case was "affirmative misconduct" involved . . . The Court has recognized, however, the "duty of all courts to observe the conditions defined by Congress for charging the public treasury" . . . Lower federal courts have recognized that duty also, and consistently have relied on *Merrill* in refusing to estop the Government where an eligible applicant has lost Social Security benefits because of possible erroneous replies to oral inquiries . . . this is another in that line of cases, for we are convinced that [the representative's] conduct—which the majority conceded to be less than "affirmative misconduct," 619 F.2d, at 948—does not justify the abnegation of that duty.⁹⁰

The decision of the Supreme Court limits the applicability of estoppel in social security cases. It is, however, questionable whether there was to be a general limitation placed on the principles of estoppel expounded in *Moser*. This is because the Supreme Court in this decision did allow for the possibility of estoppel against the United States, without stating the necessary conditions. Subsequent decisions of the U.S. Court of Appeals have confirmed the analysis that the authorities may in certain situations be estopped.

In *Miranda v. Immigration & Naturalization Service*⁹¹ the U.S. Court of Appeals for the Ninth Circuit decided that the unexplained period of eighteen

87. 4 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE 8 (2d ed. 1983).

88. 450 U.S. 785 (1981).

89. Marshall and Brennan, JJ., dissenting.

90. 450 U.S. 785, 788 (1968).

91. 638 F.2d 83 (9th Cir. 1980).

months required by the Immigration and Naturalization Service (INS) for the processing of a visa application was "affirmative misconduct." The INS was therefore directed to treat the visa application "as if it were approved."⁹² This Court of Appeals judgment thereby preserved the continuity of its previous judgments.⁹³

The decision of the U.S. Court of Appeals First Circuit in *Akbarin v. Immigration & Naturalization Service*⁹⁴ also confirmed the limited range of the Supreme Court's decision in *Hansen*. In this case the plaintiff had commenced employment without having received the necessary permit. His action was thus inconsistent with both the law and his status as a nonimmigrant alien. In the course of a telephone conversation, however, with an official of the INS who could not subsequently be identified, the plaintiff had received the advice that he was entitled to work up to twenty hours per week. The court distinguished the case at hand from *Hansen* stating that "*Hansen* itself is not otherwise helpful here because the decision seems to rest to some degree on the fact that the estoppel 'threaten[ed] the public fisc.' The immigration question in this case does not."⁹⁵

A further significant difference lay in the fact that *Hansen* was concerned with the misinterpretation of a noncoercive regulation. In this case, however, the court had to decide whether the doctrine of estoppel could be applied despite the breach of a coercive federal statute.

In 1984 the United States Supreme Court once again addressed the question of estoppel against the government in *Heckler v. Community Health Services*,⁹⁶ and once again it preferred to leave the issue unsettled.⁹⁷ It did, however, enunciate some of the rules governing the application of the doctrine of estoppel. The U.S. Supreme Court firstly stated the underlying principle:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.⁹⁸

A further significant issue addressed was the extent to which the public fisc is affected by the conduct of government agents:

Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent

92. *Id.* at 84.

93. *See, e.g., Villena v. Immigration & Naturalization Service*, 622 F.2d 1352 (9th Cir. 1980).

94. 669 F.2d 839 (1st Cir. 1982).

95. *Id.* at 843.

96. 467 U.S. 51 (1984).

97. "Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left this issue open in the past, and do so again today." *Id.* at 60.

98. *Id.*

with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.⁹⁹

The line of reasoning adopted by the United States Supreme Court in this case sits squarely with that of the decision of the U.S. Court of Appeals for the First Circuit in *Akbarin v. INS*,¹⁰⁰ where this criterion was viewed as being decisive.

Various decisions of the U.S. Circuit Court of Appeals illustrate the less than pristine clarity of the law in this area. Each of these courts has dealt with the issue of estoppel against the government. There has been unanimity in the call for the traditional elements of the doctrine of estoppel to be present. Thus anyone invoking estoppel must prove that (1) the authorities gave false or inaccurate information which he (2) reasonably and in good faith relied on, and that he (3) thereby incurred some kind of loss.¹⁰¹ The U.S. Circuit Courts of Appeals, however, are also unanimous in their judgment that these traditional elements are of themselves not sufficient.¹⁰² It is in the question as to which additional elements are required for a successful application of the doctrine of estoppel against the government that the views tend to diverge. The First, Second, Third, Fourth, Seventh, Ninth, Federal and, more recently, the Eighth Circuit Court of Appeals view "affirmative misconduct" of the government as a fourth element.¹⁰³

The U.S. Court of Appeals for the Tenth Circuit was of the view that the doctrine of estoppel can only be applied if "it does not interfere with underlying government policies or unduly undermine the correct enforcement of a particular law or regulation."¹⁰⁴

The U.S. Court of Appeals for the District of Columbia stated in *Boulez v. Commissioner*¹⁰⁵ that "claims of estoppel arising from the behavior of governmental employees may be asserted only in a narrow category of circumstances."

99. *Id.* at 63.

100. 669 F.2d 83 (1st Cir. 1982).

101. *United States v. Asmar*, 827 F.2d 907, 912 (3d Cir. 1987).

102. *See, e.g., id.* at 912 ("It is, however, well-settled that the Government may not be estopped on the same terms as any other litigant.").

103. *Akbarin v. INS*, 669 F.2d 839, 843 (1st Cir. 1982); *Long Island Radio Co. v. National Labor Relations Bd.*, 841 F.2d 474, 478 (2d Cir. 1988); *Scime v. Bowen*, 822 F.2d 7, 9 (2d Cir. 1987); *Corniel-Rodriguez v. INS*, 532 F.2d 301, 306 (2d Cir. 1976); *U.S. v. Asmar*, 827 F.2d 907 (3d Cir. 1987); *Taneja v. Smith*, 795 F.2d 355, 358 (4th Cir. 1986); *Portmann v. United States*, 674 F.2d 1155, 1158 (7th Cir. 1982); *Mukherjee v. INS*, 793 F.2d 1006, 1009 (9th Cir. 1986); *Hanson v. Office of Personnel Management*, 833 F.2d 1568, 1569 (Fed. Cir. 1987); *Maynard v. Sayles*, 823 F.2d 1277, 1281 (8th Cir. 1987); *Boyd v. Bowen*, 797 F.2d 624, 628 (8th Cir. 1986); *U.S. v. Manning*, 787 F.2d 431, 436 (8th Cir. 1986). The question was left open in *Chula Vista City School Dist. v. Bennett*, 824 F.2d 1573, 1583 (Fed. Cir. 1987); *Federal Deposit Ins. Corp. v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986); *Phelps v. Federal Emer. Management Agency*, 785 F.2d 13, 16 (1st Cir. 1986); *Emanuel v. Marsh*, 828 F.2d 438 (8th Cir. 1987); *Wellington v. INS*, 710 F.2d 1357 (8th Cir. 1983). It was restrictively applied in *Crown v. United States R.R.*, 811 F.2d 1017, 1021 (7th Cir. 1987); *Azar v. United States Postal Service*, 777 F.2d 1265, 1269 (7th Cir. 1985).

104. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984).

105. 810 F.2d 209, 218 n.68 (D.C. Cir. 1987).

In *Simmons v. United States*¹⁰⁶ the U.S. Court of Appeals for the Fifth Circuit applied the doctrine of estoppel against the government but did not determine whether "affirmative misconduct" was a necessary prerequisite. Neither did this court assume a position on the issue in *Jones v. Dep't of Health & Human Services*.¹⁰⁷ It restricted its decision to determining that oral information in the absence of additional factors is insufficient. The U.S. Court of Appeals for the Sixth Circuit was of a similar view that the traditional elements are inadequate, but did not define any further requirements.¹⁰⁸

The U.S. Court of Appeals for the Eleventh Circuit in *Lyden v. Howerton*¹⁰⁹ expressly refused to decide whether "affirmative misconduct" was required. In *United States v. Vonderau*¹¹⁰ and *United States v. Killough*¹¹¹ it established two new requirements, without addressing the "affirmative misconduct" issue. In addition to the traditional elements, it was necessary that "(2) the Government must have been acting in its private or proprietary capacity as opposed to its public or sovereign capacity; and (3) the Government's agent must have been acting within the scope of his or her authority."¹¹²

Similarly, the U.S. District Courts appear to lack a uniform line of reasoning on this question.¹¹³

4. Australia

The question of the applicability of the doctrine of estoppel to the public administration in Australia has not been the subject of a great deal of litigation to date. The leading case decided by the High Court of Australia is *Brickworks Ltd. v. Warringah Shire Council*.¹¹⁴ In this case a company had applied to a local council for permission to use certain land in order to extract clay and shale. The

106. 308 F.2d 938 (5th Cir. 1962).

107. 843 F.2d 851 (5th Cir. 1988).

108. *West Augusta Dev. Corp. v. Giuffrida*, 717 F.2d 139 (4th Cir. 1983); *S.E.C. v. Blavin*, 760 F.2d 706 (6th Cir. 1985).

109. 783 F.2d 1554, 1558 (11th Cir. 1986).

110. 837 F.2d 1540, 1541 (11th Cir. 1988).

111. 848 F.2d 1523, 1526 (11th Cir. 1988).

112. See also *ATC Petroleum, Inc. v. Sanders*, 661 F. Supp. 182 (D.D.C. 1987).

113. Rejecting estoppel: *U.S. v. One Single Family Residence*, Miami, Fla., 683 F. Supp. 783 (S.D. Fla. 1988), even when "affirmative misconduct" is present; *United States v. Roper*, 681 F. Supp. 77 (D. Me. 1988), existence of "oral representation"; *Hampshire Mfg. v. United States*, 667 F. Supp. 874 (Ct. Int'l Trade 1987), concerning tax issues. Allowing estoppel: *United States v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. 1987); *Great Am. Credit Corp. v. Wilmington Housing Auth.*, 680 F. Supp. 131 (D. Del. 1988); *Younghee Na Huck v. Attorney General*, 676 F. Supp. 10 (D.D.C. 1987); *United States v. City of Hoboken*, 675 F. Supp. 189 (D.N.J. 1987); *St. Charles Assocs., Ltd. v. United States*, 671 F. Supp. 1074 (D. Md. 1987); *Connecticut Funds for Environment, Inc. v. Upjohn Co.*, 660 F. Supp. 1397 (D. Conn. 1987); *United States v. Wood*, 658 F. Supp. 1561 (W.D. Ky. 1987); *Wagner v. Director, Fed. Emer. Management Agency*, 658 F. Supp. 1530 (C.D. Cal. 1987). Question left open: *United States v. Dakota*, 666 F. Supp. 989 (W.D. Mich. 1985).

114. 108 C.L.R. 568 (1963).

company received a document from the council to the effect that the application would be approved, subject to certain conditions. The council subsequently brought proceedings against the company alleging noncompliance with the stated conditions. The council also claimed that no approval had in fact been granted. Windeyer, J., reiterated the traditional doctrine as it had been applied to the first group of cases examined above ("the statute speaks for itself"):

... an estoppel seems to me to arise. The Council did not at any time before it commenced this suit repudiate what its President had told the Company. In effect it repeated it. And the Company relied upon these purported consents. Does not this found an estoppel? It was argued that it could not do so because estoppel by representation cannot prevent the performance of a statutory duty or the exercise of a statutory discretion. *There is no doubt about this principle*; but I doubt its application to this case.¹¹⁵

The High Court was not, however, inclined to interpret the doctrine in a narrow manner, and came to the conclusion that a public administration is bound by its actions when it mistakenly leads an applicant to believe that it had exercised a discretion in the applicant's favor:

It seems to me that, in the circumstances of this case, the Council was estopped from denying that it had exercised its discretion in the manner it had said it had done. The case is not, as I see it, one in which a consent once given could be withdrawn. That could only, I think, be so if the consent were expressly given upon a condition that it might be withdrawn in specified events. And, moreover, it is not now said that consent was given and later withdrawn. The allegation is that it was never given.¹¹⁶

It appears that this area of the law has not yet been exhaustively examined by the courts. There have, however, been developments in Australia in the area of torts which differ from those in some other common law jurisdictions and would possibly enable an applicant to at least gain financial relief in an action against a public authority, although specific performance would be excluded.

It has become an established rule that public administrations may be held liable for financial loss resulting from the tort of negligent misstatement in just the same way as private persons. This principle, developed in relation to the private sphere through the English case *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*¹¹⁷ has been widely applied in Australian cases against public administrations.¹¹⁸

According to the rule in *Hedley Byrne*, a duty of care arises when a person with special skills or knowledge gives information or advice to others who would be reasonably expected to rely on such information or advice, or allows such

115. 108 C.L.R. 568, 577 (1963) (emphasis added).

116. 108 C.L.R. 568, 577 (1963) (Windeyer, J.).

117. [1964] A.C. 465.

118. See, e.g., *Hull v. Canterbury Mun. Council*, [1974] 1 N.S.W.L.R. 300; *G. J. Knight Holdings Pty. Ltd. v. Warringah Shire Council*, [1975] 2 N.S.W.L.R. 796; *Freeman v. Shoalhaven Shire Council*, [1980] 2 N.S.W.L.R. 826; *Johnson v. South Aust.* [1980] 26 S.A.St.R. 1; *L. Shaddock & Assocs. v. Parramatta City Council*, 150 C.L.R. 225 (1980).

information or advice to be passed on to others in circumstances in which the skilled person knew or ought to have known that the recipient would rely on it.

The High Court of Australia clearly approved of and applied *Hedley Byrne in Mutual Life and Citizen's Assurance Co. Ltd. v. Evatt*.¹¹⁹ Barwick, C.J., defined the circumstances in which a duty of care shall arise:

First of all, I think the circumstances must be such as to have caused the speaker or be calculated to cause a reasonable person in the position of the speaker to realize that he is being trusted by the recipient of the information or advice to give information which the recipient believes the speaker to possess or to which the recipient believes the speaker to have access or to give advice, about a matter upon or in respect of which the recipient believes the speaker to possess a capacity or opportunity for judgment, in either case the subject matter of the information or advice being of a serious or business nature. It seems to me that it is this element of trust which the one has of the other which is at the heart of the relevant relationship . . . Then the speaker must realize or the circumstances must be such that he ought to have realized that the recipient intends to act upon the information or advice in respect of his property or of himself in connexion with some matter of business or serious consequence . . . Further, it seems to me that the circumstances must be such that it is reasonable in all the circumstances for the recipient to seek, or to accept, and to rely upon the utterance of the speaker.¹²⁰

The appellant subsequently appealed from the High Court of Australia to the English Privy Council,¹²¹ where the scope of this general principle was limited considerably.¹²² The Privy Council determined that the tort of negligent misstatement only arose when information or advice was given by three categories of persons: first, those carrying on a business or profession in which advice is given which requires special skill or competence; second, those expressly proclaiming their skill or competence in a particular area and giving advice or information which they know, or ought to know, is to be relied on; and third, those with a financial interest in the subject matter of the advice or information given.

The limitations imposed by the Privy Council in *Evatt* were subsequently removed by the High Court of Australia in *L. Shaddock & Associates v. Parramatta City Council*.¹²³ In this case a firm intended to buy land for redevelopment. Before the purchase was completed the firm's solicitor inquired of the local council whether any road-widening plans existed for the land in question. A council officer replied in the negative. The firm's solicitor then applied for and was given a council certificate declaring the status of the land with respect to zoning and town planning matters. The certificate made no mention of any road-widening plans, although it was the council's practice to include any such plans, should they exist, in the certificate. The firm thus

119. [1971] A.C. 793.

120. 122 C.L.R. 556, 571 (1968).

121. *Mutual Life and Citizen's Assurance Co. v. Evatt*, [1971] A.C. 793.

122. The right to appeal from the Australian High Court or the respective State Supreme Courts to the Privy Council no longer exists. The same principle applies for Canada.

123. 150 C.L.R. 225 (1981).

proceeded with the purchase, relying on the information in the certificate. It subsequently discovered that road-widening plans for the land had been approved by the council two years before the firm's inquiries. The firm successfully sued the council for damages for negligent misstatement.

The High Court referred to its own decision in *Evatt*, expressly rejecting the Privy Council's more narrow interpretation of the requirements for negligent misstatement. According to Mason, J.:

[W]henever a person gives information or advice to another upon a serious matter in circumstances where the speaker realises, or ought to realise, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chooses to give.¹²⁴

Referring directly to the application of this principle to public administrations, Mason, J., stated "[W]hen information (or advice) is sought on a serious matter, in such circumstances that the authority realises, or ought to realise, that the enquirer intends to act upon it, a duty of care arises in relation to the provision of the information and advice."¹²⁵

The High Court also considered the argument that public administrations could be unduly obstructed in carrying out their statutory functions for the benefit of the community as a whole if such a duty of care existed. It found no favor with the Court:

Recognition of the existence of a duty of care and consequential liability would make little difference, if any, to the standard of care taken in giving information and advice. An authority can, if it wishes, obtain protection against liability by means of insurance . . . It is improbable that the practice of providing such information would be discontinued, though it is possible that a fee might be charged and that an endeavour might be made to exclude liability.¹²⁶

This line of reasoning would appear to be directly opposed to that of the English Court of Appeal in *Western Fish Products Ltd. v. Penwith District Council*,¹²⁷ where it was stated that too high a level of liability might deter officers in public administrations from providing advice or information, for fear of legal action. These two views may be reconciled by the fact that in *Western Fish Products* the remedy sought was specific performance, thereby possibly involving an injustice to third parties, whereas in *Shaddock* it was damages.

III. The Doctrine of Estoppel before International Arbitral Tribunals

A fundamental difficulty in determining the attitude of international arbitral tribunals to the application of the doctrine of estoppel arises from the fact that

124. 150 C.L.R. 250 (1981).

125. 150 C.L.R. 252-253 (1981).

126. 150 C.L.R. 252 (1981) (Mason, J.).

127. [1981] 2 All E.R. 204; *see supra* note 52.

there exist very few published cases on the subject. There are, in fact, only three main published sources in which at least a cross-section of arbitral awards appear. These are the decisions of the Iran-United States Claims Tribunal,¹²⁸ awards made under the rules of the International Centre for Settlement of Investment Disputes (ICSID)¹²⁹ and those under the International Chamber of Commerce Rules of Conciliation and Arbitration.¹³⁰

Only a few of the reported decisions deal explicitly with the doctrine of estoppel. The reports of the Iran-United States Claims Tribunal are the most comprehensive sources of material on this topic. The other two sources cited above are relatively sparse in their treatment of the question. The reason for this may be found in the fact that the doctrine of estoppel or analogous concepts was originally applied by international tribunals in the context of international public law (i.e., between States). Thus the International Court of Justice determined in *Temple of Preah Vihear, Cambodia v. Thailand* that "a State must not be permitted to benefit by its own inconsistency to the prejudice of another State."¹³¹

In this context the application of the principle of estoppel by international arbitral tribunals arises out of the recognition of the universality of this principle, regardless of the different labels that may be given to it in the various legal systems of the world:

It is a principle of good faith that "a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another . . . Such a principle has its basis in common sense and common justice, and whether it is called "estoppel," or by any other name, it is one which courts of law have in modern times most usefully adopted."¹³²

It is only comparatively seldom that the arbitral tribunals appear to have dealt with this question in cases where one of the parties was a private entity:

Although this dictum [that a State must not be permitted to benefit by its own inconsistency to the prejudice of another State] refers to activities of States, the Tribunal is of the view that the same general principle is applicable in international economic relations where private parties are involved. In addition, the Tribunal considers that, in particular for the applications in international relations, the whole concept is characterized by the requirement of good faith.¹³³

In such cases, however, the doctrine of estoppel has indeed been applied by arbitral tribunals against governments and government agencies in order to remedy outcomes which would otherwise be inequitable.

128. Published in Iran-United States Claims Tribunal Reports [Iran-U.S. C.T.R.] (Cambridge 1983) and 1976 Y.B.: COM. ARB. (A.J. van den Berg, ed. Deventer).

129. Published in ICSID REVIEW-FOREIGN INV. L.J. (Wash. 1986), JOURNAL DU DROIT INTERNATIONAL (Clunet) and Y.B.: COM. ARB.

130. Published in JOURNAL DU DROIT INTERNATIONAL (Clunet) and Y.B.: COM. ARB.

131. [1962] I.C.J. 6, 39–51.

132. B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 141–41 (1953), cited in *Oil Field of Tex., Inc. v. Iran*, 1 Iran-U.S. C.T.R. 376 (1982).

133. *Amco Asia Corp. v. Republic of Indonesia*, 23 I.L.M. 351–83 (1984); (Award on Jurisdiction of Sept. 25, 1983), 10 Y.B.: COM. ARB. 61–71 (1985); 113 JOURNAL DU DROIT INTERNATIONAL (Clunet) 201–21 (1986).

There can be little doubt that it has found virtually universal acceptance. "The doctrine has been invoked in varying forms over a period of a century and a half; and although there have been occasions on which it has been held to be inapplicable to the particular facts, its jurisprudential basis has been unchallenged."¹³⁴ This statement succinctly expresses the overall attitude of arbitral tribunals to estoppel. It may in fact be said that arbitral tribunals, when compared with national courts, proceed from exactly the opposite starting point when considering the applicability of the doctrine of estoppel against governments or their agencies. Whilst national courts frequently still tend to see estoppel as an exception to the general principle that "the King can do no wrong," arbitral tribunals assume that estoppel is generally applicable unless particular fact situations preclude it. Some of the essential elements of estoppel as applied repeatedly by arbitral tribunals and recognized by commentators are as follows: the statement or conduct must be clear and unambiguous in its effect; the statement or actions of the person must be capable of being reasonably construed as having been authorized by the government concerned; and the party claiming estoppel must have relied in good faith upon the statement or conduct either to his own detriment or to the advantage of the party responsible for the statement or conduct.¹³⁵

As a general observation, it may be said that arbitral tribunals tend to apply standards for estoppel against governments and their agencies in a manner quite analogous to that used for private individuals and entities. This is done to a considerably greater extent than generally occurs in the decisions of national courts. In view of the independence of such tribunals from the judicial system of any particular country, this is hardly surprising. Arbitral tribunals have frequently found governments liable on the basis of estoppel in circumstances in which national courts may well have barred such executive liability.¹³⁶ A logical extension of the hypothesis that estoppel is a universal principle independent of any particular legal system is the argument that estoppel, or whatever it may be called in noncommon law jurisdictions,¹³⁷ may be applied by arbitral tribunals, even if it has no formal legislative basis in the country concerned.¹³⁸

An example of just such a generous application of the principle of estoppel against government agencies is *Sola Tiles, Inc. v. Iran*.¹³⁹ In this case the claimant, who had business interests in Iran, wished to assign power of attorney

134. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468, 479 (1958).

135. See, e.g., Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 1957 BRIT. Y.B. INT'L L. 176, 202.

136. Numerous examples can be found in the decisions of the Iran-United States Claims Tribunal.

137. For an overview from a noncommon-law perspective, see Gaillard, *L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international (le principe de l'estoppel dans quelques sentences arbitrales récentes)*, REV. ARB. 241 (1985).

138. See MacGibbon, *supra* note 134, at 478.

139. 14 IRAN-U.S. C.T.R. 230 (1987) (see in particular the concurring opinion of Mosk, J.).

to a third person to act for him in his absence, as he could not enter Iran at that time. The document of assignment was completed in the United States and, due to conditions prevailing during the revolution in 1979, it was not possible for the assignment to be notarized in Iran. The claimant took the document of assignment, which was in Farsi, to the Iranian Consul in San Francisco, in whose presence the claimant signed it. The Consul then stamped and signed the document. The Iranian government, as respondent, argued that the assignment was invalid. Although the assignment did not fulfill the formal requirements of Iranian law, which stipulated that such an assignment be carried out within Iran, the Tribunal upheld its validity. The Tribunal found that it would have been inequitable in the circumstances to deem the assignment invalid. This was because it had been notarized by an official of the Iranian government. The Tribunal was further of the view that the Iranian government was responsible for the circumstances which prevented the claimant from fulfilling the formal requirements.

This short overview of the attitude of international arbitral tribunals to the doctrine of estoppel provides evidence for the proposition that such tribunals are increasingly tending not to rely on any specific national legal order but to apply general equitable principles—sometimes referred to as “*lex mercatoria*”—which are present in most legal systems. This may be seen as a positive development in terms of the progress of legal principles and a uniform approach to international contracts. On the other hand it could lead to a divergence between arbitral awards and national court decisions, thereby increasing the danger of such awards being annulled by national courts in actions for enforcement on the basis of narrow interpretation of public policy requirements.

IV. Summary

This study shows that the present state of the law in the Federal Republic of Germany, England, Canada, the United States, and Australia is unclear concerning the question as to the conditions under which authorities are bound by promises or assurances they may make.

In none of the four common law countries investigated have the courts arrived at a clear formula for determining when estoppel may be applied against the government. A common thread in all four jurisdictions is the fact that the earlier rigid separation of the two groups of cases, “the statute speaks for itself” and “the statute defines rights in terms of determination,” no longer exists.

It would appear that the Canadian courts are the most likely to strictly apply the theory of the two groups of cases and consequently to reject the option of estoppel whenever it would undermine a statutory rule. In England, on the other hand, this difference no longer appears to be decisive. The general tendency is rather to allow estoppel whenever the person affected would otherwise be seriously disadvantaged. The Australian courts, to the extent that case law exists,

appear to be following a line similar to that of the English courts, while allowing a broad interpretation of the tort of negligent misstatement.

It is in the United States that the cases in which the courts will reject estoppel are the most foreseeable. The majority of the recent decisions of the U.S. Circuit Courts of Appeals require "affirmative misconduct" alongside the traditional estoppel criteria. There does, however, still exist quite a degree of uncertainty as to what this means at the individual level. A tendency seems to be evolving whereby estoppel will be allowed in cases where the government has acted in its private or proprietary capacity rather than in its public or sovereign capacity. It is still unclear, however, whether and/or to what extent this question is influenced by the issue of public fisc involvement.

The legal position in the Federal Republic of Germany is comparable to that in Canada. A promise is generally not binding if the authorities acted *ultra vires*, or if the promise contravened the law. It is only in exceptional circumstances that this principle does not apply. An overall comparison of the approach taken by the Federal Republic of Germany as opposed to the common law countries examined shows that there exists a high degree of congruence, despite the fact that their legal orders display quite different pedigrees.

This analysis is thus a further confirmation of the fact that the conditions prevalent in modern societies, despite historical, geographical, and social differences, lead their judiciaries and legislatures to analogous means of solving particular problems. This general observation does not, however, afford a great deal of comfort to a firm like INVEST in the predicament described at the outset. It is imperative that firms acquaint themselves with the salient rules and avenues of redress available to them in the jurisdictions in which they are contemplating foreign investment.

A comparison of the attitude of international arbitral tribunals to estoppel with that of the national jurisdictions examined shows that the arbitral tribunals in general are more willing to apply the doctrine of estoppel (or corresponding general principles) against governments or their agencies than are national courts. It would thus certainly be worth serious consideration to include an arbitration agreement in an investment contract, regardless of the proper law chosen. It may well be that the chances of success of a firm in the situation of INVEST, as outlined above, would be enhanced by such a clause.

