

UNDERMINING GOOD FAITH: U.S. VIOLATIONS AND THE CRISIS OF THE WTO APPELLATE BODY

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ABSTRACT

This article introduces the Doctrine of Good Faith, emphasizing its significant role within the international legal framework. It establishes this doctrine as a general legal principle and a customary international law, highlighting its importance as a fundamental principle of International Law. The article primarily focuses on how the United States has repeatedly violated the Principle of Good Faith over the past decade. Violations of Good Faith can be categorized into several types, including Estoppel, Interpretation of Treaties, Performance of Treaties, and Abuse of Rights. This article explores in detail how the United States has violated these categories and how these violations have been established. It outlines the various components necessary to demonstrate the extent of U.S. authority and how this authority has been misused to breach the doctrine. The article also examines the strengths of the U.S.'s justifications for these actions and how they are part of its strategy to assert dominance over other states. Additionally, the article discusses how these actions have undermined the World Trade Organization (WTO), negatively impacting numerous states involved in disputes and causing them significant losses.

Keywords: WTO, Good Faith, Abuse.

INTRODUCTION

"Honesty of aim or sincerity of declaration" and "expecting such traits in others" traditionally define good faith. The terms "good faith" and "bona fides," which mean "freedom from intent to deceive," are often used interchangeably. Good faith was first recognized as a fundamental legal norm during the creation of the Statute of the Permanent Court of International Justice (PCIJ). It has been described as "the foundation of all law, or a fundamental principle of law." According to O'Connor, a University of College Cork law professor and author of a notable book on Good Faith in International Law, good faith arises from "the necessity for at least some human cooperation and tolerance if group living is to emerge and endure"¹. Although good

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¹ John O' Connor, Good Faith in International Law (1991).

faith dates back to early human communities, O'Connor argues that its closest relative is the Roman concept of *bona fides*, associated with dependability, scrupulosity, and honourable behaviour. Today, most civil law countries recognize the principle of good faith as a notion of fair and open dealing, and they often require agreements to be made and fulfilled in good faith. In contrast, common law systems are less consistent in their application of the doctrine. For example, the United Kingdom lacks a general notion of good faith, while the United States requires parties to contracts to act with good faith and fairness in both performance and enforcement.

The recognition of the Principle of Good Faith as customary international law began with its acceptance by Brown and Schwarzenberger as one of the seven core principles of international law². Good faith has been described as a "continuous line of law-declaring instruments of substantial significance," some of which codify international customary law³. These references are often related to domestic contractual obligations to uphold agreements in good faith. Several international tribunals have acknowledged the concept of good faith. The International Court of Justice has stated that while good faith is crucial in creating and performing legal obligations, it "is not in itself a source of responsibility where none would otherwise exist".

As a fundamental rule of international law, negotiations and dispute resolution must be conducted in good faith, and parties must not hinder the achievement of a treaty's aims before ratification. This obligation requires states to exercise their rights honestly and uphold duties arising from other sources of international law. Numerous international law court decisions and academic works have diversified and specified these good faith criteria. These specific responsibilities might eventually be refined to operate independently of the broader concept of good faith⁴.

Thus, as legal systems evolve, the use of the good faith principle may diminish. According to this view, the principle of good faith "is both a fundamental principle and one of last resort," becoming relevant only when a more precise norm cannot be identified, when rights conflict, or when seemingly contradictory concepts are in play.

² Georg Schwarzenberger & Edward D Brown, *A Manual of International Law* 7 (6th Ed, 1976).

³ Mary Hiscock, '*The Keeper of the Flame: Good Faith and Fair Dealing in International Trade*', 29 *Loyola of Los Angeles Law Review* 1059, (1991).

⁴ *Border and Transborder Armed Actions (Nicaragua v Honduras) (Jurisdiction and Admissibility)* [1988] ICJ Rep 69, 105.

GOOD FAITH DOCTRINE IN WTO

Every WTO provision is interpreted according to Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT), which requires that treaties be construed in good faith based on the common meaning of their terms in context and light of their objectives⁵. This mandate is reflected in Article 3.2 of the Understanding of Rules and Procedures Governing the Settlement of Disputes (DSU), underscoring that good faith is a fundamental element of WTO law. Although numerous WTO provisions reference "good faith," they lack a precise definition. This absence suggests that good faith is a general principle influenced by broader international law concepts.

Some scholars argue that the lack of a clear definition weakens the doctrine of good faith, while others believe this ambiguity strengthens it, contributing to the perception of a global public order. The vagueness of the term allows for the potential development of a multilateral public order in international law. The principle of good faith involves consistency and stability; states must act consistently to maintain the stability of the international system. Once a state declares its position, it should not change it without legal justification, promoting trust and honesty in international relations. All WTO member states must adhere to the principle of good faith in treaties and other instruments.

The legal concept of estoppel is related to the consistency of state actions⁶. It ensures that a state's legitimate reliance on the actions of other states is protected, fostering trust and confidence in international relations. The principle of estoppel holds that a state may be legally bound by its unilateral declarations due to their multilateral implications, and it is applied within the WTO. The good faith principle also includes a prohibition against the misuse of rights by states. A state must exercise its treaty or customary rights with due regard for the rights and interests of other states, reflecting a multilateral public dimension⁷. In the international community, a state's rights may be limited if there is a significant disparity between its benefits and those of other states.

The good faith principle generally supports decisions made under a treaty or customary rule, playing a supplementary role. The WTO exemplifies the absence of a true international

⁵ Vienna Convention on Law of Treaties, 1155 UNTS 331.

⁶ Steven Reinhold, "Good Faith in International Law" (2013) 2(1) UCL Journal of Law and Jurisprudence 54, (2013)

⁷ Micheal Byers, "*Abuse of Rights: An Old Principle, A New Age*", 47 McGill Law Journal 415, (2002).

community, as its procedures primarily facilitate private bilateral dispute settlements. The WTO's dispute resolution bodies act as facilitators and overseers of these bilateral trade disputes, and their decisions do not set binding precedents. Each WTO dispute is considered unique, and although panels and the Appellate Body often cite previous decisions, they do so voluntarily⁸.

When a losing state fails to comply with the WTO panel and Appellate Body's recommendations, the WTO can only request information about unilateral measures taken by the prevailing state against the non-compliant state. The WTO cannot directly sanction the non-compliant state; it can only endorse the unilateral actions of the victorious state. The principle of good faith is crucial because it introduces a multilateral and public dimension into the WTO's inherently private and bilateral enforcement mechanism. WTO member governments are expected to follow the established procedures for resolving disputes. Article 3.10 of the DSU emphasizes that conciliation requests and dispute resolution processes should not be seen as aggressive acts and that all members should engage in these processes in good faith.

Despite this, the absence of WTO panel or Appellate Body decisions based solely on the good faith principle indicates that it does not significantly influence the substance of WTO dispute settlement outcomes. Similar to its role in ICJ rulings, good faith serves an ancillary purpose in supporting WTO dispute resolution outcomes. WTO panels and the Appellate Body base their judgments on more than 60 WTO-adopted treaties, giving WTO dispute resolution a positivist approach. If a member state violates these agreements, the issue is resolved through the WTO's dispute resolution procedures.

Although the WTO agreements include provisions that mention good faith, they do not allow disputes to be resolved solely based on the doctrine of good faith. The concept of good faith has never served as the sole legal basis for a WTO dispute settlement decision. However, it could be argued that the international community should be able to rely on the principle of good faith on its own.

HYPOTHESIS

This article examines the hypothesis that as a member of the P5, the USA enjoys significantly more privileges than third-world, developing nations within the United Nations and its various

⁸ Basaran Halil, *The Principle of Good Faith in International Law*, Hong Kong Law Journal, 51, 597-624, (2021).

organs. Furthermore, it asserts that the USA not only benefits from these privileges but also reacts negatively when the actions of the WTO or its organs contradict its national interests, leading to decisions that harm the international community and violate the doctrine of good faith. This hypothesis will be substantiated through an analysis of the United States' actions, statements by its representatives, and other relevant evidence.

RESEARCH METHODOLOGY

This article relies on secondary data collection, focusing specifically on the doctrine of good faith. The author reviewed a wide range of sources, including treaties, articles, and other documents, to capture diverse perspectives and provide a comprehensive assessment.

ANALYSIS

U.S. Influence and Trade Policy

The United States has long enjoyed significant freedoms and authority as a permanent and influential power within the United Nations. This influence extends to international trade, where the U.S. was instrumental in creating institutions post-World War II to control economic nationalism. After several failed attempts, the U.S. and other major powers succeeded in drafting the General Agreement on Tariffs and Trade (GATT) in 1947 to reduce tariffs and trade barriers, countering the protectionism that had been prevalent since the late 1700s. This system worked effectively for decades until emerging Asian economies and global supply networks pressured American industries, leading to challenges similar to those posed by China in the last 20 years. In 1994, the U.S. played a key role in establishing the World Trade Organization (WTO), which institutionalized trade liberalization and introduced a binding dispute resolution system supported by the Appellate Body's seven judges.

Misunderstanding and Dispute Settlement

A fundamental misunderstanding tainted the design of the dispute settlement process. American trade negotiators believed they had created a system ensuring that other nations would uphold the law and respect trade sanctions established by domestic law. However, in recent years, the U.S. has been embroiled in a trade war with China while simultaneously ignoring significant issues affecting the WTO. The U.S. has blocked nominations for members of the Appellate Body, claiming that it strays from what members agreed to. Instead of focusing on appellate nominations, the U.S. has concentrated on China's trade violations, imposing

penalties to force concessions, which China has resisted. This trade war has harmed both economies, with analysts estimating costs of \$125 billion to the U.S. and \$35 billion to China⁹.

Breach of Good Faith Doctrine

The actions of the American government clearly breach the Doctrine of Good Faith. Historically, the U.S. has enjoyed a powerful position in international organizations it helped establish. However, in the WTO, where decisions often contradict U.S. assumptions of favourable outcomes, the nation has taken actions detrimental to the international community. Trump's protectionism and China's practices pose systemic risks to the WTO, an institution the U.S. originally built for multilateral commerce but is now aggressively undermining¹⁰. The Trump administration advanced its agenda through bilateral negotiations, potentially ignoring the global collaboration required.

The Section 211 Appropriations Act

In the case of the Section 211 Appropriations Act, the U.S. defended its actions before the Appellate Body, which reviewed whether Section 211 violated the TRIPS Agreement. The panel found that Section 211(a)(2) of the Act violated Article 42 of the TRIPS Agreement by sometimes preventing right holders from having effective access to civil court processes. The U.S. contested the panel's findings, arguing that the Appellate Body should not review a panel's determinations of municipal law. Despite the U.S.'s contention, the Appellate Body upheld the panel's decision, asserting its right to review the application of local laws to ensure compliance with WTO obligations.

Impact on the Appellate Body

The U.S. has repeatedly blocked the appointment of Appellate Body members, reducing the body to three members, the minimum required to hear and decide new appeals. This obstruction has led to "appeals into the void," keeping disputes unresolved and damaging the credibility and effectiveness of the WTO dispute settlement process. The U.S.'s actions, particularly its prevention of the appointment of judges to the Appellate Body, clearly indicate a breach of the Doctrine of Good Faith. The Appellate Body's dysfunction due to unfavourable rulings on U.S. measures such as safeguards, subsidies, and anti-dumping duties further exemplifies this

⁹ Farah N. Jan & Megan Phansalkar, *Trump's War on the World Trade Organization*, December 12, 2019

¹⁰ Keith Johnson, *How Trump may Finally Kill the WTO*, December 9, 2019

violation.

The United States has long utilized its position of power within international organizations to further its interests. However, recent actions, particularly within the WTO, have demonstrated a clear breach of the Doctrine of Good Faith. The U.S.'s blocking of Appellate Body appointments, its trade war with China, and its protectionist measures undermine the principles of multilateral cooperation and fairness that the WTO was designed to uphold. Through these actions, the U.S. has significantly impacted the functioning and credibility of the WTO, demonstrating a clear violation of the Doctrine of Good Faith.

CONCLUSION

The World Trade Organization (WTO) distinguishes itself among international organizations through its effective dispute resolution mechanism, which also serves as an enforcement tool. However, this effectiveness is threatened by the reluctance of powerful nations, particularly the United States, to participate in the system and adhere to its rules. The current crisis of the Appellate Body underscores the vulnerability of the international trade rules system, which risks collapse without a functioning enforcement structure. Ironically, the United States, a dominant force in the liberal trading order for the past 70 years, has now become its most significant challenger. Despite benefiting substantially from the WTO, as evidenced by the consistency of panel decisions favouring the U.S., the Trump administration's actions have severely undermined the institution. By blocking appellate nominations and unilaterally imposing tariffs on key trading partners, the U.S. has single-handedly dismantled the system. The Trump administration's selective engagement with the WTO further illustrates this inconsistency. When the WTO sides with the U.S., as in the case of authorizing retaliatory tariffs on the E.U. in October, the administration proudly acknowledges the organization. However, it bypasses the WTO entirely for bilateral negotiations with China, displaying clear disdain for the multilateral system when it does not suit American interests.

A weakened WTO could lead to a scenario where economically strong nations oppress weaker ones, reverting to a pre-WTO era where trade disputes were settled through diplomatic influence rather than a formal legal process. This shift could undermine global trade stability and fairness. Despite its flaws, the WTO's dispute settlement system, endorsed by the global trading community, has been a significant success over the past two decades, as noted by Michael Froman, former U.S. Trade Representative under the Obama administration. Critics of the WTO's Appellate Body, including nations other than the U.S., argue that the current

solution—leaving the dispute settlement system with insufficient arbitrators—is flawed. Supporters highlight the U.S.'s frequent use of the system and its high success rate in resolving trade disputes, which benefits American businesses and workers. They argue that the system's impartiality and effectiveness should be preserved. Looking forward, there is hope among some that a future American administration will recognize the value of impartial international arbiters and restore the Appellate Body to its former effectiveness. However, a more pragmatic approach requires addressing the underlying causes of American discontent, which extend beyond specific grievances. The international community must develop politically viable responses to these concerns to restore faith in the WTO's dispute resolution system.

In conclusion, the United States' actions have significantly violated the Doctrine of Good Faith, undermining the WTO's effectiveness and credibility. Restoring the Appellate Body and the broader dispute resolution mechanism is crucial for maintaining a fair and stable international trade system. The global trading community must work collaboratively to address the challenges posed by the U.S. and other critics, ensuring that the WTO continues to serve as an effective platform for resolving trade disputes and promoting economic cooperation.

